

**Domestic Abuse Disclosure Schemes:  
Regulatory responsibility and  
coherent legality, or a vulnerability  
'policy spiral'?**

A thesis submitted in partial fulfilment of the requirements of the University of Sheffield for  
the degree of Doctor of Philosophy

School of Law

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## **Declaration**

I confirm that this thesis submission is my own work.

Jamie Grace, 23<sup>rd</sup> September 2020

## **Abstract**

This thesis is the first full independent analysis of the law, policy and regulation relating to the operation of different Domestic Abuse Disclosure Schemes (DADS), in a number of common law jurisdictions. DADS typically deploy a 'right to ask' strand and a 'right to know' strand. These respective strands represent the ability to ask the police for information on the domestic violence offending history of a current or former partner, and the ability of a police to proactively consider the sharing of such information. Under the common law that operates in each jurisdiction of the UK as a whole, such disclosures can be made where a 'pressing need' to do so exists, while other legal considerations under data protection law and human rights law also apply.

This interdisciplinary thesis argues that DADS have risen to a disproportionate prominence in the landscape of public protection, and in policy on the prevention of domestic violence. Problematically, no thorough government study has ever been undertaken to rigorously explore whether the disclosure of information concerning the criminal history of one person, to that person's intimate partner, will ultimately increase the likelihood of keeping the recipient safe. The main criticism in this thesis, however, is not levelled at the core aims of DADS, per se, but at the manner in which they have proliferated in the common law world (in what can be described as a 'policy spiral'<sup>1</sup>) without proper critical evaluation to date by policymakers, the police or any other government agency in the UK or elsewhere. This thesis argues that DADS must be evaluated, where they have entered or might enter a public protection landscape, in terms of the exposure to victimisation that faces the recipients of disclosures. This thesis also makes recommendations for reforming DADS policy in the UK.

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<sup>1</sup> Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', (2018) PL 725, 726.

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Lastly, I would like to dedicate this thesis to my son Bennett Thomas Grace - already the most amazing young man.

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<sup>2</sup> This thesis makes its own arguments about Domestic Abuse Disclosure Schemes, but where relevant I have had cause to acknowledge my contributions to earlier pieces of work where some of my ideas have been formulated, including: Kat Hadjimatheou & Jamie Grace, 'No black and white answer about how far we can go': police decision making under the domestic violence disclosure scheme, *Policing and Society* (2020) DOI: 10.1080/10439463.2020.1795169; Sarah Poolman, Richard Wilshaw and Jamie Grace, 'Human rights in policing: The past, present and future', (2019) *The Political Quarterly*, 449; Marian Duggan & Jamie Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', 2 (2018) CFLQ 145; and Jamie Grace and Marion Oswald, "'Being on our radar does not necessarily mean being under our microscope": The Regulation and Retention of Police Intelligence', (2016) 22(1) *European Journal of Current Legal Issues* < <http://webjcli.org/article/view/441/621> > accessed at 15 July 2020.



## **List of abbreviations**

ACPO - Association of Chief Police Officers

CFREU - Charter of Fundamental Rights of the European Union (2012)

DADS - Domestic Abuse Disclosure Schemes

DSDAS - Disclosure Scheme for Domestic Abuse (Scotland)

DVADS - Domestic Violence and Abuse Disclosure Scheme

DVDS - Domestic Violence Disclosure Scheme

ECHR - European Convention on Human Rights (1950)

FVIDS - Family Violence Information Disclosure Scheme

HMIC - Her Majesty's Inspectorate of Constabulary

HMICFRS - Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services

HRA - Human Rights Act 1998

LGBTQ - Lesbian, gay, bisexual, transsexual and queer

NSW - New South Wales

NPCC - National Police Chiefs' Council

PNC - Police National Computer

PND - Police National Database

QLRC - Queensland Law Reform Commission

UNCRC - United Nations Convention on the Rights of Children (1989)

ViSOR - Violent and Sex Offender Register

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## 1. Introduction

### 1.1 The original Domestic Abuse Disclosure Scheme

The police practice (and Home Office policy) of sharing information to warn potential victims of domestic violence about the dangerousness of their partners is now widely known as 'Clare's Law'<sup>3</sup>. The issues outlined throughout this thesis concern distinct issues (and key problems) with 'Clare's Law' in terms of the legal, policy and regulatory features in relation to what is properly known as the Domestic Violence Disclosure Scheme (DVDS). This thesis also addresses similar Domestic Abuse Disclosure Schemes (DADS) from outside of England and Wales; namely in Scotland, Northern Ireland, parts of Australia, and from Canada and New Zealand. This comparative approach helps this thesis demonstrate the problematic 'policy spiral' that is the growth of DADS globally<sup>4</sup>.

Since its inception as a Home Office policy, the Domestic Violence Disclosure Scheme has been predicated in part on a so-called 'Right to Ask': the ability to ask the police whether a new partner has a previous history of perpetrating domestic violence<sup>5</sup>; and also on a public policy option for the police to consider making a disclosure of such a history, without any prior request from the recipient – the so-called 'Right to Know'<sup>6</sup>. This thesis argues that such DADS are often examples of poor public policy: given the weak coherence of the legal basis and operation of the original Domestic Violence Disclosure Scheme, for example. But this thesis also argues that DADS might be poor public policy because of the current lack of evidence of the effectiveness of DADS, as they purport to protect vulnerable people at risk of abuse from their partners. Indeed, this thesis compiles enough evidence to suggest that DADS are poor public policy, based on the limited knowledge we have about their operational

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<sup>3</sup> For an overview of the case involving the killing of Clare Wood and the manner in which a campaign to introduce a Domestic Violence Disclosure Scheme-type policy formed around the prospect of 'Clare's Law', please see Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version <[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020.

<sup>4</sup> 'Policy spirals' are explored conceptually in Chapter 2 of this thesis, and thereafter feature as an analytical tool across the thesis. For a definition of the term, see Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', (2018) PL 725, 726.

<sup>5</sup> See BBC News, 'Clare's Law' gives 'right to ask' on domestic violence' (*BBC*, 5 March 2012) <<https://www.bbc.co.uk/news/uk-17254163>> accessed 16 June 2020

<sup>6</sup> See HM Government, 'Police pilot right to find out about domestic violence', (Gov.uk, 5 March 2012) <<https://www.gov.uk/government/news/police-pilot-right-to-find-out-about-domestic-violence>> accessed 16 June 2020

effectiveness, in the context of what we know about the difficulties of preventing domestic violence. Furthermore, and regardless of the overall effectiveness of DADS, this thesis argues there is a considerable public policy issue concerning the nature of DADS as ongoing initiatives which are typically not well-monitored by those public bodies responsible, as regulators, for their deployment<sup>7</sup>.

The DVDS operates on the basis of the disclosure of criminal histories of domestic abusers to their partners, as potential victims. First introduced and piloted by the Coalition Government in four police force areas in 2012-13; the Scheme has been operated in every police force across England and Wales since 8<sup>th</sup> March 2014<sup>8</sup>. At the time of writing the DVDS in England and Wales is likely to be re-founded in terms of a duty on police forces to 'have regard' to making disclosures under the DVDS in accordance with a (soon to be statutory) code of practice, as it is framed in the Domestic Abuse Bill (2020), at the time of writing. The premise of the Scheme is that if a person were to be informed about the violent past of their intimate partner, they would take steps to prevent themselves from being the next victim in a series of victims abused by that partner. Conceptually speaking, in order to be effective the Scheme relies on the recipient of a disclosure then making appropriate self-preserving and rational decisions about ending, or presumably somehow otherwise managing, their personal relationship with an offender. At the time of writing, nobody can really say how recipients of disclosures might do this, or how effective this policy might be. On a practical basis, the Scheme relies on the disclosure of information to individuals from police records. From the perspective of the subject of any possible disclosure, this public protection measure requires an interference with the private life of the previously-abusive partner concerned<sup>9</sup>.

The DVDS is more of a novel intervention, on a theoretical and policy basis, than one might initially consider. As Helena Kennedy has acknowledged, since domestic violence is often by

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<sup>7</sup> For an overview of the most extensive (although not thorough) government monitoring of the Scheme to date, please see Her Majesty's Inspectorate of Constabulary, *PEEL 2016: Police effectiveness 2016 - A national overview* (March 2017) < <https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf> > accessed 16 June 2020, and Home Office *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (2016).

<sup>8</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (2016).

<sup>9</sup> There is no case law (as yet) that discusses the operation of the Scheme directly; but recent appellate case law supports the idea that the disclosure to a third party of information relating to a person's criminal history engages the right to respect for private and family life of an individual under Article 8 of the European Convention on Human Rights (1950). See for example *R (T) v Chief Constable of Greater Manchester Police & ors.* [2014] UKSC 35.

its very nature a human rights abuse conducted in a private setting; it "has not been easy shifting the culture to acknowledge that human rights is not only about obscenities which take place in Kosovo or Sudan, Somalia or Iraq, but also about the abuse of people closer to home."<sup>10</sup> But the adoption of a DADS sees public policy in a given jurisdiction take a new position on personal relationships, in terms of policies designed to prevent domestic abuse as a human rights issue 'closer to home', in a literal sense.

The sensitivity around the intrusion of the state into private, intimate relationships, albeit for public protection reasons, is captured well in a point made by Victoria Atkins MP, a Home Office minister at the time, during an oral evidence session in a recent Parliamentary joint committee inquiry into the draft Domestic Abuse Bill in 2019, and as originally introduced<sup>11</sup>:

"I fully acknowledge that it is a very difficult area for the police. Of course, it is not for the police to police relationships unless they feel it is necessary and proportionate under the guidance, but we want to put it on a statutory footing so that it is there in law to ensure, we hope, consistency of approach between forces. We want to make it clear that this is the guidance and it's on a statutory footing, to ensure that police forces are abiding by it where appropriate."<sup>12</sup>

So the DVDS and other DADS are more novel intrusions by the state into personal relationships, in public policy terms, and are intrusions that are motivated by public protection purposes. In that sense, however, they are far from unique public policy measures: and public policy for public protection purposes has proliferated in general in the last two decades. Policy formulation in the arena of public protection has, however, been complex<sup>13</sup>. As Bill Heberton and Terry Thomas highlighted in their work on criminal records policy in the early 1990s, the "...piecemeal developments of criminal record disclosure, bureaucratic

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<sup>10</sup> Helena Kennedy QC, *Eve was shamed: How British justice is failing women* (Penguin 2018) 87

<sup>11</sup> The first version of this particular Domestic Abuse Bill was introduced to Parliament in 2019, but was not passed before Parliament was dissolved prior to the General Election of December 2019.

<sup>12</sup> Joint Committee on the Draft Domestic Abuse Bill, Oral evidence: Draft Domestic Abuse Bill, HC 2075, Tuesday 21 May 2019, 18

<sup>13</sup> At the time of finishing this thesis, and making it ready for submission, HM Government were wrestling with the policymaking process of establishing an ongoing trade relationship with the European Union, and in the teeth of trying to boost a national economy, as we left COVID-19 'lockdown' behind us. The Brexit approach chosen by the May and Johnson governments did not have a direct effect on the context of this thesis; but the coronavirus pandemic has led to some early evidence from Police Scotland that, as pressures in households under lockdown increased, so too did the relative number of requests from members of the public in relation to the Disclosure Scheme for Domestic Abuse in Scotland, with an 18% rise on a comparable period in early 2019. See: Andrew Picken, 'Coronavirus: Rise in requests to reveal partners' abusive pasts', (*BBC Scotland News*, 29 April 2020), < <https://www.bbc.co.uk/news/uk-scotland-52444555> > accessed 16 June 2020.

demands and technological developments... makes the meaning of 'protection' by no means [self-explanatory]"<sup>14</sup>. Heberton and Thomas would no doubt agree that today, and as they wrote in 1993, the concept of 'public protection' and who is deemed to be "at risk' forms part of the discourse for an ever widening set of targets..."<sup>15</sup>. Firm targets for the effective use of the DVDS in England and Wales, however, have never been set - as this would require measuring the actual impact of disclosures under the Scheme, potentially, and this has never been done. As a result, policy pressure in relation to UK DADS has simply taken the form of strong hints from criminal justice inspectorates to make more disclosures and raise more awareness of DADS amongst officers and public protection professionals (as discussed in Chapter 6).

Broad outlines of a policy formulation process in the relevant academic literature roughly accord with the process that initially unfolded in the creation of the DVDS. As Frank Fischer has outlined, in giving an overview of an archetypal process of public policy formulation:

"Decision-makers first identify empirically the existence of a problem, then formulate the goals and objectives that would lead to an optimal solution. After determining the relevant consequences and probabilities of alternative means to the solution, they assign a numerical value to each cost and benefit associated with the consequences. Combining the information about consequences, probabilities, and costs and benefits, they select the most effective and efficient alternative."<sup>16</sup>

Certainly, the relevant Home Office policy impact assessment underpinning the DVDS tried to be clear about the possible benefits of the introduction of the new measure:

"Domestic violence and abuse has the highest rate of repeat victimisation of any crime with around two-thirds (63%) of all incidents of domestic violence experienced by repeat victims... preventing domestic violence will bring significant benefits in terms of public protection and reducing health and criminal justice costs."<sup>17</sup>

A major aim of the DVDS is to assist the police and other public protection agencies in preserving life. The relevant Home Office policy impact assessment also noted that a

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<sup>14</sup> Bill Heberton and Terry Thomas, *Criminal Records: State, citizen and the politics of protection* (Avebury 1993) 10

<sup>15</sup> *Ibid.*

<sup>16</sup> Frank Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (OUP 2013) 4

<sup>17</sup> Home Office (2013), 'Domestic Violence Disclosure Scheme Impact Assessment', <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf)> accessed 14 March 2015, 1.

"domestic violence and abuse incident which results in the death of the victim is often not a first attack, and serious injury and homicide may be prevented with early intervention such as a Domestic Violence Disclosure Scheme"<sup>18</sup>. Again, this thesis will show that there is as yet no evidence for the effectiveness, in the round, of such 'early intervention', and explores why this may be a complex issue to address and to measure.

## 1.2 Research questions and an overview of thesis methods

As an overview, this thesis seeks to address three key research questions:

- 1. To what extent do Domestic Abuse Disclosure Schemes show a lack of regulatory responsibility for preventing domestic violence?*
- 2. To what extent do the Domestic Abuse Disclosure Schemes adequately address issues of victim vulnerability?*
- 3. To what extent do the Domestic Abuse Disclosure Schemes pose issues of coherence in terms of their legality, and in relation to the context of disclosures?*

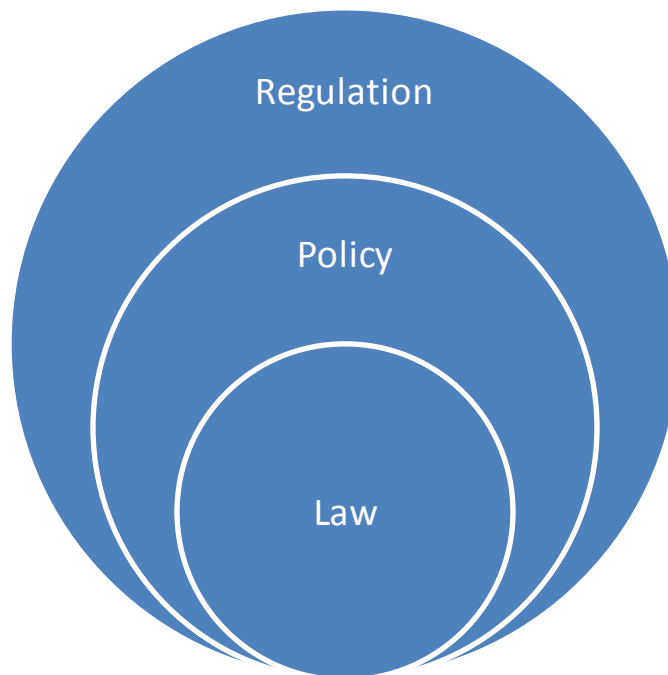
This thesis therefore uses a method and approach of evaluating the evolving landscape of Domestic Abuse Disclosure Schemes by combining policy analysis with an application of regulatory theory, and conducted in the light of relevant legal standards. This combined approach allows for this thesis to draw on a wider body of analytical approaches when assessing the place of the DADS in the public protection domain. A short overview of how this approach works in this thesis follows here, but Figure 1, below, shows how this thesis understands the relationship between regulation, policy and law in governing a public protection intervention.

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<sup>18</sup> Home Office (2013), 'Domestic Violence Disclosure Scheme Impact Assessment', <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf)> accessed 14 March 2015, 6.



Fig. 1- The relationship between regulation, policy and law



This thesis argues that the policy opportunity of a DVDS has been swept along in a 'policy spiral'<sup>19</sup>. Clive Walker has observed that:

"A "policy spiral" describes a policy which lacks clear initial purpose or subsequent direction, progression, control and reflection. A policy spiral is therefore susceptible to unresolved contradictions or gaps, dramatic direction changes, and uncertain outcomes. As a result, policy spirals arise from inexact and contested meanings, objectives, and mechanisms..."<sup>20</sup>

The 'policy spiral' in relation to DADS in the UK and globally is taking place in a 'regulatory space'<sup>21</sup> that is legalistic, but which is poorly-equipped to stop that 'policy spiral', despite 'multi-level governance'<sup>22</sup> in a legal system like that in the UK. This has largely been a result

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<sup>19</sup> See Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', (2018) PL 725.

<sup>20</sup> *Ibid*, 726.

<sup>21</sup> 'Regulatory space' is the holistic regulatory environment surrounding a particular piece of public policy or a dimension of a justice system, in this context. See L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998).

<sup>22</sup> It is a key feature of multi-level governance that on a public policy issue, despite formal and hierarchical constitutional arrangements, an issue of public policy on a national level can be influenced by sub-national and supranational bodies. From a constitutional perspective HM Government may govern unchecked, to a degree, if they control a large majority in the House of Commons, and use that advantage to leverage a specific legislative agenda across UK society - but the work of policy development in central government is equally prone to influence from supranational courts or domestic 'arm's length bodies'. See Ian Bache and Matthew Flinders, 'Multi-level governance and the study of the British state', 19.1 (2004) *Public Policy and Administration*, 31, 37.

of the domination of the 'politics of public protection'<sup>23</sup> within the relevant 'regulatory space'. It is argued below that without the sort of stronger regulation that would mandate policy evaluation, with regard to the effectiveness of DADS, this 'policy spiral' has led to a situation where, for some victims and potential victims of violence, the DADS in place in a jurisdiction may indirectly worsen their vulnerability as victims. Victim vulnerability is not the only issue unexplored by regulators in the 'regulatory space' of which those DADS are a part. The details of disclosure legalities are also something in which DADS regulators have so far shown little interest; particularly with regard to the wider legal standards that should feature in guidance for disclosure decision-makers in police forces. Later chapters in this thesis address the broader context to legal standards that should guide the process of making disclosures in terms of their legality. Chapters 8 and 9 of this thesis address this disclosure legality in the light of what is known about the regulatory space that DADS in the UK occupy, in a legal system involving multi-level governance from domestic or common law, European law and international law tiers.

The legal basis of the Scheme rests upon the common law duty of the police to act to protect the public<sup>24</sup>, and to disclose information to do so<sup>25</sup>. According to an established line of case law that pre-dates the development of the DVDS as a piece of public policy from government, disclosures under the Scheme must be made on the basis of a 'pressing need' for those disclosures; and should only be made in a manner that is lawful and proportionate as well as necessary<sup>26</sup>. The case law concerned, and as is detailed in later Chapters of this thesis, shows that the disclosure of criminality information to protect members of the public, or to help members of the public take decisions to safeguard themselves or others, was already something encapsulated in the common law powers of the police prior to the development and piloting of the DVDS by the Home Office in 2011-12.

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<sup>23</sup> The 'politics of public protection' can sometimes account for the domination of any policy discourse by a public protection ethos, over and above concerns such as civil liberties or the rehabilitation of offenders. See Mike Nash, 'The politics of public protection', in Mike Nash and Andy Williams (eds.) *Handbook of Public Protection* (Willan 2010).

<sup>24</sup> For example, Hale LJ in *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 at 195 noted that 'there is no doubt that the police owe a positive duty in public law to protect members of the public from harm caused by third parties.'

<sup>25</sup> See *A v B* [2010] EWHC 2361 (Admin)

<sup>26</sup> See in particular *R v Chief Constable for North Wales ex parte Thorpe* [1998] EWCA Civ 486

Notably, the new Scheme has come under academic criticism both in terms of its operation and its capacity to secure results i.e. its ability to actually safeguard potential victims from the risk of domestic violence. This thesis extends and develops this criticism on the basis of new evidence, including a smattering of case law that is contextually relevant, and statistics either published by the Office for National Statistics or obtained by the candidate via freedom-of-information requests. Two Home Office evaluations of the DVDS have highlighted that the legal tests for disclosures as articulated in the current Scheme guidance are difficult to interpret consistently, a likely part-explanation for the disclosure rates that vary considerably across force areas in England and Wales<sup>27</sup>. While much is hoped for, as yet little is known in detail of the true impact of schemes like the DVDS, in the sense of their effectiveness in making (potential) victims of domestic violence safer from harm<sup>28</sup>.

Because the DVDS is a public protection measure, and is aimed at helping to reduce levels of domestic violence in the UK, it weaves itself within the policy landscape, not just on offender rehabilitation, but on the prevention of 'violence against women and girls' (VAWG<sup>29</sup>) (as well as against men and boys). As such, the DVDS is affected by broader issues of social justice and accountability in the criminal justice system. The Scheme did not and could not, however, evolve spontaneously into its current form, as a matter of policy development, without regulatory oversight and design.

Given that many of the issues concerning DADS result from regulatory stances (or shortcomings), this thesis addresses the scope, nature and operation of the Scheme from a regulatory theory perspective, and interrogates the policy input of various government bodies and other 'regulatory actors'. As such, this thesis addresses the core issue of the coherence of the Scheme given its competing policy tensions and the (sometimes) opposing bodies of legal doctrine - against a backdrop of policy critique, and according to a body of regulatory theory.

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<sup>27</sup> See J. Grace, 'Four years on: The postcode lottery of Clare's Law' (*SIPS blog*, 8 March 2018) <<https://sheffieldinstituteforpolicystudies.com/2018/03/08/four-years-on-the-postcode-lottery-of-claras-law/>> accessed 18 July 2020; and Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out*, (2016); and Home Office *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment*, (2013); as well as Jamie Grace, 'The nature of spent convictions and the common law basis of the Domestic Violence Disclosure Scheme: Limiting the effectiveness of Clare's Law?', (2015) 21(2) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/401/517>> accessed 16 July 2020.

<sup>28</sup> As is observed in Kate Fitz-Gibbon, and Sandra Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales', 17(3) (2017) *Criminology & Criminal Justice*, 284, 290.

<sup>29</sup> See HM Government, 'Violence against women and girls', <<https://www.gov.uk/government/policies/violence-against-women-and-girls>> accessed 16 June 2020

It is appropriate at this juncture to consider which original areas of analysis this thesis will contribute to our understanding of DADS, and of the DVDS in particular.

### 1.3 An original contribution to knowledge

The original contribution to knowledge made by this thesis is the incremental analysis in depth of a trio of important themes about the novel Home Office-led project that is the Domestic Violence Disclosure Scheme, and looking in comparison at other DADS. Perspective is provided through exploring the three themes of i) victim *vulnerability*, ii) regulatory *responsibility* and iii) disclosure *legality* as they emerge from that incremental analysis of the Scheme and other DADS. These three themes have been chosen to guide the overall analysis using legal research, policy analysis and regulatory theory as deployed in this thesis because they a) allow the thesis to be posited in terms of the rights of vulnerable victims and offenders; b) require the thesis to tackle the important question of whether the legal bases of different DADS contributes to their regulatory problems; and c) whether stronger regulation of DADS would benefit the vulnerable victims at the heart of these criminal justice policies. The table below shows the manner in which the three themes of victim *vulnerability*, regulatory *responsibility* and disclosure *legality* work across the thesis in terms of each successive chapter and the relevant focus of each as applicable, prior to a final, concluding Chapter 10.

As a first dimension of the original contribution to knowledge sought by this thesis, an analysis of these three key themes in relation to the DVDS has not been undertaken in a single comprehensive study before now. The findings of these analyses apply, to varying extents, to the different DADS in operation elsewhere in the UK (i.e. in Scotland and Northern Ireland) and elsewhere in the common law world (i.e. New Zealand, Canada and some parts of Australia). These are the jurisdictions that operate an explicit government-level policy on the disclosure to intimate partners of criminal records relating to domestic violence, at least in the common law world. As a result, an informative and insightful analysis of the UK DADS can be strengthened with an evaluation of policies on DADS in common law jurisdictions where the legal position regulating such DADS would be thematically similar.

Table 1- The structure of the thesis by theme and analytical approach

Theme	Chapter	Chapter focus	Main analytical tool
Victim vulnerability	Chapter 2	A method of a combined policy, regulatory and legal analysis	Walker's policy spiral
	Chapter 3	Exploring the policy problem of victim vulnerability in relation to Domestic Abuse Disclosure Schemes	
	Chapter 4	The policy origins of the Domestic Violence Disclosure Scheme in England and Wales	
Victim vulnerability and regulatory responsibility	Chapter 5	The growth and operation of DADS in common law jurisdictions: Scotland, Northern Ireland, Australia and New Zealand	
	Chapter 6	Reviewing the limited evidence for the effectiveness of Domestic Abuse Disclosure Schemes	
Regulatory responsibility	Chapter 7	The challenges of operating DADS in a complex 'regulatory space'	
Regulatory responsibility and disclosure legality	Chapter 8	Multi-level governance and the developing legalities of DADS	'Regulatory space', 'multi-level governance' and UK law
	Chapter 9	Issues with the regulation of UK DADS by wider legal frameworks	'Regulatory space' and supranational law
Overall findings	Chapter 10	Conclusions and recommendations	N/A

A second strand of the original contribution to knowledge sought by this thesis relates to the way that policy, law and regulation interact in wider public protection settings, establishing that the 'policy spiral' is a valid vehicle of analysis for public protection measures. This is possible since the UK DADS are a microcosm of the wider system of public protection based, importantly, around timely and proportionate sharing of risk information (which often occurs in the employment context, for example).

A third strand of the original contribution to knowledge sought by this thesis is the application of the 'organising principle' of regulatory space in a manner not previously undertaken, namely that of a regulatory evaluation of what is known about the operation of the current crop of DADS, and the way this produces a set of key regulatory problems that

can be identified in this way. These range, for example, from the problem of making disclosures in the face of a 'fragmentation of knowledge'<sup>30</sup> (the shortcomings of non-comprehensive data about offenders' histories), to the mismatch between regulatory promotion of the DVDS in England and Wales at a time of 'austerity' impacts and reduced funding for, and an increased shortage of, domestic violence support for victims<sup>31</sup> - through to a need for the disclosure decision-making processes under the DVDS guidance to better encapsulate the need to have regard for the wellbeing of children affected by any possible disclosure/non-disclosure. These findings, in the form of a series of significant regulatory problems, show what a complex and contested regulatory space the UK DADS actually occupy.

Lastly (and fourthly), it will be seen that the research underpinning this thesis has generated a novel picture of the Scheme, in terms of making available new statistics that shed light on the operation of the DVDS in England and Wales. This thesis has used freedom-of-information requests to produce some hitherto unavailable insight into the operation of DADS in the UK. (To pre-empt some details from Chapter 6, the research in this element of the thesis has shown that of a sample of 520 early recipients of disclosures under the Scheme, at least 45% (234) have been victimised by their partners at the time of that disclosure, i.e. the perpetrators of domestic violence that they were actually warned about; raising considerable questions about the purported effectiveness of the Scheme.) As such, this thesis also demonstrates originality in its collection of data on the DVDS, in addition to the elements of originality outlined above.

Domestic Abuse Disclosure Schemes are *prima facie* a narrow topic of study, about which published research is quite sparse, but they are an important and growing area of public policy, and in fact DADS are a feature of a growing number of criminal justice systems. In terms of the regulatory concepts, policy areas and the bodies of doctrinal law that the development and operation of the Schemes concerned touch upon, when seen and taken together, it can be shown that DADS, in the common law jurisdictions that operate them to date, make for an area of study suitable for a doctoral thesis.

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<sup>30</sup> Julia Black, 'Decentering regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world', 54 (1) (2001) *Current Legal Problems* 103, 107

<sup>31</sup> See Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version <[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020

## 1.4 The nature of the Domestic Violence Disclosure Scheme

This section of my introduction to the thesis explains the nature of the policy guidance underpinning the Domestic Violence Disclosure Scheme (DVDS) in England and Wales - the original Domestic Abuse Disclosure Scheme-type policy in the common law world. This section also addresses the process for decision-making concerning a DVDS application, as outlined in the 2016 Home Office guidance that currently configures the common law power of the police to make reasonable, necessary and proportionate disclosures of information on a history of domestic abuse committed by a partner or former partner to an applicant or potential victim, according to, in essence, a 'pressing need' in terms of risk<sup>32</sup>. This section of this chapter also addresses the aims of the DVDS as set out in Home Office policy for England and Wales; and highlights the extent of the multi-agency nature of the policy.

DVDS policy operates on the premise of an applicant ('A') approaching the police using their 'Right to Ask' about a partner or former partner ('B') who they feel may pose a risk of abusing them. Alternatively, the policy provides for A's 'Right to Know': the ability for other agencies and professionals to refer the potential need for a disclosure about B to the police. The current Home Office guidance on the DVDS includes a key statement about the nature, scope and purpose of the policy:

"The Domestic Violence Disclosure Scheme is focused on disclosure and risk management where B is identified as having a conviction, caution, reprimand, or final warning for violent or abusive offences; and/or information held about B's behaviour which reasonably leads the police and other safeguarding agencies to believe that B poses a risk of harm to A."<sup>33</sup>

However, the Home Office did not create the DVDS in England and Wales entirely anew, given that the Scheme was based on pre-existing common law powers. This thesis argues that the national launch of the Scheme for England and Wales in March 2014 and the uncritical growth in its operation since then (see section 1.5, below) has allowed the Home Office and police forces to make the DVDS an increasingly prominent feature of policy around the

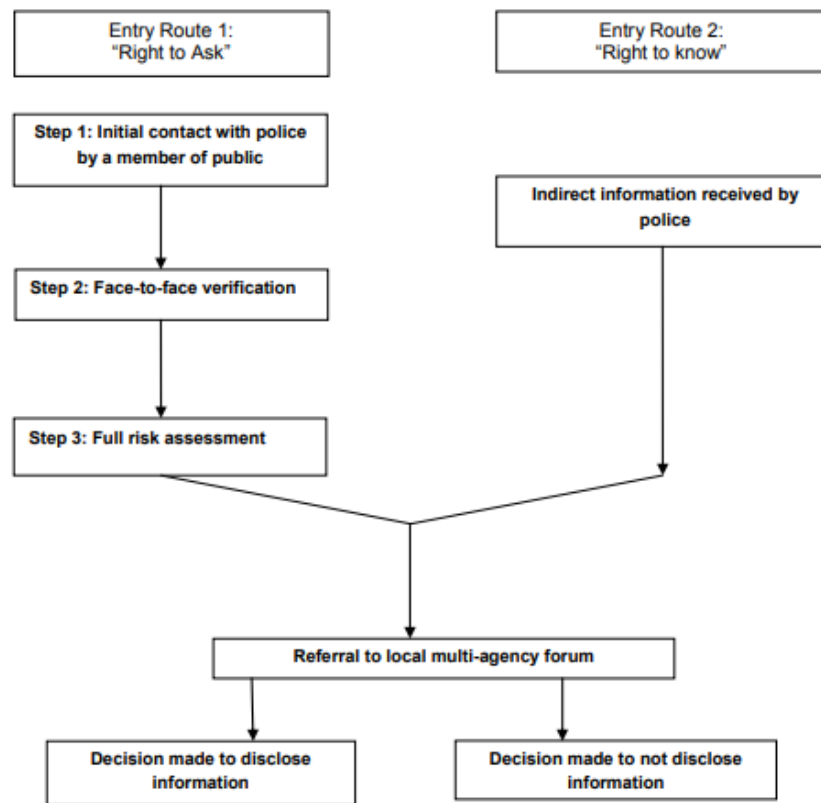
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<sup>32</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, p.18.

<sup>33</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, p.6.

prevention of domestic abuse. This intensification of the use of the Scheme has occurred despite gaps in the evidence as to the effectiveness of the Scheme (see Chapter 6).

Fig. 2 - A process map of the operation of the Domestic Violence Disclosure Scheme<sup>34</sup>



The Home Office guidance on the DVDS makes it plain that under the 'Right to Ask' entry point for applications, where 'A' approaches the police, or a member of the public ('C') does so on their behalf, there is an integral stage to the process that involves an initial risk assessment. This takes place before a face-to-face meeting is used to verify an applicant's details and to feed into a more detailed risk assessment. There is a considerable emphasis in the later stages of the disclosure decision-making process on a multi-agency risk assessment conference approach, where there may be representation, dependent on local practices, of a range of agencies and organisations familiar with either 'A' or 'B', or both parties. However, the initial risk assessment stage, conducted by police officers using information at the disposal of those police officers, renders the 'Right to Ask' strand of the DVDS a police-dominated public protection practice, as "...it will be for the police member of staff to...

<sup>34</sup> This is a process map presented in the Home Office guidance on the DVDS from 2016. See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, p.7.



make the decision on whether or not to progress the disclosure application following this [initial] risk assessment...<sup>35</sup>. However, one strength of the framing of the police as the chief operators of the Right to Ask strand, to be used by members of the public themselves ('A' applicants) or in making requests on behalf of their relatives or friends (as 'C' applicants) is that the police can be argued to have a primary victim safeguarding role and legal powers to match. As the 2016 Home Office guidance puts it, in relation to the outcome of an initial assessment using the contents of the Police National Computer (PNC), the Police National Database (PND), the ViSOR database (the Violent and Sex Offender register) and local police intelligence systems, "if it is identified there is an immediate/imminent risk of harm to A, then ACTION MUST BE TAKEN IMMEDIATELY to safeguard those at risk"<sup>36</sup>.

A full risk assessment will take place with searches and checks on police databases and intelligence systems once a face-to-face meeting with an applicant ('A') has taken place to verify their identity (see Fig. 2); drawing on multi-agency information and insight from social services, probation services, any Multi-Agency Risk Assessment Conference (MARAC) in place in the locality, and local domestic abuse services<sup>37</sup>. Finally, whether the potential disclosure comes through the 'Right to Ask' route or the 'Right to Know' referral route, a multi-agency meeting is used to determine whether and how a disclosure should actually be made. This multi-agency forum will often be the local MARAC, but in any event the Home Office guidance stipulates that the agencies that must be represented at this decision-making stage are the police, the probation service and an Independent Domestic Violence Advocate (IDVA)<sup>38</sup>. However, the DVDS guidance puts primacy in relation to disclosure decision-making in police hands:

"The police should categorise either the disclosure application (under "right to ask") or the indirect information received (under "right to know") as either a "concern" or

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<sup>35</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, p.10.

<sup>36</sup> *Ibid.* Emphasis is in the original.

<sup>37</sup> *Ibid.*, p.14-15.

<sup>38</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, p.18.

“no concern” before it is referred to the local multiagency forum for discussion and *final decision for disclosure by the police.*<sup>39</sup> [Emphasis added.]

It is appropriate, in terms of the lawful use of legal powers, that the police can be held accountable for the final decision to disclose; since, as is discussed in detail in Chapter 8 of this thesis, the common law position of the police power to disclose information is well-established, allowing for police discretion to make disclosures of information where necessary, reasonable and proportionate in relation to an identified 'pressing need'<sup>40</sup>.

Home Office guidance suggests a disclosure can be made anywhere up to 35 working days following police receipt of a 'Right to Ask' request; and up to 25 working days from receipt of an inter-agency 'Right to Know' referral. Where a disclosure is made, the Home Office guidance prompts the local multi-agency forum or MARAC to consider referring the subject of the disclosure ('B') to either local Multi-Agency Public Protection Arrangements (MAPPA) or a local Integrated Offender Management (IOM) scheme; respectively<sup>41</sup>.

MAPPA are statutory public protection approaches "where probation, police, prison and other agencies work together locally to manage offenders who pose a higher risk of harm to others"<sup>42</sup>. A joint inspection report on police and probation offender management practices explains that "[IOM] brings a cross-agency response to the crime and reoffending threats faced by local communities"<sup>43</sup>. MAPPA typically deal with higher risk offenders than IOM schemes, and so "IOM arrangements should add value to, but not duplicate, existing arrangements to tackle crime, reoffending and victimisation, including MAPPA."<sup>44</sup> By prompting a consideration by the local MARAC or multi-agency forum as to the correct and necessary degree of offender management and monitoring for a disclosure subject, the Home

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<sup>39</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, p.16.

<sup>40</sup> See *R v Chief Constable of North Wales ex p Thorpe* [1999] Q.B. 396.

<sup>41</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, p.22.

<sup>42</sup> HM Inspectorate of Probation and HM Inspectorate of Constabulary and Fire & Rescue Services, *A joint thematic inspection of Integrated Offender Management*, February 2020 <<https://www.justiceinspectors.gov.uk/cjji/wp-content/uploads/sites/2/2020/02/A-joint-thematic-inspection-of-Integrated-Offender-Management-2.pdf>> accessed 5 March 2021, p.44.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, p.35.

Office guidance on the DVDS retains a multi-agency dimension in its public protection function, even if it stipulates police primacy in disclosure decision-making overall. However, the next section of this introduction to the thesis begins to paint a picture of some of the problems apparent to date in the operation of the DVDS in England and Wales.

### 1.5 A picture of the original Domestic Violence Disclosure Scheme in England & Wales<sup>45</sup>

This section of the introduction to the thesis gives a view of the statistical picture of the operation of the DVDS in England and Wales in the last few years, as the 'original' DADS. A later Chapter of this thesis, Chapter 5, gives an overview of the operation of DADS in a number of other common law jurisdictions; namely, Scotland, Northern Ireland, New Zealand, parts of Australia, and parts of Canada. This section of my Introduction chapter, however, establishes some basic principles and trends concerning 'Clare's Law', the proto-DADS, in the form of the Domestic Violence Disclosure Scheme in England and Wales.

The Domestic Violence Disclosure Scheme has been operational across all of England and Wales for more than five and a half years (and had been piloted in four of 43 police force areas from 2012). A Home Office impact assessment had noted that for the option of a dual approach of a national DVDS for England and Wales, operating both a Right to Ask and a Right to Know model, it was "estimated that this option will result in 4,302 initial cases per year, of which 1,237 will result in a disclosure..."<sup>46</sup>. The Home Office report on the roll-out of the DVDS 'one year on' from national implementation in England and Wales in March 2014 suggested an initial figure of more than 5,000 applications in a year of operation for the DVDS, since the period "between 8 March 2014 and 31 December 2014 [alone saw] a total of 4,724 applications... with 1,938 disclosures made"<sup>47</sup>. So the practical impact of the DVDS was very quickly greater than was anticipated.

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<sup>45</sup> This section of my introductory chapter draws on material also found in my draft paper on the UK DADS, posted online on the Social Sciences Research Network (SSRN), and some material that I contributed to drafts of my recent paper with Dr. Kat Hadjimatheou at the University of Essex. See Jamie Grace, 'Whatever Happened to 'Clare's Law'? Reviewing the Evidence', (August 7, 2018; Revised 3<sup>rd</sup> December 2019). SSRN <<http://dx.doi.org/10.2139/ssrn.3227956>> accessed at 16 June 2020; and Kat Hadjimatheou & Jamie Grace, 'No black and white answer about how far we can go': police decision making under the domestic violence disclosure scheme, *Policing and Society* (2020) DOI: 10.1080/10439463.2020.1795169.

<sup>46</sup> Home Office (2013), 'Domestic Violence Disclosure Scheme Impact Assessment', <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf)> accessed 16 June 2020, 15.

<sup>47</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out*, (2016) 4.

We can see that the initial estimates of the uptake of the DVDS were under-estimates. The estimate of more than 4,000 applications per year to police forces in England and Wales, under both strands of the DVDS, was always very likely to grow if, for example, the twin pressures of a police inspectorate positively reinforcing a high rate of Right to Know disclosures by individual forces, and the media profiling of the Scheme as efficacious, also continued to grow<sup>48</sup>. Indeed, figures show that in the year ending 30<sup>th</sup> June 2016, there were 6,314 applications made under the DVDS in England and Wales (3,236 under the Right to Know, and 3,078 under the Right to Ask)<sup>49</sup>.

Data from the Office of National Statistics on domestic abuse shows that across the three years ending March 2017, 2018 and 2019, the increase in disclosures, using the legal 'pressing need' test<sup>50</sup> as required by the policy known as 'Clare's Law', has entailed a near doubling, from 3,410 in a year to 6,583<sup>51</sup>. However, the greater embedding of the DVDS for policing in England and Wales has not had an effect on the number of domestic homicides in each of those three years, or not in a way that is measurable - with the number of killings by partners and former partners dropping and then rebounding again between 2017 and 2019 (see Table 2, below). There will be many factors that play a bigger role than the DVDS in terms of harm prevention, in terms of the work of the criminal justice system to prevent domestic violence, and not least with regard to the interoperation the criminal justice system must have with health, social care and local authorities. For that reason, it is interesting to see a *London Evening Standard* headline in February 2020 that implies an increasing number of disclosures by the Metropolitan Police led to a direct reduction in domestic homicides in

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<sup>48</sup> The roles of criminal justice inspectorate-regulators such as Her Majesty's Inspectorate of Constabulary (and Fire and Rescue Services) (HMICFRS), and the role of the media, in positing the Scheme in England and Wales as an unequivocal and wholly-positive policy is considered in later Chapters of this thesis.

<sup>49</sup> See HMICFRS, *PEEL assessments data*, <<https://www.justiceinspectors.gov.uk/hmicfrs/data/peel-assessments/>> accessed 16 June 2020

<sup>50</sup> A 'pressing need' test for the disclosure threshold, in the use of a common law power to disclose information about offenders, can be traced to the pre-Human Rights Act 1998 judgment in *R v Chief Constable for North Wales ex parte Thorpe* [1998] EWCA Civ 486. This judgment is discussed in more detail later in this thesis.

<sup>51</sup> Office for National Statistics, *Domestic abuse and the criminal justice system, England and Wales: November 2019* <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019>> accessed 16 June 2020

London by nearly half, from 27 in 2018 to 15 in 2019 - despite the national picture showing no such obvious relationship<sup>52</sup>.

Table 2 - DVDS statistics and intimate partner homicide statistics from the ONS, 2017-19<sup>53</sup>

Year	RtA Apps.	RtA Discs.	RtA Rate	RtK Apps.	RtK Discs.	RtK Rate	Total Disclosures	Domestic Homicides by Partner/Formal Partner (ONS)
Year to March 2017	3045	972	31.9%	5445	2438	44.8%	3410	95
Year to March 2018	4655	2055	44.1%	6313	3594	56.9%	5649	70
Year to March 2019	6496	2575	39.6%	7252	4008	55.3%	6583	96

With greater police prioritisation of the Scheme as a tool to combat domestic violence (and through the measuring and promotion of the use of the Scheme by HMIC, as it then was) this greater proportion of Right to Know (RtK) applications and disclosures compared to those under the Right to Ask (RtA) strand shows that the DVDS has become an accepted part of public protection work by the police. Inter-agency 'backing' for applications in the Right to Know strand might perhaps be more likely to produce a result of a disclosure too. The possibility that the Right to Know strand of the DVDS is increasingly embedded in police public protection work might be supported by the fact that the disclosure rate for RtK applications increased more than for RtA applications across 2016-2019. A key point to make is that there was quickly an intensification overall in the policing landscape in England and Wales as regards the DVDS.<sup>54</sup> Extra pressure on resources from any informal targeting and

<sup>52</sup>Anthony France, 'Domestic killings fall as women use Clare's Law to check partners' (*London Evening Standard*, 21 February 2020) <<https://www.standard.co.uk/news/crime/domestic-killings-fall-as-women-use-clare-s-law-to-check-partners-a4367966.html>> accessed 16 June 2020

<sup>53</sup>Compiled from ONS commentaries on statistical releases. For the most recent commentary, which links to previous releases, see: Office for National Statistics, *Domestic abuse and the criminal justice system, England and Wales: November 2019* <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019>> accessed 16 June 2020

<sup>54</sup>See appendix tables to Office for National Statistics, *Domestic abuse and the criminal justice system, England and Wales: November 2019*, <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019>> accessed 16 June 2020)

'upselling' of the Scheme by HMICFRS and the Home Office would place on individual forces could perversely have a possible impact on the risks of not properly supporting the vulnerable victims of domestic violence. This could be very damaging, as Elizabeth Greene and Jodie O'Leary have argued, since behaviour change by a potential victim i.e. discontinuing a potentially abusive and dangerous relationship, may be unlikely in any event; but would surely be harder without sufficient and adequate support services, and perhaps even with them (for some victims)<sup>55</sup>.

There are though considerable issues of scale and (in)consistency of use of the DVDS across different force areas. Assuming the Scheme, when disclosures are made, is actually working as intended and helping potential victims keep themselves safe, then the lower rate of disclosures as a proportion of the number of Right to Ask applications may suggest that victims independently seeking information to be disclosed about a partner, of their own initiative may be increasingly likely to be left without any tangible benefit from the Scheme. With the comparative lack of any information to help them make decisions about their safety in an ongoing relationship, Right to Ask applicants may be at greater risk in the months following an approach to the police about their partner than someone considered by a multi-agency panel for a Right to Know disclosure. Indeed, in some of the only empirical (qualitative) research on the operation of the DVDS in England and Wales to date, Marian Duggan has found that "... the DVDS is currently operating very differently according to the status of the person requesting information":

"It appears to be the case that [the DVDS] is more easily and usefully accessed in cases involving high risk victims who are already assigned to IDVAs [and so would be more likely to receive information under the Right to Know]. Importantly, this advocacy is crucial to being able to navigate the often-complicated criminal justice system. Access to the DVDS appears to be more difficult for those who seek information via the RtA route, plus they must wait longer, may not receive the information needed, and are less likely to have the necessary support following a disclosure to manage the information imparted."<sup>56</sup>

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<sup>55</sup> See Elizabeth Greene and Jodie O'Leary, 'Domestic Violence Disclosure Schemes: Effective Law Reform or Continued Assertion of Patriarchal Power?' 30 (2018) 6:1 *Bond Law Review*, 55, 76-77.

<sup>56</sup> Marian Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' 24.2 (2018) *International Review of Victimology* 199, 214-215.

The public protection landscape has been hit hard by austerity in public spending, which will no doubt contribute to and perhaps exacerbate the issue of a 'postcode lottery' in terms of not only how the DVDS is operated from police force to police force (see Table 3 below)<sup>57</sup>, but also how other policing strategies are used to make a contribution to the prevention of victimisation through domestic abuse<sup>58</sup>. However, if the disclosure decision-making process is operating on a very different basis potentially, from force to force, the large variation in ONS figures on disclosure rates might mean that there is a considerable variation in the application, amongst other factors, of the 'pressing need' test for disclosure.

The space in which the DVDS operates, involving police revelations of an abusive history, typically of a male perpetrator of violence, and made to a very possibly vulnerable woman, is one that is in principle appropriate as a method purporting to reduce the risk of the most serious harms or indeed, homicide. For one thing, as revealed by the Femicide Census project in February 2020, of the 149 women known to have been killed by men in the UK in 2018, over half (52%) of perpetrators of these killings were already known by the police to have a history of violence against women<sup>59</sup>. Marian Duggan has consistently criticised the manner in which the DVDS in England and Wales, and as the proto-DADS, inappropriately 'responsibilises' victims of domestic violence because the Right to Ask strand appears to place the onus on the victim to contact the police about their fear of potential violence from a partner - while disclosures under both the Right to Ask strand and the Right to Know strand of the DVDS would appear, after all, to hand the hard task of cutting ties with a potentially violent partner directly, and only, to the victim<sup>60</sup>. It is possible to argue that in a force area

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<sup>57</sup> In November 2018, however, the BBC revealed, following a series of their own freedom-of-information requests, that there are issues with forces not recording disclosure decision-making in a standardised way. BBC journalist Francesca Williams specifically cited Cumbria police, with their high disclosure rates as reported by the ONS, as a force acknowledging their own exclusion of 'mischief-making' applications, and applications for which there was nothing to disclose about a subject, from the data returned to the Home Office and the ONS about the DVDS. Other forces would presumably not take this approach, resulting in lower disclosure rates overall in that case. See Francesca Williams, 'Clare's Law: The women who risk their lives by refusing information' (*BBC News*, 29 November 2018) <<https://www.bbc.co.uk/news/uk-england-42920020>> accessed 19 June 2020.

<sup>58</sup> See findings in HMICFRS, *PEEL spotlight report: Diverging under pressure* (2020) <<https://www.justiceinspectrates.gov.uk/hmicfrs/wp-content/uploads/peel-spotlight-report-diverging-under-pressure-2018-19-overview.pdf>> accessed 16 June 2020, 12.

<sup>59</sup> Femicide Census, *Annual Report on UK Femicides 2018* <<https://femicidescensus.org/wp-content/uploads/2020/02/Femicide-Census-Report-on-2018-Femicides-.pdf>> accessed 16 June 2020, 35

<sup>60</sup> See for example Marian Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' 24.2 (2018) *International Review of Victimology* 199.

like Essex, with consistently very low disclosure decision-making rates for both Right to Ask and the Right to Know strands, victims are being 'responsibilised' by their very awareness of the existence of 'Clare's Law', but left with little information to act upon, creating more stress for them. These disparities as a result produce a 'postcode lottery' in the way that the DVDS is operated<sup>61</sup>, and as is highlighted in Table 3, below.

*Table 3 - High and low disclosure rates for the DVDS by police force area, ONS 2017-19<sup>62</sup>*

<b>Data from year</b>	<b>Key Forces for Lowest Disclosure Rate(s)</b>	<b>Key Forces for Highest Disclosure Rates</b>
<b>Year to March 2017</b>	<b>RtA 6.7% in Northumbria</b> <b>RtK 3.2% in Kent</b>	<b>RtA 76% in Cumbria</b> <b>RtK 97.8% in Cumbria</b>
<b>Year to March 2018</b>	<b>RtA 8.5% in Kent</b> <b>RtA 16.9% for TVP</b> <b>RtK 9.6% for TVP</b> <b>RtK 12.3% for Met Police</b>	<b>RtA 99.5% Hampshire</b> <b>RtA 100% Wiltshire</b> <b>RtK 100% Kent</b> <b>RtK 99.3% Hampshire</b>
<b>Year to March 2019</b>	<b>RtK 19.6% TVP</b> <b>RtA 13.8% Essex</b> <b>RtA 8.9% Kent</b>	<b>RtK 91.3% Cumbria</b> <b>RtK 91.7% Cambridgeshire</b> <b>RtA 92.% Hampshire</b>

This is at odds with the uniformly positive way that forces allow, or prefer, the DVDS to be presented to the public i.e. that the use of the Scheme correlates with fewer intimate partner homicides (see Table 2, above), despite the fact that the use of the DVDS fluctuates over time within the same force, as well as between forces in the same period. Some of the biggest forces in England and Wales have seen a considerable fluctuation in their use of one strand of the DVDS or the other. For example, Essex recorded a fall in Right to Know applications

<sup>61</sup> See Jamie Grace, 'Four years on: The postcode lottery of Clare's Law', <<https://sheffieldinstituteofpolicystudies.com/2018/03/08/four-years-on-the-postcode-lottery-of-clares-law/>> accessed 14 April 2018.

<sup>62</sup> This table is compiled from appendix tables to ONS statistical releases on the policing of domestic abuse. For the most recent release, and links to earlier releases, see: Office for National Statistics, *Domestic abuse and the criminal justice system, England and Wales: November 2019*, <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019>> accessed 16 June 2020)



from 1010 in 2017 to only 105 in 2018. The Metropolitan Police went from recording 309 RtK applications (resulting in 86 disclosures) in 2017 to 155 applications (resulting in just 19 disclosures) in 2018. The Met police a London population of more than 8 million residents; meaning their per capita rate of RtK disclosures was then extremely low. But the Met also recorded only 54 Right to Ask applications in 2018, down from 143 in 2017; resulting in 2018 in 19 disclosures, down from 35 in 2017. As a result, the Met could, in effect, have been deemed to be side-lining the DVDS as a public protection tool, whether intentionally or not. This was at odds with the national picture; and this degree of variance for the most prominent force in the UK, with respect to a 2018 national trend of increasing use of the DVDS, is inexplicable without more transparency from the Met on their use of the DVDS, or empirical research into the same. Similarly hard to explain is the subsequent jump in the 2019 data for the Met, to 234 disclosures overall, up from 38 disclosures overall in 2018<sup>63</sup>. Force culture and leadership decision-making could be one factor to partly explain these sorts of considerable force-level variations in disclosure rates. For the Met, this is captured in the words of Acting Detective Chief Inspector Pam Chisholm, who is reported in a *London Evening Standard* article in February 2020 as saying there had been "...a cultural change in the Met, so that all staff are talking about tackling and preventing domestic abuse"<sup>64</sup>.

So there are some real issues with the inconsistencies in the use of the police power to disclose information through the DVDS in England and Wales. *Inconsistent* use of police powers, even assuming that their use is always lawful should they be used, is itself inherently problematic. Inconsistent use of a police power smacks of arbitrariness, raising questions about the sufficiency of oversight and regulation. Andrew Sanders has written that:

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<sup>63</sup> These numbers of applications and disclosures for the Met are taken from publicly available ONS data. however, a *London Evening Standard* article of February 2020 makes mention of the Met making 195 disclosures in 2017, 317 in 2018, and 468 disclosures in 2019 (the last oddly exactly double the number which the ONS data records). See Anthony France, 'Domestic killings fall as women use Clare's Law to check partners' (*London Evening Standard*, 21 February 2020 <<https://www.standard.co.uk/news/crime/domestic-killings-fall-as-women-use-clare-s-law-to-check-partners-a4367966.html>> accessed 16 June 2020.

<sup>64</sup> Quoted in Anthony France, 'Domestic killings fall as women use Clare's Law to check partners' (*London Evening Standard*, 21 February 2020 <<https://www.standard.co.uk/news/crime/domestic-killings-fall-as-women-use-clare-s-law-to-check-partners-a4367966.html>> accessed 16 June 2020.

"In the context of police coercive powers, the question becomes whether there are clear rules of standards, whether compliance is monitored effectively, and whether there are adequate realignment mechanisms."<sup>65</sup>

As we shall see later in this thesis, the attempts at the realignment of the operation of the DVDS in England and Wales have to date been piecemeal on the part of HMICFRS and the Home Office. Wide disparities in disclosure rates are not as much of a priority, as we shall see, as pushing the Scheme as a policy, despite evidence of a lack of clarity in the disclosure guidance itself, as discussed in later Chapters, and the little effort made in monitoring police forces' compliance with that guidance from those same criminal justice regulators. So this quick growth in the use of the DVDS in England and Wales is problematic at least in part. And since the DVDS is at its core presented as a means of empowering or rather 'responsibilising' (potential) victims of domestic violence<sup>66</sup>, there is the serious issue that little oversight of the DVDS, and little certainty and accountability in its operation as evidenced by wide variations in disclosure rates between forces, suggests there is a risk that some forces are using the Scheme as a means of social discipline aimed at victims, not offenders, no less. It can be argued that adding new police powers over time, without strong oversight and monitoring creates regulatory difficulties. As Satnam Choongh has observed, the police often seek to impose social discipline with the powers they are granted, "...the exercise of which is difficult to review or control..."<sup>67</sup>.

Aside from the above simple statistical picture of the broad variation of the way the Scheme is operated from force-area to force-area in England and Wales, in order to provide context for this thesis, freedom-of-information requests were used to gather a picture in May 2018 as to how the first wave of recipients of disclosures under the DVDS were dealing with those disclosures.

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<sup>65</sup> Andrew Sanders, 'Can Coercive Powers be Effectively Controlled or Regulated?: The Case for Anchored Pluralism', in Ed Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 - Past, Present and Future* (Hart Publishing 2008) 51.

<sup>66</sup> See Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version <[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020

<sup>67</sup> Satnam Choongh, *Policing as Social Discipline* (OUP 1997) 222.

This was an admittedly problematic attempt to gain a picture of the effectiveness of the first wave of disclosures, using the measure of whether the recipients of disclosures were recorded in police systems as being victimised by the person the disclosure concerned (who would have been their intimate partner at the time of the disclosure)<sup>68</sup>. The combined results of 26 responses to the FOI request, from a possible 43 responses from police forces in England and Wales, show that of 520 recipients of disclosures that would have been made in the first months of the national operation of the Scheme from March 2014, by around four years later, in May 2018, 45% (234 individuals) had been recorded as victimised by the person they were warned about by the police. The problematic nature of this figure is explored fully in Chapter 6 of this thesis, below, but suffice to say here the main concern with this figure of 45% as a rate of victimisation for 'early wave' recipients of DVDS disclosures is that police systems chronically under-record domestic abuse - through both under-reporting by victims and under-recording by police officers themselves<sup>69</sup>. In other words, it is likely that the true rate of victimisation amongst 'early wave' disclosure recipients is even higher. If at least 45% of recipients are harmed by those they are warned against, however, we certainly need to ask questions of the rapid growth of DADS with little real evaluation. These issues are explored in more detail in Chapter 6 of this thesis, and as explained in the thesis overview, below.

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<sup>68</sup> Costs rules for FOI mean that overly-onerous requests will be rejected by public bodies. Police forces in England and Wales can only spend up to 18 hours in collating data in response to a request (that is, for a request costed at £25ph up to a maximum of £450), so 20 disclosure recipients for each force to locate records upon seemed pragmatic. My May 2018 freedom-of-information request asked:

1. Of the first 20 recipients of a disclosure under the DVDS in your force area, counting from the point when the DVDS went into national operation as a policing policy on 8th March 2014, how many of those 20 recipients have since reported, or have been reported, being the victims of some form of domestic abuse perpetrated by the person about whom they requested or were given information about under the DVDS?
2. Of the first 20 recipients of a disclosure under the DVDS in your force area, counting from the point when the DVDS went into national operation as a policing policy on 8th March 2014, how many of those 20 recipients have since reported, or have been reported, being the victims of some form of domestic abuse perpetrated by any person *other than* the person about whom they requested or were given information about under the DVDS?

<sup>69</sup> See for example Lizzie Dearden, 'Police failing to record tens of thousands of crimes, inspection finds' (*The Independent*, 15 February 2020) <<https://www.independent.co.uk/news/uk/crime/police-failing-record-thousands-crimes-uk-inspection-thames-valley-yorkshire-durham-hmicfrs-a8210831.html>> accessed 16 June 2020, and Jamie Grierson, 'Domestic abuse still under-reported in England, say Women's Aid' (*The Guardian*, 7 March 2018) <<https://www.theguardian.com/society/2018/mar/07/domestic-abuse-still-under-reported-in-england-says-womens-aid>> accessed 16 June 2020.

## 1.6 Thesis structure

In the second chapter of this thesis, the method adopted, comprising a combined policy, regulatory and legal analysis, is set out in order to justify the approach taken to evaluating DADS in particular common law jurisdictions. These jurisdictions are England and Wales, Scotland, Northern Ireland, Australia (across its federal jurisdictions), Canada (and its provincial jurisdictions) and New Zealand. These are the jurisdictions, as noted above at the outset of this chapter, that are known to operate an explicit state-level or national-level policy on the disclosure to intimate partners of criminal records relating to domestic violence, at least in the common law world, where the legal position regulating such DADS would be thematically similar. This comparative method allows a thematic contrast to be drawn between these DADS amongst these common law jurisdictions.

There is also a discussion in Chapter 2 of the extent to which particular understandings of policy and regulatory analyses in this thesis are informed by certain models and key literatures. In this second chapter, there is also an outline of the extent to which European legal frameworks of different kinds can be used to analyse specifically those DADS that operate in the different UK jurisdictions, and the way that wider, more international law frameworks can be used to offer suggestions as to how DADS may be more thoroughly regulated from the perspective of emerging legal norms. To accomplish this methodological scene-setting, Chapter 2 introduces the key policy analysis concept for this thesis of the 'policy spiral', outlined by Walker<sup>70</sup>, and the key regulatory theory concepts of 'regulatory space'<sup>71</sup> and 'multi-level governance'<sup>72</sup>.

In the third and fourth Chapters of the thesis, the notion of victim vulnerability is first explored in such a way that it can inform the development of the rest of the thesis, and then the specific policy origins of the Domestic Violence Disclosure Scheme and its journey to its recent operation are investigated in depth, since this is the chief progenitor Scheme amongst the current crop of DADS in operation in different common law jurisdictions. In Chapter 3, the complexities of the factors that can make victims

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<sup>70</sup> Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals' (2018) PL 725.

<sup>71</sup> See L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998) 154.

<sup>72</sup> Ian Bache and Matthew Flinders, 'Multi-level governance and the study of the British state' 19(1) (2004) *Public Policy and Administration* 31, 37.

vulnerable to domestic violence are explored in a way that makes it clear that the DVDS, as the original DADS, does not take these factors into account very well in its operation in policy terms. In Chapter 4, an analysis is undertaken of the manner in which some problems with the DVDS were shaped by its emergence as a compromise between, on the one hand, the non-adoption of a disclosure scheme policy, and on the other hand, a more tightly regulated statutory scheme meshed together with stronger legal powers for criminal justice agencies to monitor and control domestic abuse perpetrators.

In Chapter 5, an analysis is undertaken of the growth and operation of DADS in particular common law jurisdictions outside of the 'original' DVDS: namely in Scotland, Northern Ireland, Australia, Canada and New Zealand. Lessons can be observed here as to the extent to which different jurisdictions, and policing policymaker actors in those jurisdictions, took lesser or greater pains to carefully or carelessly deliberate over the introductions of a DADS and form it would take etc. Chapter 6 of the thesis entails the researcher reviewing the limited evidence for the effectiveness of DADS which currently exists in the public domain; including the results of several waves of freedom-of-information requests that have allowed a basic statistical picture of (re)victimisation following disclosures under the DVDS to be built up from responses by police forces in England and Wales. Chapter 6 also introduces the challenges that DADS have faced to be effective despite being rolled out with little reflection and essentially no evaluation (as with the DVDS in England and Wales) as to their efficacy. In Chapter 7, the challenge of operating DADS in a complex 'regulatory space' is explored as a major reason as to how the DVDS, for example, can have spread in such an un-evaluated way to other common law jurisdictions outside England and Wales.

In Chapter 8 of the thesis, the concept of multi-level governance is used to unpick the complexities behind the developing legalities of DADS, with a particular focus on the European, national, devolved and common law legal frameworks that overlap and interact to regulate the specific granular complexities of the three DADS in operation in England and Wales, Scotland and Northern Ireland, respectively. A case is made for the reform of these three DADS in the UK, through the statutory codification of both their processes of operation and their bases in law, notwithstanding Lord Bingham's pithy observation that "...legislative hyperactivity has become a permanent feature of our governance."<sup>73</sup> In

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<sup>73</sup> Tom Bingham, *The Rule of Law* (Allen Lane 2010) 40.

Chapter 9, the issues with the regulation of UK DADS by wider international and supranational legal frameworks that was observed in Chapter 2 is picked up again and discussed in greater detail. This allows for reflections in Chapter 9 on the extent to which any of the sets of DADS guidance in the UK jurisdictions would be said to be free from the need for re-working and reform.

In the tenth and final chapter of this thesis, a set of conclusions and recommendations are offered up as to the 'lessons learned' from this body of research as to the need to better evaluate DADS policies before their (otherwise uncritical introduction) on the part of policy-makers and government actors. Some conclusions are given as to the means by which the proliferation of a similar public protection-themed "policy spiral" could be avoided in future. And on a final evaluation of the legalities of the UK DADS, some specific doctrinal conclusions are offered up as to the need to combine the three legal bases of the DADS in operation across the different jurisdictions that make up the United Kingdom. Finally, some thoughts are offered up as to the value of freedom-of-information approaches as valuable supplementary research methods that can be used to augment the publically-available picture of a problematic programme of public policy.

## 2. A method of combined policy, regulatory and legal analysis

### 2.1 Chapter Introduction

In each following section, this Chapter addresses the manner in which this thesis uses particular approaches to policy analysis, regulatory analysis and legal analysis, to combine in an overall evaluation of DADS policies globally, and the evidence about their operation in the public domain. In this way, this Chapter is a prelude to later Chapters which this thesis uses to weave together policy, legal and regulatory analyses in the hunt for evidence that the growth of DADS globally has been cognisant of the need for *regulatory responsibility; coherent (disclosure) legality*, and in a way that recognises *victim vulnerability*. Because of the fragmented nature of the governance of DADS in operation worldwide (in five or more common law jurisdictions, for one thing) it would have been difficult to use a single analytical framework to articulate a critique of current DADS together. It can, however, be noted from the outset that this thesis adopts a method which sees regulation as a lens broader than either policy or law, and encompassing both, while "[t]he concept of policy is necessarily broader than legislation..." as the Court of Appeal noted in *R (Plan B Earth and others) v Secretary of State for Transport* [2020] EWCA Civ 214 at 224.

One common analytical framework for policy analysis is the model of the 'policy cycle'. This is inherently non-linear as a model, and maintains that policy will come about because policymakers, once an agenda is set in public discourse, will engage in policy *formulation, legitimation, implementation* and finally, *evaluation*<sup>74</sup>. So a common approach to policy analysis is a longitudinal analysis, and in several parts or stages, with the last one being evaluative of the impact of the policy. However, this process is in no way standardised. As Paul Cairney has observed:

"There is no single theory applicable to public policy as a whole. The world is too complex to allow for parsimonious and universal explanations. Our choice is to produce a single theory that is so complicated it defeats the purpose of

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<sup>74</sup> For an overview see Paul Cairney, 'Policy Concepts in 1000 Words: The Policy Cycle and its Stages' <<https://paulcairney.wordpress.com/2013/11/11/policy-concepts-in-1000-words-the-policy-cycle-and-its-stages/>> accessed 16 June 2020.

parsimonious explanation, or simpler theories that explain parts of the story in different ways."<sup>75</sup>

As such, the idea of 'policy analysis' is *partly* used in this thesis to examine the spread of DADS policy without much in the way, for most of the jurisdictions concerned, of an evaluative phase. This thesis will show that where evaluations or pilot assessments of DADS have been conducted in any given jurisdiction, they have been procedural in their focus, rather than with a substantive focus on determining how effective disclosures are in protecting victims; and so lacking sufficient rigour to steer the policymaking process on the DADS concerned away from greater entrenchment of the policy, if that were appropriate. As such, the chief policy analysis tool used in this thesis is not a 'policy cycle' but a 'policy spiral'<sup>76</sup> - while it is difficult to conclude that the spread of DADS accords with the nature of a full-blown 'policy disaster'<sup>77</sup>. Dunleavy has written that 'policy disasters' are those policies "generally construed to mean significant and costly failures of commission or omission by government". This thesis overall finds that there is not yet sufficient evidence in the public domain to conclude as to whether the DADS policies in the United Kingdom and elsewhere are a 'policy disaster', but there is much to suggest that DADS are currently in a 'policy spiral'; a concept explored in a later section of this Chapter.

## 2.2 Developing three thematic research questions

Before later Chapters undertake a detailed analysis of the various DADS under scrutiny, this Chapter further explores the research questions that the thesis addresses, and describes the methods that have been adopted to answer them. The research questions stated below, here, have a defence of their particular inclusion presented in later sections of this Chapter. This thesis seeks to address three key research questions:

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<sup>75</sup> Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2012) 282.

<sup>76</sup> Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', (2018) PL 725, 726.

<sup>77</sup> Patrick Dunleavy, 'Policy disasters: explaining the UK's record' *Public Policy and Administration* 10(2) (1995) 52, 52.



1. *To what extent do Domestic Abuse Disclosure Schemes show a lack of regulatory responsibility for preventing domestic violence?*
2. *To what extent do Domestic Abuse Disclosure Schemes adequately address issues of victim vulnerability?*
3. *To what extent do Domestic Abuse Disclosure Schemes pose issues of coherence in terms of their legality, and in relation to the context of disclosures?*

These research questions were developed and re-developed through the construction of the thesis, and as the research revealed gaps in knowledge about the DADS concerned. This deeper understanding of the operation of DADS was gained through searching the limited available literature on such Schemes, and connected areas of scholarship including that concerning privacy law, the management of criminal records, the vulnerability of victims of domestic violence and the positive obligation to protect their human rights to be free from harms, and the way that theories of regulation and governance can be used to model the efforts to do so. As such, this thesis blends together legal, policy and regulatory approaches to evaluating the current crop of Domestic Abuse Disclosure Schemes. The original contribution to knowledge made by this thesis is found in the *thematic* nature of the evaluation undertaken; as well as the novelty of the new data on the Scheme that work undertaken to complete this thesis has generated, besides the simpler originality of this thesis being the first fully-detailed study of DADS in the common law world.

The evaluation across the thesis itself draws upon particular themes of *vulnerability*, *responsibility* and *legality* taken from policy, regulatory and legal literature and source material, respectively, as it relates to the operation of the DADS concerned. As a result, this thesis is undertaken using a policy analysis, a regulatory analysis and a legal analysis. For clarity, the terms 'policy analysis', 'regulatory analysis' and 'legal analysis' must be given a distinct meaning through the work done in this Chapter, below, not least because law and policy are both tools of regulation, but can be seen as distinct from one another, as well as from regulatory theory itself. In terms of later Chapters in this thesis, we start with a dedicated chapter on the scale of the problem for victim vulnerability as posed by domestic violence in Chapter 3; an analysis of the policy origins of the DVDS in Chapter

4, a comparative analysis in Chapter 5; while later Chapters deal with a series of regulatory and then legal analyses of the UK DADS. In the next sections of this Chapter, below, the key tools used in this thesis as to policy analysis and regulatory analysis are set out, along with the tools of legal analysis to be used in a doctrinal approach to considering the (in)coherent legalities of DADS globally, with a particular focus on the UK legal frameworks concerned.

### 2.3 Policy analysis

The policy analysis strand of the thesis is concerned with the positioning of the Scheme in the public protection landscape of England and Wales. It incorporates analysis of issues from a victim-vulnerability perspective, but is also an examination of the policy methods used to address the problem of the (lack of) rehabilitation support for serial domestic violence perpetrators. However, as Knoepfel et al have outlined, it is possible to take a "diagnostic approach that demonstrates the factors that explain the 'good' and 'bad' functioning of public policies in terms of public administration production and with respect to the efficacy of its policies and their products"<sup>78</sup>. For Knoepfel et al, a standard policy analysis involves describing, understanding and explaining the outputs, impacts and outcomes of public policy<sup>79</sup>. At the same time, an assessment must be made of the actors, institutions and resources deployed in and around the policy work concerned<sup>80</sup>.

Importantly, then, the term 'policy analysis' is used here to describe an evaluation of the manner in which a regulatory initiative or phenomenon in, here, the criminal justice system, is variously pieced or woven together by actors with sometimes different interests. Policy interventions analysed in relation to the DVDS will not always evidence a purely top-down, command-and-control style of political seniority for public policy making in the arena of public protection. As Page has put it, 'policy is better seen as a production process involving people at all levels adding different bits to the overall product, although it is hardly a linear process that starts with agreement on principle

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<sup>78</sup> Peter Knoepfel, Corrine Larrue, Frederic Varone and Michael Hill, *Public Policy Analysis* (Policy Press 2011) 10.

<sup>79</sup> *Ibid*, 11.

<sup>80</sup> *Ibid*, 12.

which is followed by elaboration of detail<sup>81</sup>. Indeed, as Cairney notes, while "policy processes are complex and often unpredictable", a "division of policymaking into stages helps us analyze the process [of policymaking]... with reference to... five pillars of explanation: institutions, networks, ideas, socio-economic factors and choices"<sup>82</sup>. The next chapter of this thesis, Chapter 3, begins to unpick the policymaking process with regard to policy on the prevention of domestic violence in terms of these 'pillars' and others, in turn, in relation to the policy work of preventing domestic violence; before Chapter 4 examines the policy origins of the DVDS.

The measure of a 'policy spiral' warrants some further unpacking here. Writing of the proliferation of counter-terrorism policy in the UK, some of it arguably damaging and counter-productive, Clive Walker has observed that:

"A "policy spiral" describes a policy which lacks clear initial purpose or subsequent direction, progression, control and reflection. A policy spiral is therefore susceptible to unresolved contradictions or gaps, dramatic direction changes, and uncertain outcomes. As a result, policy spirals arise from inexact and contested meanings, objectives, and mechanisms..."<sup>83</sup>

As a simple introductory observation to this Chapter on the regulatory method adopted in the rest of this thesis, and in giving one initial explanation for this 'policy spiral' issue in relation to the spread of DADS globally, it should be noted that the spread of DADS has taken place in an era within and across jurisdictions, in an arena of multi-level governance. It is the aim of this thesis to show the extent to which DADS have proliferated globally despite a poor evidence base; showing poor 'control and reflection' on the part of criminal justice regulators, and entailing 'uncertain outcomes' for the victims of domestic violence whose interests they purportedly serve. As such, DADS are a good example, this thesis will argue, of a 'policy spiral' overseen (albeit under-scrutinised) by criminal justice regulators across different tiers of the policy landscape in more than one jurisdiction. The spread of policy on DADS from England and Wales, to Scotland and Northern Ireland, and then to a number of other common law jurisdictions

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<sup>81</sup> Edward C. Page, 'Their word is law: parliamentary counsel and creative policy analysis' (2009) *Public Law* 790, 790.

<sup>82</sup> Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2012) 288-289.

<sup>83</sup> Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', (2018) *PL* 725, 726.

globally, can be said to be a de facto 'policy spiral' that has *uncertain effects* when it comes to concerns for the vulnerability of victims.

There is no UK government study to definitively show if there is a boost to public protection from the adoption of a DADS as part of criminal justice policy. This means an Antipodean policymaker must conduct their own substantive evaluation as to the effectiveness of a DADS in their jurisdiction, or create a further turn in the policy spiral on DADS globally. The spread of DADS to Australian states and in New Zealand and Canada, discussed below in Chapter 5, is a result of the tendency for policy to spread in non-linear or non-hierarchical ways in an environment of 'multi-level governance'. As Paul Cairney has noted, in a description of this more haphazard reality of policy formation, and in a way that applies to the global spread of DADS:

"A combination of multi-level governance and policy transfer suggests that we may no longer witness the straightforward adoption of policies from one country to another. Rather, the importation of policy can take place at various levels - local, regional, national and supranational. This introduction of complexity produces *uncertain effects*." [My emphasis]<sup>84</sup>

Importation of criminal justice policies into a jurisdiction at different levels will happen differently from jurisdiction to jurisdiction as the regulation of policymaking varies between each in turn. As such, the theory of *regulatory space*<sup>85</sup> is vital to the analytical work done in this thesis, because as a tool for analysis it makes or requires no assumptions as to how the development and regulation of a policy or policy actors should occur; its approach is merely descriptive. But for that reason it has value, since as a descriptive tool, 'regulatory space' allows for a multi-faceted approach to be taken in putting together a critique of a piece of public policy. For this reason, 'regulatory space' is given an overview as a concept, in relation to the regulatory analysis approach used in the thesis, in a further section of this Chapter, below.

In this thesis, Chapter 3 shows the way that the creation and practice of policy to prevent domestic violence is a regulatory space into which the DVDS, in England and Wales, is inserted. That this takes place on a particular basis is due to the balance of power between the Home Office, policing institutions and campaigning pressure groups, and is

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<sup>84</sup> Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2012) 261.

<sup>85</sup> See in particular L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998) 154.

demonstrated in the analysis offered of the policy process affecting the DVDS in Chapter 4. This thesis is thus very much concerned in the following chapters with the actions (or inactions) of a range of regulatory and institutional actors around the adoption of DADS, and the strategic power field and priorities they adopt - though for many such bodies, including the Home Office in the UK, DADS are not a top-level policy priority.

The extent to which a classic 'policy cycle' has been used to develop DADS (as well as the emergence of the more damning 'policy spiral' outlined above) will also be assessed across Chapters 3 and 4. Chapters 3 and 4 create a focus on the extent to which the development of the DADS to date emerged from, first, the perception of a societal problem; then, a phase of agenda-setting; before a process of policy formulation; and an implementation phase followed by an evaluation phase - in the typical or expected public policy creation process<sup>86</sup>. The issue for this thesis is that the rigour of all of these phases and processes, in relation to the work of the policymakers who developed the UK DADS in practice, is contestable.

The policy analysis elements in this thesis draw on readily available textual sources in areas of government policymaking connected with the prevention of domestic violence, as well as the rehabilitation of offenders and other matters for the management of criminal records information. These sources are mainly documents freely available from the websites of the Home Office, Ministry of Justice, Her Majesty's Inspectorate of Constabulary (HMIC) (and now of Fire and Rescue Services, HMICFRS), different police forces and the College of Policing, as well as the Association of Chief Police Officers (ACPO) (now the National Police Chiefs' Council (NPCC)). Some freedom-of-information requests were also submitted to the Home Office and police forces (including all of those in England and Wales, Police Scotland, New Zealand Police and the Police Service of Northern Ireland) in the course of the research.

It should be noted that this thesis has not required formal ethics approval for the research to be undertaken; since the mixed and incremental analysis of law, policy and regulation outlined above all draws upon primary legal and secondary (academic and or/policy) sources only, which are freely available. Any sources obtained using freedom-of-

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<sup>86</sup> Peter Knoepfel, Corrine Larrue, Frederic Varone and Mmichael Hill, *Public Policy Analysis* (Policy Press 2011) 32

information requests are *de facto* in the public domain, and while an informal enquiry was made with the School of Law ethics committee Chair, I was informed that as a result of this feature of the research, my FOI requests did not require formal ethical scrutiny or approval. Separately, and in terms of more empirical research methods, this thesis also drew some inspiration from Savage and Hyde's use of the Freedom of Information Act 2000 to generate fresh data to augment a regulatory, legal and policy analysis.

Westmarland et al have also used a freedom of information-based approach to gather fresh statistical insight into the (worrying) trend of conducting the policing of reported domestic violence solely using only 'out of court disposals', in more than 5,000 cases in 2014 alone.<sup>87</sup>

#### 2.4 A regulatory analysis

Chapter 7 of this thesis presents the most concentrated regulatory analysis of DADS in the UK in particular, and deploys a wide range of constructs drawing on regulatory theory in order to present this analysis. This section of Chapter 2 introduces a smaller, core subset of concepts from regulatory theory, to show how a regulatory analysis in this thesis complements and augments the policy and legal analyses I use here. In order to explain the nature of the regulatory analysis that is conducted across this thesis as a whole, the first thing to identify is the use in this thesis of a key concept of 'regulatory space'. As already mentioned above, 'regulatory space' is an 'analytical construct'<sup>88</sup> expounded by Hancher and Moran - two highly influential regulatory theorists. Using the idea of 'regulatory space' to order the criticisms that will be levelled at the development and ongoing operation of DADS allows for three levels of regulatory findings, through which this thesis identifies nine 'regulatory problems' with the DADS in the UK and other common law jurisdictions. Classically, in defining an understanding of 'regulatory space', Hancher and Moran explained that:

"Notions of [policies or measures that] are 'regulatable' are plainly shaped by the experience of history, the filter of culture, and the availability of existing

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<sup>87</sup> See Nicole Westmarland, Kelly Johnson and Clare McGlynn, 'Under the Radar: The Widespread use of 'Out of Court Resolutions' in Policing Domestic Violence and Abuse in the United Kingdom', 58(1) (2017) *The British Journal of Criminology* 1.

<sup>88</sup> L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998) 153.

resources... Understanding why some issues are prioritised, included or excluded, and different times and in different places, thus demands an exploration of how organizations become committed to, and maintain a commitment to, particular definitions of the scope of regulatory space. Likewise, understanding changes in the notion of what issues should be [regulated] demands attention to the shifting balance of power within and between institutional actors inside the common regulatory sphere."<sup>89</sup>

Through this organising principle of 'regulatory space', this thesis thus identifies problematic features of the manner in which DADS operate at the three levels of micro-level regulation; meso-level regulation, and macro-level regulation, overall. Micro-level regulation is best likened to force/regional-level operation of the DADS (framing both police forces in Scotland and Northern Ireland as comparable with a single police force in England and Wales - with micro-level policy 'steer' only from within those organisations and from their politicised local-level counterparts in the form of Police and Crime Commissioners for forces in England and Wales, for example). Meso-level regulation of the DADS operates at a national/jurisdictional level; and is considerably more complex; with oversight and control from the courts; policing regulators, policy makers and inspectorates etc. as well as key government departments concerned with policy and strategy in addressing public protection issues. Macro-level regulation in the context of the DADS comes from the legislative frameworks adopted by the relevant Parliaments, and devolved or federal assemblies, in relation to the particular DADS concerned in operation in different common law jurisdictions - as well as the supranational or international law values that may drive the operation of the DADS in some of their features right down to the most local level. This analysis of the complex regulatory space in which each of the currently operated DADS exists is then used to explain how nine key regulatory problems can be and are categorised at a specific regulatory level in this thesis, and these are detailed in Chapter 7.

The key regulatory theorist I draw upon in this element of my analysis is Julia Black<sup>90</sup>, albeit amongst others<sup>91</sup>. While it is possible to select key theorists to use in an analysis by

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<sup>89</sup> L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998), 154.

<sup>90</sup> See for example: Julia Black, 'Critical reflections on regulation', 27 (2002) *Austl. J. Leg. Phil.* 1

<sup>91</sup> John Braithwaite, for example - see: John Braithwaite, 'Limits on Violence; Limits on Responsive Regulatory Theory' (2014) *Law & Policy* 36(4) 432.

way of a more quantitative, bibliometric approach based on citation data<sup>92</sup>, for example, for a general overview of regulatory theory, in Julia Black I have chosen to draw upon a regulatory theorist I knew to have already been deployed in a successful information law-related research project<sup>93</sup>. Julia Black is the key regulatory theorist drawn upon by Ashley Savage and Richard Hyde in their socio-legal, freedom of information-based study of local authorities and those national regulators responsible for enforcing food safety laws. As with that study conducted by Savage and Hyde, this thesis is an attempt to capture a complex regulatory framework. Savage and Hyde drew upon Black's work since the latter has articulated a wide-ranging typology of different types of regulatory actors. The regulatory process of attempting to prevent domestic violence similarly draws in the work of a wide range of regulatory actors, and so this study of the DVDS also finds great value in Black's typological work, just as Savage and Hyde found, from a regulatory perspective, in examining the processes of whistleblowing to local authorities, in a food safety context. As such, Julia Black's theories of regulatory capacity, regulatory function, and regulatory enrolment between regulatory actors have informed the development of my thesis across several of the chapters that follow. Regulatory actors in the context of public protection and criminal justice, such as the Home Office, or her Majesty's Inspectorate of Constabulary (HMIC), have specialisms and powers (that is, 'functions' and 'capacities') or responsibilities (their 'enrolment') for given regulatory issues<sup>94</sup>. This approach to mapping regulatory capacities and functions is particularly central to the analysis of the (lack of) the monitoring and evaluation of the UK DADS discussed in Chapters 5 and 6. Given the novelty of this thesis in examining DADS in such a level of detail, it has been very useful to use a tried and test regulatory framework in order to do so.

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<sup>92</sup> See for example, the approach taken in Jorge Eduardo Tasca et al., 'An approach for selecting a theoretical framework for the evaluation of training programs', (2010) *Journal of European Industrial Training*, 34(1) 631.

<sup>93</sup> See Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: A practical perspective', 35(3) *Legal Studies* (2015) 408; and Ashley Savage and Richard Hyde, 'Local Authority Handling of Freedom of Information Requests: Lessons from a Research Project', (2013) *WebJCLI* 19(2) <<http://webjcli.org/article/view/240/315>> accessed 16 July 2020. Indeed, I have already cited Julia Black in some of my own more doctrinal and theoretical research: please see Jamie Grace, 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK', *International Journal of Law, Crime and Justice* 41 (2013) 303, citing Julia Black, 'The emergence of risk-based regulation and the new public risk management in the United Kingdom', (2005) PL 512.

<sup>94</sup> See Julia Black, 'Enrolling actors in regulatory systems: Examples from UK financial services regulation' (2003) *Public Law* 63, 65.



The thesis also draws upon the work of the highly influential John Braithwaite, in such a way that both clarity and depth is added to the regulatory analysis undertaken.

Braithwaite's explanation of a 'regulatory pyramid' of responsiveness in regulation, for example, posits that the more serious a criminal behaviour is in terms of the harm perpetrated, the less that an offender, for example, should be left to mend their own ways, following encouragement or threat of sanction, in an exercise in self-regulation. But Braithwaite's theory highlights that according to that same responsive regulatory approach, and the regulatory 'pyramid', it is unusual for the DVDS to place such an emphasis on self-regulation for potential victims of domestic abuse. This is because Braithwaite's theory of regulatory responsiveness suggests that in the criminal justice system, greater emphasis should be placed on the self-regulation and self-motivation of an individual where the risk of harm of the repercussions of their failure to act or to otherwise self-regulate is not so great<sup>95</sup>. As such, responsabilising victims through making disclosures to them, under the banner of a DADS policy, is distinctly out of step with Braithwaite's theory of responsive regulation, *prima facie*, given the risk of harm potential victims may suffer, and twinned with the onus on them to take action<sup>96</sup>. There is a severe degree of responsibility that a disclosure under the DADS places on a potential victim to end a relationship and cut ties with an offender *by themselves*. We are left only with the conclusion that no matter the intention of policymakers, DADS have become or are innately a means of regulating the (potential) victims of domestic violence, rather than the (possible) repeat perpetrators thereof.

## 2.5 A legal analysis

In the third phase of my combined and incremental analysis, is a doctrinal analysis of the legal basis and operation of the Scheme. If, as in the words of Hutchinson and Duncan, 'doctrinal research is research into the law and legal concepts'<sup>97</sup>; then this doctrinal analysis is an analysis of the law and legal concepts that can be said to be, for my thesis,

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<sup>95</sup> See John Braithwaite, 'Limits on Violence; Limits on Responsive Regulatory Theory', 36(4) (2014) *Law & Policy* 432.

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

<sup>97</sup> Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research', *Deakin L. Rev.* 17 (2012) 83, 85.

regulating a certain phenomenon, process or human activity; here Domestic Abuse Disclosure Schemes.

Mark Taylor observed in his 2012 book that a good regulatory framework would result in 'clarity', 'generality', 'certainty' and 'relative constancy'...<sup>98</sup>. As Christina Liene has observed, a legal system "should strive for coherence; the adjudicative process should produce results the underlying reasoning of which is intelligible and, to some extent, predictable"<sup>99</sup>. This thesis investigates the extent to which the operation of the three DADS in the UK today is aligned with core values of a sound and rigorous legal system. Because of the legal complexity of a decision to disclose information to a potential victim under a DADS policy, this thesis seeks to test the coherence of a DADS policy with other such policies, based as they are (in the UK at least) on primarily common law underpinnings, against the standards of human rights law, data protection law and developing international law norms.

In order to conduct this investigation of the DADS from the perspective of their legality in these senses, as is explained in later Chapters of the thesis, the DADS can be analysed for their compliance with wider public law and human rights standards, even if these standards are shifting over time. These standards are also drawn from distinct, separate bodies of UK and European legal doctrine, and are given an overview below. It should also be noted that this thesis is written, at present, as though most relevant EU law will be in force in the UK for the much longer term. This is not least because the EU (Withdrawal) Act 2018, at the time of writing, has created a category of legal sources now known as 'retained EU law'. However, EU data protection law as it applies to data processing for law enforcement purposes, in its range of principles and rules, provides a series of useful doctrinal test standards, now still legally in force through Part 3 of the Data Protection Act 2018. The data protection standards applicable in the context of UK policing are thus used to discuss the operation of the Domestic Violence Disclosure Scheme and the other UK DADS, as well as on the basis of the overlapping common law of England and Wales, and the European Conventions on Human Rights (1950) (ECHR).

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<sup>98</sup> Mark Taylor, *Genetic data and the law: a critical perspective on privacy protection* (Cambridge University Press 2012) 15.

<sup>99</sup> Christina Liene, 'Common law constitutional rights: Public law at a crossroads?', PL (2018) 649, 665.

As such there are a variety of doctrinal standards that will be used in the thesis to 'test' what we know of the regulation and operation of the Domestic Violence Disclosure Scheme. This thesis will test the DVDS, across several Chapters, against possible grounds of judicial review. The model of using a variety of common law- and human rights law-based grounds of judicial review to test the public policy development that is the DVDS adds rigour and a pragmatic structure to the legal analysis that runs as a strand through later Chapters of the thesis. In addition, the latest guidance on the DVDS suggests that: "Any decisions made as a result of this scheme must be recorded fully and in a format that would stand scrutiny of any formal review including judicial review."<sup>100</sup> So the Home Office are clearly cognisant of the possible challenge to the operation of the Scheme in a particular case, or systemically, using judicial review as a means of challenge, and so grounds of judicial review are a pragmatic basis of a legal analysis for this thesis to deploy.<sup>101</sup>

So currently, an individual subject of a (potential) disclosure under the DVDS, for example, is encouraged by Home Office policy to see judicial review proceedings as the most rigorous means of challenging such a disclosure, or perhaps - in advance of a possible disclosure - attempting to prevent or prohibit disclosure using an array of legal

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<sup>100</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance*, (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 22.

<sup>101</sup> The Court of Appeal for England and Wales observed in *R (XX) v Secretary of State for the Home Department* [2016] EWCA Civ 597 at 25 that in relation to the use of criminal record disclosure schemes for public protection purposes (and specifically in relation to the Child Sex Offender Disclosure Scheme (CSODS) under discussion in that case): "There is no general requirement of an independent overseer though of course it is right to say that the judicial review jurisdiction provides a supervisory discipline to ensure the legality of individual decisions... [judicial review] takes its place at the apex of a set of arrangements that is full of detailed provisions for the achievement of balanced proportionate decisions, and of course the application of those provisions is liable to scrutiny in the judicial review court." Furthermore, the Court of Appeal also noted in *XX* (at para. 26) that: "There is... no freestanding general requirement that a subject should have an opportunity to seek exemption from the scheme. The general law does not so require. Nor does the Strasbourg jurisprudence impose such a requirement as a matter of overall principle." The Supreme Court gave permission to *XX* (also known as *A*) to appeal in October 2019, though at the time of writing a hearing is yet to take place. However, permission to appeal was granted by the UKSC only on the grounds of an arguable breach of Article 8 ECHR and common law requirements if there is no presumption in relevant statutory guidance that a subject be consulted about a possible police disclosure identifying them. Permission to appeal was not granted in relation to arguments in *XX* relating to the need for an individual exemption from disclosures for qualifying offenders. See Supreme Court, *Permission to appeal results - October and November 2019* <<https://www.supremecourt.uk/docs/permission-to-appeal-2019-1011.pdf>> accessed 16 July 2020. Subjects' rights to notification and/or consultation under the ECHR and at common law prior to police disclosures under the DVDS are discussed later in this thesis.

arguments or grounds. These grounds and the relevant analytical sections of this thesis will be addressed according to:

- the standards and requirements of the common law;
- the interrelating framework of the Human Rights Act 1998 and the Data Protection Act 2018 - since at the time of writing the latter had recently reformed the Data Protection Act of 1998 (which is still, at the time of writing, referenced in the three UK DADS guidance documents and operational protocols);
- the jurisprudence of both the European Court of Human Rights and the European Court of Justice where relevant in interpreting international law and domestic legislation and case law;
- the normative and doctrinal standards of the European Convention on Human Rights
- Wider international law frameworks, such as the Istanbul Convention and the United Nations Convention on the Rights of the Child, as discussed below.

The Data Protection Act 2018 also now requires greater specificity in doctrinal and policy terms regarding the use of criminality information. Arguably, greater clarity will be required in relation to the length of retention, scope for erasure and potential restrictions on the processing of criminality information as data making a clear distinction between suspects, offenders, victims and witnesses, for example, or in terms of varying provenance, between allegations, say, and convictions<sup>102</sup>. To an extent, these taxonomic

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<sup>102</sup> The subtleties of any process provided for the review of, and any possible bar from, disclosure of items of criminality information are already the subject of considerable judicial scrutiny in the UK in the employment context, particularly involving what are termed Enhanced Criminal Record Certificates (ECRCs). ECRCs are principally used by employers to regulate who can work with children and vulnerable people. In this way, criminal records disclosure in the UK is a key strand of public protection law, policy and regulation by HM Government. Individuals are able to challenge what is ultimately disclosed on their particular criminal record certificate, via judicial review against a police force that supplied its contents, or through an independent monitor that oversees the work of the Disclosure and Barring Service, which applies 'filtering rules' to the material supplied by police forces for the production of on type of criminal record certificate or another. This is an enormous task facing the DBS, and clear or 'bright line' filtering rules are helpful to this body in producing millions of criminal records certificates for use in employment contexts each year by job applicants. However, the scale and complexity of this system is not something which has persuaded the judiciary toward sympathy for public protection regulators, since being barred from employment in a long sought-after role due to past convictions of debatable seriousness is an issue of fundamental rights of individuals versus positive obligations towards the public. In a challenge to the then newly-introduced filtering rules for ECRCs in *R (P and A) v Secretary of State for Justice* [2016] EWHC 89 (Admin), McCombe LJ was scathing in *obiter* (at 88) in response to arguments he characterised as 'questions of administrative convenience'. The resulting Supreme Court case of *R (P and others) v Home Secretary* [2019] UKSC 3 saw the finally successful challenge to the 'filtering' rule that meant any person

requirements stemming from the Law Enforcement Directive (which underpins Part 3 of the Data Protection Act 2018) also largely aligns with recent momentum in the UK jurisprudence connected to the management of criminal records for public protection purposes<sup>103</sup>. The Law Enforcement Directive set out a clear framework for Parliament in adopting a coherent set of values, which is codified in Part 3 of the Data Protection Act 2018, for the use of a taxonomy of criminal records by setting out with clarity the (limited) rights to erasure, rectification and the restrictions of processing of police intelligence data in the law enforcement context concerned.

Aside from possible grounds of judicial review, another useful 'test standard' deployed in this thesis is the level of compliance provided by the UK DADS against the 'Istanbul Convention' - the Council of Europe Convention on preventing and combating violence against women and domestic violence, dating from 2011. This Convention is a set of standards, which, in the view of the Parliamentary Joint Committee on Human Rights, the UK may actually fall short of in some areas, in terms of provision of support to victims of domestic abuse<sup>104</sup>. The Istanbul Convention is not yet ratified by the UK. Though the Istanbul Convention is yet to be binding on the UK government (as at the time of writing its incorporation is dependent on provisions of the Domestic Abuse Bill currently before Parliament), it would, at least *prima facie*, allow us to place the DVDS amongst 'necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies' that 'offer a holistic response to violence against women'<sup>105</sup>. As Ronagh McQuigg has noted, however, an emerging understanding of the

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with more than one conviction of any type would see all their convictions eligible for inclusion on an ECRC. In turn, this eventually led to the HM Government laying two statutory instruments for debate in Parliament in the second half of 2020: The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2020 and The Police Act 1997 (Criminal Record Certificates: Relevant Matters)(Amendment) (England and Wales) Order 2020. Under these reforms, while single convictions may be less likely to be disclosed to employers in many sectors, chief officers of police will retain discretion to disclose convictions and cautions on ECRCs in contexts where an applicant may work with children of vulnerable people, and unspent convictions and convictions for a long list serious of serious offences will be readily disclosable by the Disclosure and Barring Service to possible employers.

<sup>103</sup> See Elena Larrauri Pijoan, 'Criminal record disclosure and the right to privacy' (2014) Crim. L.R. 723.

<sup>104</sup> See for example concerns expressed as to the shortcomings of police risks assessments of domestic violence cases: Parliamentary Joint Committee on Human Rights, *Report on violence against women and girls - Sixth report of 2010-15* <<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/106/106.pdf>> accessed 3 August 2020, 4.

<sup>105</sup> See Article 7(1) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011).

values of the Istanbul Convention must still be examined in the light of jurisprudence from the ECtHR, and on Articles of the ECHR, as the ECHR arrangements must still predominate in our legal consciousness, overall. Notably, as McQuigg observed in 2015, "...there is no mechanism under the Istanbul Convention whereby individuals can take cases or make complaints concerning violations of the Convention."<sup>106</sup>

Later chapters of this thesis go on to evaluate the development, operation and practice of the DVDS in the light of these wider legal values, amongst the other doctrinal standards highlighted above, and also in relation to international norms which are increasingly applied at the micro-regulatory level; such as the 'best interests of children' (which stems from Article 3 of the UN Convention on the Rights of the Child). Indeed, we might hope that the DADS/DVDS could fit well into developing regional legal frameworks not because of a concern that otherwise Schemes such as the DVDS would be unlawful *per se* (since this judgment would be made only on the basis of more domestic, and thus more clearly-binding legal standards), but because we can make the assumption that these carefully developed frameworks, such as the Istanbul Convention, the UNCRC and the Law Enforcement Directive, have principles of normative value and a consistency that is appealing and progressive in relation to the balanced protection of rights (to safety from violence, a consideration of the best interests of children, and refraining from inappropriate intrusion into privacy, respectively).

## 2.6 Chapter conclusions

In summary, this chapter has done some work to set out and to then explore the research questions that this thesis pursues, in its analyses, in exploring themes of victim vulnerability, regulatory responsibility and disclosure legality. This chapter has also explained the use of policy analysis, regulatory analysis, and broader grounds of a legal analysis used in this thesis in order to pursue these three thematic research questions. In setting out these key methodological approaches this chapter has begun the process of deploying key organising principles and analytical tools in the context of our knowledge

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<sup>106</sup> Ronagh McQuigg, 'Domestic violence as a human rights issue: Rumor v. Italy', E.J.I.L. (2015) 26(4), 1009, 1023.

of the operation of DADS in the UK and globally: chiefly, this has been an explanation of the perspective of 'regulatory space'; the notion of a 'policy spiral'; and a set of doctrinal standards.

In the next Chapter, Chapter 3, this thesis begins to build up a picture of the roots of the regulatory and legal problems that later chapters of the thesis address, in terms of how vulnerable victims' needs may go unaddressed by the operation of the Scheme, and how the legality of the Scheme may be challenged, with the regulatory responsibility of government actors driving the growth of the Scheme becoming questionable.

### 3. The policy problem of victim vulnerability

#### 3.1 Chapter Introduction

Chapter 3 is the first in the series of Chapters within this thesis featuring, between them, the combined policy, regulatory and legal analysis discussed in Chapter 2, above. As such, Chapter 3 is the start of the public policy analysis of the foundation and operation of Domestic Abuse Disclosure Schemes (DADS) particularly, to begin with, in the UK context. This Chapter will therefore first sketch the scale of the problem of trying to prevent domestic violence in the UK; and will begin the process of building up a picture of the vulnerability of victims of domestic violence who might try to use DADS disclosures to keep themselves safe (and some problems with this). In this way, an assessment of the notion of DADS through the lens of 'victim vulnerability' will emerge. The concept of victim vulnerability is highly relevant to this thesis, since policymakers adopting DADS have made some considerable assumptions about the ability of a potential victim of domestic abuse to protect themselves from harm following the disclosure of criminality information from the past of a domestic violence perpetrator. Indeed, the very existence, sparsely evaluated, of the DADS in the UK, and now Australia, Canada and New Zealand too, can be leveraged for considerable political capital by policymakers, and politicians, keen to look like they have left no avenue unexplored in seeking to combat domestic violence and keep victims safe. Conceptually, this should be unsurprising: in the words of Marian Duggan, 'Clare's Law' in fact "links to existing debates about the symbolic mobilisation of victims for political gain"<sup>107</sup>.

Despite the overwhelming need to do more, in policy terms, to combat domestic violence in the UK and many common law jurisdictions, and as is highlighted below, there are enough reasoned objections against Domestic Abuse Disclosure Schemes available for consideration by policymakers, that we should ask questions of the eagerness with which those policymakers have caused those Schemes to proliferate. This proliferation, in a 'policy spiral'<sup>108</sup>, has developed across the UK and internationally without proper and critical evaluation as to their effectiveness. It is inherently laudable for policymakers to seek to combat domestic violence, but being blasé about the effects of an intervention, to

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<sup>107</sup> Marian Duggan, 'Victim hierarchies in the domestic violence disclosure scheme', *International Review of Victimology* 24(2) (2018) 199, 201.

<sup>108</sup> Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals' (2018) P.L. 725, 726.



the extent of it comprising a regulatory *failing*, is less so. This Chapter begins the process of establishing the origins of the UK 'policy spiral' on DADS, with respect to the development of the policy position of the original Domestic Violence Disclosure Scheme in England and Wales.

### 3.2 The problem of domestic violence in England and Wales

At this point we must remind ourselves briefly of the scale of the problem; that is, of the challenges facing any aim to prevent domestic violence as an aspect of public protection. First to note is that the task of preventing domestic violence in society is vital, but is exceedingly complex and far from straightforward. The best approach to criminalising abusive behaviour, conducted in private in relationships between two people, and using legal tools to shape the behaviour of one or both parties, is a difficult one to determine. It has been noted by Lewis et al that "[u]nderstanding legal responses to men's violence, with a view to transforming those responses, has taxed the minds of many researchers, activists and practitioners on the international stage"<sup>109</sup>. This is primarily because the reasons that account for the prevalence of domestic violence in human society are numerous and wide-ranging: individual and psychological or neurological<sup>110</sup>, as well as social, and economic, and so forth.

It is well-known that domestic violence is a widespread and socially harmful crime, with, for example, "...a total of 1,316,800 domestic abuse-related incidents and crimes recorded by the police in England and Wales in the year ending March 2019 (an increase of 118,706 from the previous year)..."<sup>111</sup>. In terms of police interventions, as opposed to simply police record, in England and Wales officers "...made 32 arrests per 100 domestic abuse-related crimes in the year ending March 2019, equating to 214,965 arrests..."<sup>112</sup>.

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<sup>109</sup> Ruth Lewis, et al. 'Protection, prevention, rehabilitation or justice? Women's use of the law to challenge domestic violence', *International Review of Victimology* (2000) 179, 179.

<sup>110</sup> The arguably core neurological roots of domestic violence perpetration, for example, are given a summary in Adrian Raine's remarkable book on the subject. Adrian Raine, *The Anatomy of Violence* (Penguin 2014).

<sup>111</sup> Office for National Statistics, *Domestic abuse and the criminal justice system, England and Wales: November 2019* <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019>> accessed 16 June 2020

<sup>112</sup> *Ibid.*

The estimated prevalence of domestic violence in England and Wales is very extensive. In the first year of national operation of the DVDS in England and Wales, resulting in just a couple of thousand disclosures<sup>113</sup>, the Crime Survey for England and Wales (CSEW) for the year ending in March 2015 estimated that nationally:

"8.2% of women and 4.0% of men reported experiencing any type of domestic abuse in the last year (that is, partner / ex-partner abuse (non-sexual), family abuse (non-sexual) and sexual assault or stalking carried out by a current or former partner or other family member) ...equivalent to an estimated 1.3 million female victims and 600,000 male victims."<sup>114</sup>

Domestic violence is also clearly gendered, therefore, in its manifestations in contemporary UK society. As a result, the term 'victims', at least in the sense of recipients of disclosures under DADS, should be taken in this thesis to be near-synonymous with 'women', and the notion of a 'subject' in relation to a disclosure under a DADS taken to be male; since the majority of victims of domestic violence in England and Wales in any given year will be women; and the vast majority of the worst perpetrators of domestic abuse will be men<sup>115</sup>. This is reflected in the uptake of the DVDS in England and Wales in terms of the relative numbers of men and women drawing on the Scheme. In one year in Lancashire, it has been reported<sup>116</sup>, 7 men applied to the DVDS compared to 822 women, for example. This can be said to be problematic from a men's rights perspective; and it is likely to have been exacerbated by the labelling of the DVDS as 'Clare's Law' in the media and in police discourse. Of course, men are also the victims of considerable domestic violence each year in England and Wales, up to and including homicide in terms

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<sup>113</sup> See appendix to Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (2016).

<sup>114</sup> Office for National Statistics, *Intimate personal violence and partner abuse* (2016) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2015/chapter4intimatepersonalviolenceandpartnerabuse>> accessed 16 June 2020

<sup>115</sup> In November 2019, the ONS noted that in the year to March 2019, "...75% of the domestic abuse-related crimes recorded by the police in the year ending March 2019, the victim was female". Office of National Statistics, *Domestic abuse victim characteristics, England and Wales: year ending March 2019* <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2019>> accessed 16 June 2020

<sup>116</sup> The Newsroom (Lancashire Post), 'Violence against Lancashire men: figures show worrying drop in men coming forward to report abuse' (*Lancashire Post*, 14 November 2018) <<https://www.lep.co.uk/news/crime/violence-against-lancashire-men-figures-show-worrying-drop-in-men-coming-forward-to-report-abuse-1-9444233>> accessed 16 June 2020

of severity of harm. But the issue of gender in the perpetration of domestic violence remains one that is highly skewed. As for the single most important point of all concerning gender and domestic violence, the prevalence of men killing women each year in the UK through acts of domestic violence is shockingly high. In November 2019, the ONS noted that between "...the year ending March 2016 and the year ending March 2018, 74% of victims of domestic homicide were female compared with 13% of victims of non-domestic homicide"<sup>117</sup>. In February 2020 the ONS found, with regard to the year ending March 2019, that for

"...almost 4 in 10 female homicide victims aged 16 years or over, the suspect was their partner or ex-partner (38%, 80 homicides). This was an increase of 17 homicides compared with the previous year. However, the 63 [intimate] homicides [with female victims] in the previous year was the lowest number in the last 40 years. Over the last 10 years there was an average of 82 female victims a year killed by a partner or ex-partner. In contrast, there were only 4% of male victims aged 16 years and over where the suspect was their partner or ex-partner..."<sup>118</sup>.

Overall then, the majority of domestic abuse, and the far greater amount of fatal domestic violence, is enacted by men upon women, with the violence enacted by women on men of a qualitatively different and typically lesser order, as implied by the ONS findings, above. Issues of gender are plain in the take-up of the DVDS; statistics from the study undertaken by the Home Office of the pilot stage of the Scheme show that 98% of the applicants for potential disclosures under the Scheme were women<sup>119</sup>. It has been observed<sup>120</sup> that with the police being happy enough to allow the media to refer to the Scheme as 'Clare's Law' - useful no doubt as a public information *aide memoire* etc. - the

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<sup>117</sup> Office of National Statistics, *Domestic abuse victim characteristics, England and Wales: year ending March 2019*, <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2019>> accessed 16 June 2020

<sup>118</sup> Office of National Statistics, *Homicide in England and Wales, year ending March 2019*, <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2019#how-were-victims-and-suspects-related>> accessed 16 June 2020

<sup>119</sup> See Home Office *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (2013).

<sup>120</sup> See Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* 79(1) (2015) 36.

general PR approach to the promotion of the Scheme by the police has led it to be seen by many of the public as a tool for women only; when it is not.

Same-sex relationships of course also suffer from domestic violence, but LGBT victimisation is something that the DVDS guidance does not address per se; simply remaining neutral in its stated language about the gender of victims of and potential perpetrators of domestic violence. This neutrality in the language of DVDS policy on issues of same-sex interpersonal violence is possibly a significant shortcoming of the Scheme guidance. As Lewis et al have noted, a distinct approach to addressing the issue of violence in same-sex relationships is needed.<sup>121</sup> In the sphere of the DVDS, it could be argued that if in the past the police in the UK were historically less likely to record or to take seriously issues of domestic violence between two men or two women in a relationship<sup>122</sup>, or same sex partners were less likely to report being victims of domestic violence<sup>123</sup>, there would accordingly be less likelihood of a police record about violence demonstrated by one of the partners concerned (as cases would be less likely to be reported, to progress, and thus for convictions less likely to be secured, etc.). These issues, if repeated over time, would result in LGBT SDVPs (serial domestic violence perpetrators) being under-assessed in terms of the risk they present, on the basis of the relative paucity of recorded information about their perpetration of abuse, on average. The DVDS guidance would potentially be improved if this possible issue was noted as a factor to be aware of in conducting a risk assessment as part of the process of screening an application of either kind under the Scheme. Equally, the same informational flaw in police recording systems, stemming from other cultural assumptions in the criminal justice system about the likelihood (or lack of it) of women being abusers, might apply to the manner in which heterosexual female SDVPs are risk-assessed as one half of a relationship, for example.

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<sup>121</sup> See Ruth Lewis, et al. 'Protection, prevention, rehabilitation or justice? Women's use of the law to challenge domestic violence' *International Review of Victimology* 7(1) (2000) 179, 202.

<sup>122</sup> See C. Knight and K. Wilson, 'Domestic Violence and Abuse in Same-Sex Relationships', in *Lesbian, Gay, Bisexual and Trans People (LGBT) and the Criminal Justice System* (Palgrave Macmillan 2016)

<sup>123</sup> See Ruth Haynes, 'Violence is violence: comparing perceptions of intimate partner violence in homosexual and heterosexual relationships', *Journal of Applied Psychology and Social Science* 2(2) (2016) 1-29.

The CPS have caused a further informational flaw to be highlighted in the issue of recording the ethnicity of victims of violence, noting that while in 2018-19, the ethnicity of 65.1% of domestic abuse complainants was recorded, in previous years this had been lower, including just 52.9% in 2017-18<sup>124</sup>. This issue prompts consideration of the idea that the criminal justice system does not know enough about the perpetration of domestic violence from one particular racial and/or cultural community or context to another - while the current Scheme guidance is silent upon considerations of how culture in one ethnic group or setting might affect the receipt or efficacy of disclosures. Women from migrant and/or BME communities face intersectional, aggravating risk factors in terms of their vulnerability to domestic violence, and there are systemic problems that arise for police officers in working with women in those communities. These have been argued and evidenced to include the risks of inadequate interpreting facilities, a relative lack of ethnic minority female officers, the psychology and legality of fragile immigration statuses, 'honour' violence arising from cultural stigma concerning the breakdown of relationships including marriage, and a lack of specialised support services<sup>125</sup>, and these issues *should*, as a result, be highlighted strongly in the guidance that regulates the operation of the Domestic Violence Disclosure Scheme in England and Wales. But these sorts of issues are not addressed at all by the Scheme guidance. In terms of potential victimhood, and aggravated risk factors, migrant women and women from BME communities are also not explicitly encapsulated by the Scheme guidance. Again, this is because a sort of victim neutrality appears to underpin the Scheme guidance: but it has been argued<sup>126</sup> that cultural factors may play a large role in the 'take up' (or not) of the Scheme in certain minority communities, and thus cultural factors may play a large role

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<sup>124</sup>Crown Prosecution Service, *Violence Against Women and Girls Report: 2018-19*, <<https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf>> accessed 16 June 2020, 48.

<sup>125</sup> See Jyoti Belur, 'Is policing domestic violence institutionally racist? A case study of south Asian Women', *Policing and Society* (2008) 18(4) 426; Sundari Anitha, 'Neither safety nor justice: the UK government response to domestic violence against immigrant women', *Journal of Social Welfare and Family Law* 30(3) (2008) 189; Omolade Femi-Ajao, Sarah Kendal & Karina Lovell, 'A qualitative systematic review of published work on disclosure and help-seeking for domestic violence and abuse among women from ethnic minority populations in the UK', *Ethnicity & Health* (2018) DOI: [10.1080/13557858.2018.1447652](https://doi.org/10.1080/13557858.2018.1447652); and Aisha K. Gill, and Karen Harrison, 'Police Responses to Intimate Partner Sexual Violence in South Asian Communities', *Policing: A Journal of Policy and Practice* 10(4) (2016) 446.

<sup>126</sup> See Sofia Graca, 'Domestic violence policy and legislation in the UK: A discussion of immigrant women's vulnerabilities', *EJoCLI* 22(1) (2017) online <<http://webjcli.org/article/view/531>> accessed 16 July 2020.

in the purported success of the DVDS in helping victims in those communities.

'Purported' success is a phrase used here because, as highlighted throughout this thesis at different points, the DVDS has not been widely or thoroughly evaluated, and certainly not from a critical perspective in terms of race or ethnicity, by HM Government, or police bodies themselves, as discussed here, below.

### 3.3 The poor policy monitoring of the DVDS

There has not been yet a longitudinal study of the vulnerability and victimisation of either Right to Ask or Right to Know applicants and disclosure recipients, or any study of the reoffending (if any) of those subjects about whom disclosures are made. As such it is impossible to know on the data that has been made available by the police or by government whether or not disclosures under the DVDS have a real public protection effect. However, the Scheme was positively reviewed in just a very small pilot review process, where only a handful of potential victims of domestic violence could be relied upon to give a sense of how the receipt of a disclosure about their partner affected them in a positive manner. A very low number of disclosure recipients out of a total of 111 people who had received a disclosure in the pilot said in a survey that they would be more likely to seek help from an agency or support group, post-disclosure: just 4 out of 23 (disclosure recipient) respondents to the survey, from 38 respondents in total<sup>127</sup>. The rate at which the 111 recipients of disclosures, in the 2012-13 pilot phase of the DVDS, were victimised by their partners in the longer term, is unknown. Nor we do know anything as to the victimisation rates of the other 275 applicants in the pilot who did not receive a disclosure of any kind<sup>128</sup>.

As noted above in Chapter 1, and discussed in more detail in later Chapters, this thesis used freedom-of-information requests to try to build up a picture of the rate at which recipients of DVDS disclosures in the early months of the national operation of the Scheme have been victimised by the very people they were warned about. An initial analysis of these results (discussed in Chapter 6, below) allows for a suggestion this may be at least, and quite possibly more than 45% of recipients. But HMICFRS certainly

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<sup>127</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013), 10.

<sup>128</sup> *Ibid*, 3.

consider that the more successful police forces in using the DVDS for public protection purposes are, simply, those with high rates of Right to Ask and Right to Know applications, and high rates of disclosures under the Scheme, *per capita*, in the force area concerned<sup>129</sup>.

This degree of oversight by HMICFRS, in their inspection of forces to date in their procedural use of the Scheme, is far from a consideration or evaluation of whether the Scheme is actually effective in its public protection aims. There is a lack of challenge to police forces in England and Wales to demonstrate evidence that they are actually helping victims avoid harm using the Scheme. This is starting to change, albeit slowly. Recently, the Chair of the Parliamentary Joint Committee on Human Rights, Harriet Harman MP, posed the question to Victoria Atkins MP and Edward Argar MP (then Home Office ministers) in correspondence over the Domestic Abuse Bill as it stood at the time, as to whether HM Government planned to review the efficacy of the DVDS, as currently operated, and whether it is "effective in protecting partners of known abusers"<sup>130</sup>. The reply from the two ministers, in April 2019, made more of the way that the DVDS must be accepted as engaging the Article 8 ECHR rights of subjects of disclosures, and thus only deployed in cases where a disclosure is necessary and proportionate. Of the need for a review of the efficacy of the Scheme, the Home Office would only continue to 'monitor the operation of the Scheme' via the work of HMICFRS, while refreshed statutory guidance would be developed with the new Domestic Abuse Commissioner. The two Ministers concluded this approach was enough in terms of regulation and evaluation of the Scheme, stating that "...we do not believe a bespoke review of the [S]cheme is required at this time."<sup>131</sup> However, it would appear that this position, and the rejection of

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<sup>129</sup> Her Majesty's Inspectorate of Constabulary, *PEEL 2016: Police effectiveness 2016 - A national overview* (2017) < <https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf>> accessed 16 June 2020, 86.

<sup>130</sup> Letter from Harriet Harman MP (Chair of the Parliamentary Joint Committee on Human Rights) to Victoria Atkins MP and Edward Argar MP, dated 10<sup>th</sup> April 2019, <<https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/domestic-abuse-letter-published-17-19/>> accessed 16 June 2020.

<sup>131</sup> Letter to Harriet Harman MP (Chair of the Parliamentary Joint Committee on Human Rights) from Victoria Atkins MP and Edward Argar MP, dated 20<sup>th</sup> May 2019 <[https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2017-19/190520\\_Letter\\_from\\_Edward\\_Argar\\_MP\\_and\\_Victoria\\_Atkins\\_MP\\_to\\_Chair\\_re\\_draft\\_Domestic\\_Abu\\_se\\_Bill.pdf](https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2017-19/190520_Letter_from_Edward_Argar_MP_and_Victoria_Atkins_MP_to_Chair_re_draft_Domestic_Abu_se_Bill.pdf)> accessed 16 June 2020.

a thorough review of the Scheme or its guidance, was shifting slightly by the time that the eventual Domestic Abuse Bill made its way through a Public Bill Committee in June 2020. Ministerial commitments were made to focus, in revising DVDS guidance, on key issues of risk assessments around children, and the consistency of disclosure decision making on the part of the police<sup>132</sup> - something discussed later in this thesis, and particularly in Chapter 7.

Later chapters of this thesis give an overview of the weak effort by HMICFRS in 2017 and 2018 to hold individual police forces to account for the way they have used the DVDS, while in 2019 the inspectorate have merely noted that police in Cumbria<sup>133</sup> and Leicestershire<sup>134</sup> made 'good use' of the DVDS. Durham Constabulary have also recently made, in the words of HMICFRS, a "clear commitment to Clare's Law being well used to protect potential victims of domestic abuse"<sup>135</sup>. This is hardly the equivalent of a full national inspection of force-level policy across all forces, or detailed ongoing evaluation of best use of the DVDS. However, the recent HMICFRS inspections of other forces have begun to show some greater introspection in relation to the rolling monitoring and evaluation of the Scheme in those force areas: chiefly West Midlands Police<sup>136</sup> and Nottinghamshire Constabulary<sup>137</sup>.

Across some parts of the country, there has been pressure from the families of victims of domestic homicide to reduce the recommended period of time for any eventual

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<sup>132</sup> See Public Bill Committee on the Domestic Abuse Bill (2019-20), 8<sup>th</sup> sitting minutes, PBC (Bill 96) 2019 - 2021.

<sup>133</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Cumbria Constabulary*, <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-cumbria.pdf>> accessed 16 June 2020, 14.

<sup>134</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Leicestershire Police*, <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-leicestershire.pdf>> accessed 16 June 2020, 16.

<sup>135</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Durham Constabulary*, <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-durham.pdf>> accessed 16 June 2020, 19.

<sup>136</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of West Midlands Police* (2019) <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-west-midlands.pdf>> accessed 16 June 2020, 15.

<sup>137</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Nottinghamshire Police* (2019) <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-nottinghamshire.pdf>> accessed 16 June 2020, 18.



disclosures, from 35 days down to just two days, or 48 hours. Rosie Darbyshire, for example, was killed in Preston by her boyfriend 11 days after making a 'Right to Ask' request, and her family have called for a reduction in the allowed amount of time in which forces can make disclosures.<sup>138</sup> An issue with this as a focus for policy reform would be the legitimate expectation that new policy on a short deadline for DVDS processes would create, as a matter of public law. A shorter deadline would create new resource pressures, as well as new legal and political liability. As Lord Kerr explained in *re Geraldine Finucane* [2019] 3 All ER 191 at 62-63:

"...where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context" (62) ... "a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it." (63).

In relation to this area of concern, Norfolk Constabulary, HMICFRS have noted, undertook a peer-review of their practices around the use of the DVDS, and when implementing the findings of this, have reduced the 'backlog of cases awaiting disclosure'<sup>139</sup>. HMICFRS have also reported that Nottinghamshire police have begun to undertake research with recipients of disclosures under Clare's Law, seeking "feedback on timeliness of completion from application to disclosure; the satisfaction level of the applicant; and an understanding of whether or not the disclosure made any difference to the applicant."<sup>140</sup> Likewise, HMICFRS have reported that West Midlands Police are

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<sup>138</sup> Paul Harper, 'Mum battered to death by boyfriend days after asking for info about him' (*The Metro*, 1 August 2020) <<https://metro.co.uk/2019/08/01/mum-battered-to-death-by-boyfriend-days-after-asking-police-for-info-about-him-10501222/>> accessed 16 June 2020.

<sup>139</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Norfolk Constabulary*, <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-norfolk.pdf>> accessed 16 June 2020, 19.

<sup>140</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Nottinghamshire Police*, <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-nottinghamshire.pdf>> accessed 16 June 2020, 18.

reviewing how they use DVDS disclosure powers "with a view to increasing their effectiveness"<sup>141</sup>.

So the evidence that HMICFRS is a good regulator of the DVDS in England and Wales is mixed. This sense of only partial regulation of the DVDS in England and Wales, where individual forces will adopt greater scrutiny of the DVDS in piecemeal, in particular, is something that will be returned to in later chapters. For now we must conclude that it is interesting at the very least that individual forces have clearly begun to show an interest in developing their understanding as to how the DVDS actually works or takes effect for vulnerable victims. This represents an advance on the central or national position of the Home Office, which has yet to undertake or commission any large-scale or longitudinal study or evaluation of the efficacy of the DVDS in England and Wales, and as already noted, above.

In addition to this, some academics have been less rigorous in their criticism of the Scheme, too. Birdsall et al (unhesitatingly) describe the DVDS as a 'positive step for victims' - simply citing media reports about numbers of requests under the Right to Ask and Right to Know in a particular force area.<sup>142</sup> Police and wider criminal justice/governmental efforts to reduce and prevent levels of domestic violence are multi-faceted, and so it is difficult to make any connection over time between a growing use of the DVDS to make disclosures and any possible reductions in domestic violence offences reported, prosecuted or estimated in the longer term.

### 3.4 The complex nature of victim vulnerability

Policy interventions to protect (potential) victims of domestic violence are complex and multi-stranded. As Lewis *et al* noted at the start of this century:

"What years of scholarship have made clear is the futility of considering interventions in isolation. If we are serious about challenging men's violence, we must be realistic about the potential of a single, brief, transient contact with the police and the court system to address ingrained behaviour which is supported by an accumulation of

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<sup>141</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of West Midlands Police*, <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-west-midlands.pdf>> accessed 16 June 2020, 15.

<sup>142</sup> Nathan Birdsall, Stuart Kirby, and Michelle McManus, 'Police-victim engagement in building a victim empowerment approach to intimate partner violence cases', *Police Practice and Research* 18(1) (2017) 75, 78.

complex attitudes and beliefs. Clearly, arrest or protection orders cannot, alone, stop violent men."<sup>143</sup>

It is appropriate at this juncture to explore the concept of victim vulnerability in more detail, however. The starting point in this thesis for a discussion of the vulnerability perspective on issues of victimisation through domestic violence is the work of Jonathan Herring<sup>144</sup>. An academic lawyer, Herring takes the view that: "Properly understood, a rights-based response [to victimisation] mandates the state to take reasonable steps to protect victims of domestic abuse"<sup>145</sup>, but that "the hyper-autonomous, non-vulnerable man as the norm around which the law is developed is a fiction"<sup>146</sup>.

There are several implications of these two points for this thesis. Disclosures under the DVDS may be a component of a lawful response by the state to a risk of domestic violence. But a failure to consider the application of the principles of policy upon which the DVDS is built, in the light of the particular vulnerabilities of victims of domestic violence, who can be drawn from any vulnerable section of society, may render the guidance on the operation of the Scheme overly simplified. In turn this could increase the vulnerability of some potential victims of domestic violence.

There is no doubt that domestic violence may be the proper motivation for intervention on the basis of public policy that tries to protect vulnerable family members, even as other offending might be better dealt with through less intrusive regulatory or policy means. The primary motivation for putting domestic violence in a category of (potential) harms along with other serious offences and that warrants a more proactive policing approach in policy and regulatory terms is, as Braithwaite acknowledges, the vulnerability of "less powerful members" of a family, household or relationship<sup>147</sup>.

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<sup>143</sup> Ruth Lewis et al. 'Protection, prevention, rehabilitation or justice? Women's use of the law to challenge domestic violence', *International Review of Victimology* 7(3) (2000) 179, 202.

<sup>144</sup> Jonathan Herring, *Vulnerable adults and the law* (OUP 2016).

<sup>145</sup> *Ibid*, 134.

<sup>146</sup> *Op cit*, 9.

<sup>147</sup> John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) 182-183.

Drawing on the ideas of Ashworth and Zedner, Domestic Abuse Disclosure Schemes could be said to be a form of 'preventive justice', creating a kind of preventive criminal offence of a person, namely a particular disclosure subject, being in a relationship or a domestic setting with a vulnerable victim. In terms of Ashworth and Zedner's taxonomy of preventive offences, a Scheme will 'punish', through disclosure, this situation as a 'crime of abstract endangerment' - although all a disclosure subject may know of their 'punishment' is the recipient ending their relationship with them. Another, even more problematic way of using the concept of preventive justice to address 'Clare's Law' policies is that they are, in those terms, a means of correcting the behaviour of the recipients of disclosures. Ashworth and Zedner write that:

"Crimes of abstract endangerment... do not require proof of actual or likely danger in the particular situation. They *presume* [my emphasis] that a given activity creates an unacceptable risk of harm to persons, and therefore criminalize that activity. Underlying these offences is a judgement about the degree of risk that is unacceptable."<sup>148</sup>

The current Scheme guidance is written with a neutrality with regard to many potential considerations of victim-vulnerability, but this creates problems for the operation of the Scheme as few victims of domestic violence, as a proportion, will be hyper-autonomous, non-vulnerable men. Instead the Scheme is capable of the risk of giving victims some false reassurances, in the form of 'nil returns', perhaps, about a potential violent perpetrator to whom they may then find themselves more vulnerable. It is argued elsewhere in this thesis that the DVDS could be placed on the same kind of statutory footing as the CSODS in an attempt to make it more 'routinised' as a proactive part of policing practice in England and Wales, at least with regard to the work of specialist officers, perhaps, engaged in combating domestic violence and abuse.

A statutory DVDS in England and Wales, or a codified DADS for the whole of the UK could be enshrined in legislation as something to be considered *only* when other offender monitoring or rehabilitative approaches are also deployed. This, from a vulnerable victim's perspective, would be a more coherent public protection policy development, but would necessarily entail more frequent and more regular intrusions into the rights of subject under the Scheme, as potential or actual serial domestic violence perpetrators.

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<sup>148</sup> Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 102.

This would have admittedly greater policing costs, and greater policy costs if support services such as women's refuges were to be better ready to deal with an increase in the number of dangerous relationships coming to an end. However, the combination of the development and roll-out and the media 'selling' of the DVDS by the police has coincided with an incoherent policy of cuts to services for women in a political climate as keen on austerity as it is on public protection. As Helena Kennedy has observed:

"'Why did she go back to him?' is the recurrent question in the courts. The answer may be that she had nowhere else to go. New legislation and important-sounding government strategies are all well and good, but they are only half the battle. There remains a huge gulf between the best intentions of those in power, and their track record in translating policy into practice."<sup>149</sup>

But as Crowther-Dowey and Silvestri might conclude, this is to be no surprise, since "...senior policy makers in government seem reluctant to appreciate that their expectations about the degree of public protection that can be provided are essentially unrealistic and unobtainable in practice."<sup>150</sup> In dealing with the disconnection between regulatory responsibility for vulnerable victims and policies on policing that push us towards responsabilising victims and making them take on their own risk management, Duggan has also observed that:

"...it is important to recognise that the ongoing impact of austerity measures may be negatively impacting on engagement with the community voluntary sector. Reductions in services and the capacity to provide support may deter some applicants from accessing resources if they feel that their needs are less serious by comparison to others. Therefore, it is necessary to assess the availability and accessibility of support structures for victims who may seek out information via the DVDS but then find that they are in an impossible situation with regards to what to do next."<sup>151</sup>

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<sup>149</sup> Helen Kennedy QC, *Eve was shamed: How British justice is failing women* (Penguin 2018) 89.

<sup>150</sup> C. Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach', *British Journal of Community Justice* 14(3) (2017) 12.

<sup>151</sup> Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version <[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020

Foisting this kind of personal risk management on to vulnerable victims of serious violence is not the sort of risk management that would amount to good practice; in fact, this responsabilisation of domestic violence victims is quite possibly a risk that a sensible regulator would demand should be subject to mitigatory interventions. Close analyses may show that some practical changes can be made to policy and legal vehicles to better prevent domestic violence occurring in society (as this thesis does with DADS), while from a victim-perspective the operation of the DVDS, for example, could be further reformed in order to be more coherent with wider aims of public protection policy, by twinning it with initiatives on offender rehabilitation. Of course it can be argued, as Lewis et al have noted, that the lawmaking or policymaking process could be too flawed to be a sole vehicle for positive change in preventing domestic violence:

"While some domestic violence researchers reason that practical changes can be made to the justice system to improve the protection of and justice for women, others argue that the law is so intrinsically gendered and has been so thoroughly implicated in previous injustices to women, that efforts to use it are misguided. Each contribution to the debate is grounded in a particular assumption, sometimes explicit, sometimes implicit, about the purposes which law can serve."<sup>152</sup>

But these particular observations were made nearly 20 years ago, and a great deal of legal reform and victim-oriented progress has taken place in that time. Small changes to the 'soft law' operation of the DVDS could continue this work in a small part of this policy arena. There is a wider issue of the problematic nature of forecasting risk in public protection contexts, however - and this is in essence a fundamental challenge faced by the practitioners operating the DVDS: as "...the scientific pretensions of risk assessment offer women limited protection from violent men and consequently their human rights are susceptible to being weakened."<sup>153</sup>

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<sup>152</sup> Ruth Lewis et al. 'Protection, prevention, rehabilitation or justice? Women's use of the law to challenge domestic violence', *International Review of Victimology* 7(3) (2000) 179, 180.

<sup>153</sup> C. Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach', *British Journal of Community Justice* 14(3) (2017) 12.

### 3.5 Problems with the prediction of the risk of domestic violence

The policy, guidance and the regulation of the DVDS could be amended to put the interests of different groups in society more at the heart of decision-making under the Scheme. This could be done in terms of the way the police should work to follow-up on the interests, for example, of children affected by domestic violence, where they come to police attention through the operation of the Scheme<sup>154</sup>. It may also be that the Scheme needs to be re-positing as not just gender-, culture- and sexuality-neutral in its Home Office guidance, but on the basis of Scheme guidance that requires a greater policing awareness in the prediction of risk posed by SDVPs to male, to BME and to LGBT victims. In a wider context of a prevention of domestic abuse more broadly, the delivery by the Johnson government of a new Domestic Abuse Act might in time see a swathe of incrementally useful reforms adopted. At the time of writing, these might include, perhaps, the adoption of a new statutory definition for England and Wales of domestic abuse; a new Domestic Violence and Victims Commissioner; and most importantly perhaps, new and stricter Domestic Abuse Protection Orders, which the courts could issue on application from the police, to include requirements on the offender concerned to undertake some positive steps toward rehabilitation, such as attending behaviour management courses, or wearing GPS monitoring devices, on pain of contempt of court. It could be argued that these additions to the armoury would all help the police and other criminal justice agencies (and policymakers) combat domestic violence more systematically.

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<sup>154</sup> It might, thankfully, be an inevitability that statutory DVDS guidance will, for the use of a disclosure scheme in England and Wales, come to explicitly consider the vulnerability and the wellbeing of children in the context of any possible disclosure. At the time of writing, the Domestic Abuse Bill (2020) has passed from the House of Commons to the House of Lords for consideration and debate in July 2020, and cl.70(1) of the Bill notes that: "The Secretary of State must issue guidance to chief officers of police about the disclosure of police information by police forces for the purposes of preventing domestic abuse." In relation to this, cl.1 of the Bill indicates that behaviour between two people who are personally connected can qualify as 'domestic abuse' in one or more of a variety of ways (namely physical, sexual, psychological, emotional or economic abuse, or coercive, controlling or threatening behaviour, and whether as a single incident or course of conduct); while, importantly, cl.3 entails that children are to be defined as the victims of any of these types of abuse directed at their parents, family or any person who has parental responsibility for them.

Predicting domestic violence in a relationship is fraught with difficulties. The problem with trying to predict the risk of violence in a relationship in the future is that the prediction made obviously depends on the information about the past and the present, as known to the predictor at the time their prediction is made. This recorded information will not be a full record of violence in the past, in the case of many offenders. This has been theorised by Julia Black as the issue of the 'fragmentation of knowledge'<sup>155</sup>. If no information is known to the police about a person who in truth is violent, or has been in the past, then a prediction by the police that he is not violent in the here and now might in time prove to be a kind of 'false negative'<sup>156</sup> that could be communicated to his current partner and future victim, should he transpire to be a violent and abusive partner in the future. By way of contrast, consider that telling the current partner of a second man, who has strived to turn his life around, that their partner was once violent, and had to be imprisoned, for example, might fracture that relationship, and cause emotional pain and instability for both parties. This could be said to be a 'false positive', in the sense of an erroneous prediction of risk<sup>157</sup> if the second man were never to be violent with the current partner concerned. Jane Monckton Smith puts the DVDS forward as evidence of growing acceptance of the model of domestic violence as one of a progression over time (the 'coercive control discourse'), with intimate partner femicide as the last stage in some violent relationships, and "as part of a predictable process involving domestic abuse"<sup>158</sup>. Monckton Smith sees the Scheme as "official recognition and acceptance of the risk of history"<sup>159</sup>. A problem with evaluating the efficacy of prediction and possible disclosure under the Scheme, is, of course, that we could never know how a future relationship would have unfolded for certain, were it for, or not for, a disclosure by the police.

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<sup>155</sup> Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world', *Current Legal Problems* 54(1) (2001) 103, 107.

<sup>156</sup> See Eileen Munro, 'A simpler way to understand the results of risk assessment instruments', *Children and Youth Services Review* 26(9) (2004) 873.

<sup>157</sup> *Ibid.*

<sup>158</sup> Jane Monckton Smith, 'Intimate Partner Femicide: Using Foucauldian Analysis to Track an Eight Stage Progression to Homicide', *Violence Against Women*, online first, 5<sup>th</sup> August 2019 < <https://journals.sagepub.com/doi/full/10.1177/1077801219863876> > accessed 16 July 2020, 2.

<sup>159</sup> *Ibid.*, 8.



Expecting a potential victim of domestic violence to take into account information about the risk a partner poses to them requires a rational response to learning new information. This is predicated on a logical system of thinking about risk to one's person, based on what De Bruin has termed 'belief revision', where the thinking of the recipient of the disclosure must change for them to take action, in order, therefore, for the disclosure to have been effective. As De Bruin explains:

"...new beliefs may motivate C to perform a certain action she would not have performed if A had not given her the information concerning B; and if performing this action constitutes interference with B, then B's negative freedom has been reduced as a result of an invasion of privacy."<sup>160</sup>

But, as has been noted above, predicting domestic violence in a relationship is difficult to get right. People are not fully rational; nor might they be able to act rationally in response to risk. The personalities of antagonists in a relationship are going to be crucial. Duggan has argued that "...where the perpetrator is particularly controlling or domineering, the victim may be convinced that they are better off with the abusive partner as they believe that no one else will want them, or they cannot function independently"<sup>161</sup>. So how best to generalise as to the most effective circumstances when a disclosure might be made under a DADS - and how can crucial factors be anticipated or enlisted in trying to predict the best means and contexts in which to make such a disclosure, or when not to?

### 3.6 Risk assessments and predictions for disclosures under the Scheme

The nature of the DVDS presupposes two things about risk: firstly, that the police can correctly identify the risk posed by a subject of a potential disclosure to a particular potential victim of domestic violence, and secondly, that a recipient of the information contained in a disclosure can act effectively in order to prevent themselves from becoming/being further victimised. Further, the DVDS guidance does not place anywhere near as much emphasis on interventions to help the subject of a disclosure prevent their own offending behaviour. These elements of the DVDS reflect the broader concerns of

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<sup>160</sup> Boudewijn De Bruin, 'The liberal value of privacy', *Law and Philosophy* 29(5) (2010) 505, 512.

<sup>161</sup> Marian Duggan, 'Idealising' domestic violence victims', in Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version  
<[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020.

Crowther-Downey and Silvestri about the gendered nature of failures to anticipate risks in criminal justice setting, and who have written that:

"As victims of male violence, women fare less well compared to victims of other violent and acquisitive crimes at all stages of the criminal justice process. Their human rights are further compromised by the shortcomings of two other drivers, namely *risk assessment* and flawed attempts to *rehabilitate* men who are violent towards women."<sup>162</sup>

There is of course a problem with the idea of trying to quantify a fluid concept such as the risk of domestic violence when it may have, in any individual scenario, a great amount of subjectivity in undertaking such an assessment, not to mention gaps in the knowledge of the situation from a police perspective. This is not only a problem with the basis of the DVDS, of course, but risk prediction in the business of public protection more generally<sup>163</sup>. As Crowther-Dowey and Silvestri have noted, "...crucially, the scientific pretensions of risk assessment offer women limited protection from violent men and consequently their human rights are susceptible to being weakened."<sup>164</sup> As it is ostensibly concerned with helping vulnerable victims and potential victims of domestic violence, it is no surprise that 'risk' emerged as a policy theme of the DVDS and its *travaux preparatoires* during the development of the idea of the Scheme by the Association of Chief Police Officers (ACPO) as described below. This section of this Chapter now examines 'risk' as a theme from the perspective of preventing the 'interpersonal' victimisation of individuals, chiefly women.

There is an issue with the nature of the Scheme as targeting resources at victims in terms of disclosures to try and make them more 'rational'; about their partners, as opposed to resources being targeted, more appropriately, at serial domestic violence perpetrators and for their dissuasion from that serial offending<sup>165</sup>. The Home Office policy impact

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<sup>162</sup> C. Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach' *British Journal of Community Justice* 14(3) (2017) 12.

<sup>163</sup> See C. Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach' *British Journal of Community Justice* 14(3) (2017).

<sup>164</sup> *Ibid.* 12

<sup>165</sup> There might be a wider and important issue with focusing on serial abusers who move from relationship to relationship; since they don't create much more in the way of harm than serious abusers who only ever abuse one victim, albeit just as seriously in terms of accrued harms. Matthew Bland has observed that there is a mixture of types amongst the most serious perpetrators of domestic abuse. In his PhD thesis abstract he notes that in his study of multiple police forces in England and Wales, "serial offenders account for only between 10% and 15% of all domestic offenders and contribute no more to the 'power few' than repeat

assessment, as discussed above, had noted that if the Scheme were successful in its aim of informing potential victims of domestic abuse about the risks they faced, then there would indeed be a potential risk of the 'displacement of domestic violence and abuse', if an offender were not prevented from simply finding a new person to target in a violent relationship, following the successful 'breaking up' of a relationship as a result of a disclosure via the Scheme<sup>166</sup>.

The sad case of Kerri McAuley, discussed in more detail in Chapter 6, below, led to a Domestic Homicide Review report which showed that while a disclosure of risk information to Kerri had been attempted, but in essence, and wrongly, abandoned by Norfolk Constabulary, the previous partner of her killer had been warned about his convictions for violence against women via the DVDS. In essence, one could re-tell the tale of Kerri McAuley's tragic death rather differently: she was killed by the violence of a man whom the DVDS had displaced from the life of another woman into her own. That other woman may have had the resources, opportunities or support to end that relationship and ensure the violent Joe Storey moved on from her life; Kerri McAuley did not and could not, leading to her death. Kerri had been warned of Storey's violence against women by a friend; before she was herself the victim of violence perpetrated by him against her; and even her family knew what he was capable of<sup>167</sup>. Perhaps she would have been too vulnerable to victimisation through domestic violence to have acted in an 'informed' manner on a disclosure properly made to her under the DVDS.

The Home Office impact assessment report produced prior to the adoption of the DVDS also explained, however, that:

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offenders who have just one victim." Bland's research also has an important finding when it comes to the issue that under DADS serious offenders might have no recent information to disclose about them. Bland found, in his study of the databases of multiple UK police forces, using a machine learning analysis, that (as he put it in his thesis abstract),"51% of serious domestic crime arrestees have no prior arrest record in the two years preceding their serious domestic crime and so there is no opportunity to forecast their crime based on police records alone." See Matthew P. Bland, *Targeting Domestic Abuse by Mining Police Records* (Doctoral thesis) (2020) <<https://doi.org/10.17863/CAM.46479>> accessed 16 July 2020.

<sup>166</sup> Home Office, *Domestic Violence Disclosure Scheme Impact Assessment* (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 14 March 2015

<sup>167</sup> See throughout, Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017*, May 2018.

"Should this risk [of displacement] materialise, the likely impact is that perpetrators of domestic violence and abuse will move on to new victims, so that crime is displaced rather than prevented. However, the new police national database may mitigate this risk over time as perpetrators can be... made known to all police forces across England and Wales. With appropriate data-sharing amongst agencies, appropriate support can be given to perpetrators to stop their offending."<sup>168</sup>

No evaluation of any such data sharing amongst the police and other agencies has yet to take place with specific regard to the Scheme; and we have no evidence to show that DVDS disclosures are being linked with more support for perpetrators. But HMIC have, since the 2013 Home Office risk assessment exercise, been very critical of the failures in police intelligence and information sharing in relation to protecting vulnerable people generally<sup>169</sup>. Criticism has also been levelled more recently at the notion that enough is in any way done with domestic violence perpetrators to help them stop their reoffending.<sup>170</sup> The prospect of tracking serial domestic violence perpetrators, in the longer term, through data gathering and intelligence sharing was however something seized upon by the Home Office in its formal response to a number of consultation submissions concerning the DVDS, which noted that a "Domestic Abuse and Serial Perpetrator (DASP) marker on the PND will be able to identify serial perpetrators of domestic violence meaning that, for example, a person reported for previous domestic violence incidents in Gwent will be known to the police in Greater Manchester."<sup>171</sup>

It must be noted, sadly, that such flagging of reports of domestic violence, and the secondary sharing of domestic abuse information concerning individual cases, is plainly not yet common from the content of the responses received to one of the nation-wide

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<sup>168</sup> Home Office, *Domestic Violence Disclosure Scheme Impact Assessment* (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 14 March 2015, 17.

<sup>169</sup> Her Majesty's Inspectorate of Constabulary, *PEEL 2016: Police effectiveness 2016 - A national overview* (March 2017) < <https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf> > accessed at 16 June 2020.

<sup>170</sup> See Luke Stevenson, 'Not enough focus on perpetrators in domestic abuse cases inspectors say' (*Community Care*, 19 September 2017) < <http://www.communitycare.co.uk/2017/09/19/enough-focus-perpetrators-domestic-abuse-cases-inspectors-say/> > accessed at 19 June 2020; and HM Government, *Guidance for joint targeted area inspections on the theme: children living with domestic abuse* (2017) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/645642/JTAI\\_domestic\\_abuse\\_18\\_Sept\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645642/JTAI_domestic_abuse_18_Sept_2017.pdf) > accessed 19 June 2020.

<sup>171</sup> Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 19 June 2020, 14.

freedom of information requests I made in writing this thesis; responses to this request sometimes cited difficulties with issues 'legacy recording systems' (e.g. Durham Constabulary) that would prevent the ready and speedy access of data 'flagged' or otherwise as domestic abuse incidents. The coherence of the DVDS policies with wider legalities concerning intelligence sharing and issues of data retention and 'flagging' is something that is explored later in the thesis.

A 'full risk assessment' under the DVDS guidance is based upon the 'DASH' model ('Domestic Abuse and Serious Harm'). This is used under the DVDS guidance only where the 'Right to Ask' is drawn upon by a potential victim who approaches the police - as the police can then initially obtain information to feed into the risk assessment model directly from the potential victim of domestic violence themselves. The DASH model has its problems, as noted by some academics<sup>172</sup>, however. For example:

"...risk assessments are formed through research that often produces differing results and factors, and with an assumption that victims are acting rationally and with free will. The assessment of risk, advice and subsequent safety plan based on these objective factors may not be applicable to victims who are still emotionally dependent on their abuser or where a victim's options are severely restricted by the controlling behaviour they are subject to."<sup>173</sup>

The DVDS of course presupposes a full recognition of the agency of victims, and particularly, given the gendered nature of much of the domestic violence in England and Wales, the recognition of the agency of female victims. Such recognition is of course on one level correct, as it is "an understanding of women as active agents, engaged in a complex process of 'active negotiation and strategic resistance' both with their partners and with the range of helping agencies, in their struggle for safety and 'justice'."<sup>174</sup> However, this assumption should not be taken to mean, as identified above in relation to criticism of the DASH risk assessment model, that victims of domestic violence are always able to act as fully able agents who can easily remove themselves from

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<sup>172</sup> Nathan Birdsall, Stuart Kirby, and Michelle McManus, 'Police–victim engagement in building a victim empowerment approach to intimate partner violence cases' *Police Practice and Research* 18(1) (2017) 75, 76; and Emily Turner, Juanjo Medina and Gavin Brown, 'Dashing hopes? The predictive accuracy of domestic abuse risk assessment by police', *British Journal of Criminology* (59) (2019) 1013.

<sup>173</sup> Nathan Birdsall, Stuart Kirby, and Michelle McManus, 'Police–victim engagement in building a victim empowerment approach to intimate partner violence cases' *Police Practice and Research* 18(1) (2017) 75, 76.

<sup>174</sup> Ruth Lewis, et al. 'Protection, prevention, rehabilitation or justice? Women's use of the law to challenge domestic violence', *International Review of Victimology* 7(3) (2000) 179, 180.

relationships and so readily preclude the risk of violence a partner may pose to them<sup>175</sup>. Matters are further complicated, from the perspective of whether the DVDS is an effective crime reduction tool, when we consider that there is some evidence that women in particular are at more serious risk of harm from abusive partners when they are in the process of leaving or have left those partners<sup>176</sup>; bearing in mind that one assumption often made about the Scheme is that victims would end potentially dangerous relationships at a time and in a manner of their own choosing.<sup>177</sup> Marian Duggan has summarised these concerns about the DADS-type policies emerging globally, explaining that in response to "the old adage of 'Why doesn't she just leave?'" we must acknowledge the trapped reality of many domestic abuse victims: poor access to housing for victims who would leave an abuser; the use of debt by an abuser to economically shackle a victim; practicalities of the schooling of children from a relationship or in the household concerned; and the difficulty in completely cutting oneself off from an established friendship group or family network, particularly when the latter involves caring responsibilities.<sup>178</sup> However, nonetheless, 'Why doesn't she just leave?' persists as an attitude since the moral judgement of victims of domestic violence and their self-protection measures abounds in social cultures: "An innocent victim needs to watch where she goes, with whom she associates."<sup>179</sup>

Predicting domestic violence, chaos theorists might tell us, is going to be very difficult if we only focus only on the personalities in a relationship. As Young has noted, "one cannot explain transformations in wealth, weather, bankruptcy, biology, economic, medical or marriage forms by appeal to and only to the personal characteristics of the

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<sup>175</sup> As Herring has it, "the hyper-autonomous, non-vulnerable man as the norm ... is a fiction". Jonathan Herring, *Vulnerable adults and the law* (OUP 2016) 9.

<sup>176</sup> Femicide Census, *Redefining an Isolated Incident - Annual Report on UK Femicides 2016*, <<https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/12/The-Femicide-Census-2016.pdf>> accessed 19 June 2020, 21.

<sup>177</sup> See Marian Duggan, 'Idealising' domestic violence victims', in Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version <[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020.

<sup>178</sup> *Ibid.*

<sup>179</sup> Esther Madriz, *Nothing Bad Happens to Good Girls: Fear of Crime in Women's Lives*, (1997) University of California Press, p.82.

persons affected<sup>180</sup>. Many societal and environmental factors may result in tendencies toward domestic violence in a relationship. One other example of the broader issue of difficulties predicting domestic violence would be the theory of crime 'displacement'. The police might more intensively patrol an area of a city known to be a drugs market; and the drug dealers might re-locate themselves and their operations to avoid greater police scrutiny<sup>181</sup>. And, particularly relevant here, serial domestic abusers may leave one relationship when it becomes harder to control a (newly empowered) victim, only to later come to the attention of the police for abusing a new partner<sup>182</sup>.

So what to do? Even accepting risks of 'displacement' of domestic violence from some relationships into others, surely some kinds of interventions could be made with regard to the riskiest of new relationships. Why not proactively warn the new partners of, at the very least, known, serial domestic abusers that their past behaviour has been violent? There are some possible approaches to explore by way of comparators with the current operation of DADS.

First: The police could monitor and place under bureaucratic surveillance those strongly suspected or at least those already convicted of domestic violence, on a kind of 'register' of domestic abusers. But this would, under the rule of law in the UK, require legislative effort to create a means by which the private life of such an offender could be interfered with 'in accordance with the law', and only when necessary and proportionate<sup>183</sup>. Indeed, this is the approach that the Home Affairs Select Committee has recently approved in their October 2018 report on domestic abuse, when noting that expert witnesses to their inquiry had observed that "...the Domestic Violence Disclosure Scheme ("Clare's Law") was dependent on an individual asking about an offender's history and recommended that the focus be changed so that offenders were tracked as a matter of course by police

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<sup>180</sup> T. R. Young, 'Chaos Theory and Human Agency: Humanist Sociology', *Humanity and Society* 16(4) (1992) 441, 455.

<sup>181</sup> See for example, Evan Wood et al. 'Displacement of Canada's largest public illicit drug market in response to a police crackdown', *Canadian Medical Association Journal* 170(10) (2004) 1551.

<sup>182</sup> Home Office, *Domestic Violence Disclosure Scheme Impact Assessment* (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 14 March 2015, 17.

<sup>183</sup> See *R (T) v Secretary of State for the Home Department* [2014] UKSC 35

officers..."<sup>184</sup>; leading to their recommendation as a Committee that a "... a national register of serial stalkers and domestic violence perpetrators... is introduced as a matter of urgency and that individuals placed on the register should, like registered sex offenders, be managed through multi-agency public protection arrangements (MAPPA)."<sup>185</sup> This would require new legislation<sup>186</sup>, and considerable investment in the management of offenders who are serial domestic violence perpetrators<sup>187</sup>.

Second: The police could ensure that their warnings are only issued when a full package of emotional and logistical support is waiting for a woman (and her children) from an array of agencies and helpers, since the warning should preclude the relationship from continuing, in a perfectly rational world - since the police should know that the risk to a woman from an abuser is greatest at the point of a relationship coming to an end<sup>188</sup>. But

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<sup>184</sup> House of Commons Home Affairs Select Committee, *Domestic Abuse -Ninth Report of Session 2017-19*, HC 1015, 12.

<sup>185</sup> *Ibid*, 13.

<sup>186</sup> Yvette Cooper MP, and other parliamentarians, moved a clause in relation to the committee stage of the Domestic Abuse Bill (2020), which would specifically place serial domestic abuse and stalking perpetrators on the list of offenders to be managed under statutory MAPPA processes, along with serious sexual and violent offenders. See Maya Oppenheim, 'Use domestic abuse bill to stop serial perpetrators abusing multiple women, government urged' (*The Independent*, 8 June 2020) < <https://www.independent.co.uk/news/uk/crime/domestic-abuse-bill-serial-perpetrators-register-a9555126.html> > accessed 19 June 2020.

<sup>187</sup> In the debate on the second reading in the House of Commons for the Domestic Abuse Bill (2020), Liz Saville Roberts MP observed that: "The final point I would like to raise is about the domestic violence disclosure scheme, which is also known as Clare's law. Although in and of itself it is beneficial, it continues to place responsibility on the potential victim to act and to take the initiative: to request information from the police when that person has concerns about a partner's past as a domestic abuse perpetrator. I would continue to ask the Government to consider again the value of a domestic abuse register for repeat perpetrators as a way to shift the responsibility to where it belongs—away from the potential victims and on to the authorities and the offender themselves." (HC Deb 28 April 2020 vol 675, col 293). Following this, in the debate following the report stage of the Bill in the House of Commons, Yvette Cooper MP argued that: "We need to make sure that when the call comes in about domestic abuse by someone who has been convicted before for abuse against someone else, it is not just treated as a new or one-off offence. We need to ensure that there are systems in place to join up the dots to link police, probation and support services together and to monitor people who have a series of previous domestic abuse or stalking convictions so that if they start a new relationship, the police and local services know that a new family are at risk and can take action. Too often, that does not happen. Clare's law does not solve the problem because it relies on an individual asking about an offender's history. What if they do not know to ask? What if they are too scared? Why is it still left to victims to ask for help, rather than having a proper system in place to monitor serial abusers and offenders?" (HC Deb 6 July 2020 vol 678 col 715). However, the relevant cross-party amendment aiming to add serious domestic abuse offenders to the statutory multi-agency public protection arrangements (MAPPA) framework in the Criminal Justice Act 2003 was not, by the time of writing, added to the Bill as it made its way to the House of Lords for debate and consideration.

<sup>188</sup> For an overview of the issue, see: Refuge, 'Barriers to leaving', < <http://www.refuge.org.uk/about-domestic-violence/barriers-to-leaving/> > accessed 19 June 2020; and Liam Kelly, 'Domestic abuse: You're



this would entail putting the relevant and appropriate policies and resources in place to secure this support for vulnerable women. Increasing the attention paid by the criminal justice system to victims of domestic violence would help the police, in particular, meet the challenge laid down to them in October 2018 by the Home Affairs Select Committee, who concluded that: " Despite efforts to introduce national guidance for all police forces on responding to reports of domestic abuse, there continue to be instances where victims' claims are not taken seriously or where there is an inadequate police response. These failings can have catastrophic consequences for victims of abuse"<sup>189</sup>.

Third: Whatever approach is taken to this 'warning system', the police and their political masters in the Home Office could ensure that the pilot and initial national roll-out of a change in approach would be fully evaluated, in detail and from a variety of perspectives, and would be prepared to take radical steps to make the new approach work effectively, fairly and safely for victims. But this would entail putting a greater amount of resources and a stronger political priority on the assessment of a small piece of domestic violence policy whilst also conducting wider reforms to funding and policy priorities in the arena of policing more widely.

Instead, what has occurred to date with regard to the DVDS and the other UK DADS is a change of policy to produce a 'warning system' of sorts that depends as much on women coming forward to secure information for themselves as it does on the police contacting them proactively, inherently making some potential victims more responsible for their own safety, because there was no specific legislation created to ensure that greater proactivity by the police post-disclosure.

### 3.7 Chapter conclusions

This Chapter has begun the process of undertaking a public policy analysis of Domestic Abuse Disclosure Schemes, in particular by giving an overview of the context of their operation (and very limited evaluation) to date. This initial policy assessment (followed by a much deeper dive into the background of the original Domestic Violence Disclosure

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most at risk of being killed when you try to leave" (*The Guardian*, 10 December 2014) < <https://www.theguardian.com/society-professionals/2014/dec/10/domestic-abuse-risk-trying-leave-housing-community> > accessed 19 June 2020.

<sup>189</sup> House of Commons Home Affairs Select Committee, *Domestic Abuse -Ninth Report of Session 2017-19*, HC 1015, 4.

Scheme in Chapter 4) has established a number of key issues connected to an emerging thematic finding, and crucial factor in the operation of DADS, in terms of victim vulnerability. Disclosures about the dangerousness of a partner based on information about their past may be regularly delivered to women who are ill-supported to put the information to a 'rational' use and to leave their partners. This may particularly be the case because this change of national policy on sharing information about domestic abusers, embodied in the UK DADS, has come at a time of austerity (for policing, particularly<sup>190</sup>); with a commensurate dwindling of police resources to support the women who stay in potentially risky relationships, dwindling probation resources to reach out and support likely (re)offenders<sup>191</sup>, and dwindling provision of support from refuges and other services for those women who do want to leave their partners<sup>192</sup>. Even government welfare policy has been discussed as being seen as likely to contribute to problems with domestic violence: for example, the House of Commons Work and Pensions Committee, in a scathing report, argued that the payment of Universal Credit to a single householder by default would trap women in a situation of coercive control by a potential 'financial abuser' in the form of their partner who received the relevant payments.<sup>193</sup>

Lastly, due to a tendency of the police to broadcast 'quick wins' to the press, the public are regularly informed that the new policy is working by their trusted local newspapers<sup>194</sup>. The new policy of the Scheme *might* be working in the sense of protecting individual, potential victims from serious harm in dangerous relationships. But there is no persuasive

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<sup>190</sup> National Police Chiefs' Council, 'Chief Constable Dave Thompson: Policing is at the tipping point – and we've got to move on from here', < <https://news.npcc.police.uk/releases/chief-constable-dave-thompson-policing-is-at-the-tipping-point-and-weve-got-to-move-on-from-here> > accessed 19 June 2020.

<sup>191</sup> A detailed discussion of the Coalition's *Transforming Rehabilitation* strategy, and the negative impact of the austerity-driven cuts to probation services, twinned with greater involvement of private Community Rehabilitation Companies (CRCs), is to an extent outside of the remit of this thesis. For a series of criticisms of CRCs on the basis that they let down victims of domestic violence by largely failing to adequately monitor and rehabilitate domestic abusers, please see HM Inspectorate of Probation, *Domestic Abuse: The work undertaken by Community Rehabilitation Companies (CRCs)*, 2018.

<sup>192</sup> See Maeve McClenaghan, and Jasmine Andersson, 'Revealed: Thousands of women turned away as refuge funding is cut' (*The Bureau of Investigative Journalism*, 16 October 2017) <<https://www.thebureauinvestigates.com/stories/2017-10-16/a-system-at-breaking-point> > accessed 19 June 2020

<sup>193</sup> See House of Commons Work and Pensions Select Committee, *Universal Credit and domestic abuse, Seventeenth Report of 2017-19*, HMSO, August 1<sup>st</sup> 2018.

<sup>194</sup> See Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* 79(1) (2015) 36.

quantitative or qualitative evidence that it is working in this manner, on any scale or level across England and Wales, because the Home Office, for one, is either yet to gather this evidence and publish it in a way that is convincing. As Prof. Sandra Walklate has said, quoted by BBC News in an article in November 2018, and in a comment that would still ring true today, we have "no real way of knowing whether it's working or not"; meaning that we should study the use of disclosures by women who receive them<sup>195</sup>. As noted already, the Femicide Census project reported at the end of 2016 that more than 586 women had been killed by men in 'intimate partner violence' cases between 2009 and 2015 alone, however, so the nature of the problem the Scheme purports to address is daunting, and vitally important<sup>196</sup>.

As will be explored later in this thesis, there is a smattering of evidence, however, that the operation of a DVDS will be potentially risky for a victim of domestic violence, in the sense that an offender's knowledge that a disclosure has been made may elevate risk, or that a non-disclosure concerning a potential offender may give a problematic and false reassurance and sense of safety to a that potential victim of domestic violence; thus increasing our sense of the DVDS that may in some circumstances, such as these, actually exacerbate victim vulnerability. As Duggan has concluded recently:

"Perhaps the most worrying element of this question ['Why didn't she leave?'] is the implication that by leaving, the victim would be in a better – *safer* – position. Decades of feminist research has indicated otherwise: for many women, leaving a violent partner increases their vulnerability and may result in the perpetrator's violence towards them becoming fatal..."<sup>197</sup>

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<sup>195</sup> See Francesca Williams, 'Clare's Law: The women who risk their lives by refusing information' (*BBC News*, 29 November 2018) <<https://www.bbc.co.uk/news/uk-england-42920020>> accessed 19 June 2020. This BBC News article discusses a freedom-of-information request trawl which journalists used to try and discern to what degree the police were looking to make disclosures to vulnerable, potential victims - only for those victims to prove reluctant to hear the content of proposed disclosures, or to act on them. The BBC found this was an issue in relation to the 'Right to Know' strand of the DVDS, citing an FOI response from Hertfordshire Constabulary as an example.

<sup>196</sup> Femicide Census, *Redefining an Isolated Incident - Annual Report on UK Femicides 2016*, <<https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/12/The-Femicide-Census-2016.pdf>> accessed 19 June 2020, 10.

<sup>197</sup> Marian Duggan, 'Idealising' domestic violence victims', in Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version <[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020.

It is appropriate at this juncture in the thesis, having sketched some dimensions of the problems of victim vulnerability, to address how some of problems mentioned about came to be 'baked in' to the design and operation of the DVDS as public policy in England and Wales. These issues began with 'Clare's Law' before it spread to other jurisdictions as a concept with public relations appeal. The next chapter addresses the problematic policy assumptions and positions taken in the process of creating the DVDS itself - and Chapter 4 will examine the root causes of the DADS 'policy spiral' underway.

## 4. The policy origins of the Domestic Violence Disclosure Scheme

### 4.1 Chapter Introduction

This chapter explores the policy origins of the Domestic Violence Disclosure Scheme (DVDS) in England and Wales. In this way, this Chapter gives an account of why the DVDS was allowed to become the root of the eventual 'policy spiral' demonstrated over the next set of Chapters in this thesis. The last few Chapters have looked at some of the problems or complexities of the Scheme in operation, but this Chapter takes a deeper look at how those problems and complexities originated in policy terms. In particular, this Chapter begins to build up the argument for DADS globally as a criminal justice 'policy spiral'. Clive Walker's policy spiral definition was that:

"A "policy spiral" describes a policy which lacks clear initial purpose or subsequent direction, progression, control and reflection. A policy spiral is therefore susceptible to unresolved contradictions or gaps, dramatic direction changes, and uncertain outcomes. As a result, policy spirals arise from inexact and contested meanings, objectives, and mechanisms..."<sup>198</sup> [Emphases added.]

This Chapter will focus on the elements of Walker's definition that concern a lack of 'clear initial purpose' of the DVDS as something which supposedly aims to reduce risk of domestic violence and yet focuses on managing victims' behaviour. This Chapter will also discuss the 'inexact and contested meanings' and objectives of the DVDS when it comes to its method of boosting the degree to which a victim makes 'informed choice' about their own management of risk of intimate violence. Later Chapters detail the regulation of the Scheme with regard to its growth and policymakers' 'progression, control and reflection' of the UK DADS, and DADS more widely.

### 4.2 An overview of public policy milestones for the DVDS

In terms of its classification as a matter of developing public policy, the Scheme is a nationwide project or programme that has the capacity to impact upon the lives of vulnerable victims or potential victims of domestic violence, and their children or other dependents. Whether that impact is as beneficial, efficacious or properly-scrutinised, at the least, is in question throughout this thesis - but some of the lack of oversight of the Scheme has come from a lack of public recognition by policymakers and policing

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<sup>198</sup> Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', (2018) PL 725, 726.

regulators that the Scheme was founded and predicated on some assumptions, tensions and difficulties. Home Office policymakers have made assumptions that victims will be safer once they are better informed about a perpetrator's past (when there is a concern that the breakdown of an already abusive relationship can worsen violence, as the Home Office are well aware<sup>199</sup>). There are also tensions between the need to protect the most vulnerable potential victims and the ongoing need to rehabilitate offenders; together with practical difficulties such as the partial record of domestic violence that any system of police intelligence can provide. As a result, there are grounds for suggesting that such a policy mix must be revisited.

The DVDS has since inception looked to help victims of domestic violence; and reduce harms to them arising from the criminality of repeat domestic violence perpetrators. The relevant Home Office policy impact assessment took pains, in outlining why the DVDS should be introduced, to make it clear that:

"The three main objectives of the [DVDS] policy are:

"1. Reduce incidents of domestic violence and abuse;

"2. Reduce the health and criminal justice related costs related to domestic violence and abuse;

"3. Strengthen the ability of the police and other multi-agency partnerships to provide appropriate protection and support to victims at risk of domestic violence and abuse."<sup>200</sup>

However, no Home Office review of the Scheme (neither the pilot assessment published in 2013<sup>201</sup> nor the 'one year on' evaluation following the national roll-out of the DVDS in England and Wales<sup>202</sup>) actually try to show whether these objectives are met in any substantive way. This is still very much the case, unfortunately.

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<sup>199</sup> For example, see the view of Refuge, the women's rights NGO, quoted in Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 13 March 2015, 9.

<sup>200</sup> Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment', (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 14 March 2015, 1.

<sup>201</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013)

<sup>202</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (Home Office 2016)

This section of this Chapter presents the development of Scheme-related policy as an ongoing process in the jurisdiction of the UK. As noted above, the DVDS has evolved, after all, from being a 'pure' policy proposal<sup>203</sup>, put first under public consultation<sup>204</sup>, and then to a pilot in four police force-areas in England and Wales<sup>205</sup>; then to a national Scheme for England and Wales from March 2014; and to being rolled out in Scotland after a pilot there in 2015; as well as being consulted upon in Northern Ireland, and ultimately adopted there too<sup>206207</sup>. The Scheme in England and Wales was evaluated at the end of its pilot phase in just four police force areas<sup>208</sup>; then examined 'one year on' from its national roll out<sup>209</sup>, and then re-founded on a tweaked set of policy guidelines in 2016<sup>210</sup>.

This Chapter now examines the process of policy development for the DVDS by looking at key policy actors' work in influencing the founding ethos of the Scheme; and the way that secondary policy actors, particularly the police and media, have had a great influence on the way that the Scheme is utilised and deployed in practice.

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<sup>203</sup> See Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment', (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 14 March 2015

<sup>204</sup> See Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 13 March 2015

<sup>205</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013).

<sup>206</sup> However, in the Republic of Ireland in December 2019, in giving an answer to a written question in the Dáil, the Irish Minister for Justice and Equality, Charlie Flanagan TD, ruled out the adoption of a specific policy or legislative reform for a Domestic Violence Disclosure Scheme in the Republic, explaining that "...in 2015, the Department of Justice and Equality, in consultation with An Garda Síochána, considered the question of a domestic violence disclosure scheme (as in place in the UK [sic], commonly referred to as "Clare's Law")... taking into consideration relevant data protection law and measures in place by An Garda Síochána, it was determined that such legislation was not considered necessary at that time." Dáil Éireann Debate, Tuesday - 17 December 2019 Question 274).

<sup>207</sup> DVDS-model Schemes are also developing in the wider common law world, in New Zealand and in some states of Australia, and, at the time of writing, the province of Saskatchewan in Canada in particular.

<sup>208</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013).

<sup>209</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (Home Office 2016)

<sup>210</sup> See: Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020

#### 4.3 The role of ACPO in developing the DVDS

In 2009, the Association of Chief Police Officers (ACPO)<sup>211</sup> published a report ('the ACPO report'<sup>212</sup>), written for a Home Office and wider policymaking audience, which, amongst other recommendations, argued for a stronger focus on repeat or serial domestic violence perpetrators, as a significant group of offenders within the body of domestic violence perpetrators generally. The report argued that these high-risk offenders warranted better monitoring or 'tracking'. The ACPO report also concluded that repeat victims of domestic violence could be better identified and supported by the police as particularly at-risk individuals.

Furthermore, the ACPO report acknowledged that the police had common law powers to disclose information to members of the public for public protection purposes - as well as statutory powers to share information as part of their work in facilitating 'Multi-Agency Public Protection Arrangements'. As such, the ACPO report ultimately did not fully conclude that the creation of new police statutory powers to share domestic violence-related criminality information was required for a shift in police practice in the area now purportedly addressed by the Scheme. Instead, ACPO observed that in order to "assist the operation of a disclosure regime, a provision equivalent to that in S.140 of the [Criminal Justice and Immigration Act 2008, which amended the Criminal Justice Act 2003 to create the Child Sex Offender Disclosure Scheme] could be enacted in primary legislation"<sup>213</sup>. However, the ACPO report retreats quickly from this position, observing that their own "research suggests that there is sufficient existing legislation/guidance and stated cases to allow MARAC and MAPPA to be used as a vehicle for disclosure to potential victims..."<sup>214</sup>. As a result, the scope of the Scheme, as well as its fundamental rationale, and its legal footing (as a developing practice based only upon the common law), all began to be forged several years before the Scheme became national criminal justice policy for England and Wales.

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<sup>211</sup> ACPO is now the National Police Chiefs' Council (NPCC).

<sup>212</sup> Association of Chief Police Officers, *Tackling perpetrators of violence against women and girls: ACPO review for the Home Secretary*, 2009.

<sup>213</sup> Association of Chief Police Officers, *Tackling perpetrators of violence against women and girls: ACPO review for the Home Secretary*, 2009, 27.

<sup>214</sup> *Ibid.*



#### 4.4 Policy considerations in developing the Scheme: from pilot to national roll-out

The Home Office report on responses to a 2012 public consultation on the prospect of a DVDS, following the ACPO report in 2009, noted that several respondents felt the Scheme, though it could operate on the basis of common law powers of the police to disclose information for public protection purposes, would be used more consistently in a wider legal framework (of data protection, public protection and human rights laws) if it had a specific statutory basis. The Committee for the Centre for Child and Family Law Reform, as well as the Safe Durham Partnership, for example, felt that a statutory 'right to ask' strand of any Scheme would "formalise the current position [of the common law] by creating a regularised framework for the disclosure of this type of information by the police", and would "ensure clear guidelines and rules [were] available to the police", respectively<sup>215</sup>. The follow-up Home Office impact assessment, however, did not then indicate any possibility of the Scheme being put on a statutory footing to better articulate its operation in the midst of this wider legal framework. This is perhaps because there was also some opposition to a statutory footing for the Scheme in the consultation responses received by the Home Office. A statutory footing for the Scheme had been consulted upon, but the high profile campaign group Liberty refuted the need for a statutory-based Scheme, arguing that instead of being used on operating a DVDS, police resources should and could be better deployed in using conventional means of monitoring, detecting, and otherwise bringing to justice domestic violence perpetrators<sup>216</sup>. The two well-known anti-domestic violence campaign groups, Refuge and Women's Aid, were also both insistent that the Scheme need not be created with an explicit statutory basis. However, this was mainly because they were opposed to the creation of a DVDS at all, as explored below<sup>217</sup>.

There was considerable, vocal, opposition to the introduction of the Scheme on a more practical basis, during the span of the Home Office consultation over the introduction of the Scheme, which took place at a formative stage for the DVDS as a policy as a

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<sup>215</sup> Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 13 March 2015, 8-9.

<sup>216</sup> See Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 13 March 2015

<sup>217</sup> *Ibid.*

whole<sup>218</sup>. Total responses to the Home Office consultation on the Scheme included a strong majority, collectively speaking, in favour of either a 'Right to Ask' policy basis for a Domestic Violence Disclosure Scheme, or a 'Right to Know' policy basis, or both aspects of the eventual Scheme<sup>219</sup>. But Refuge and Women's Aid both felt that there did not need to be more emphasis on facilitating disclosures to women at risk, and that police resources would be better directed to improving general police responses to domestic violence<sup>220</sup>.

The eventual founding of the DVDS on a non-statutory basis, as a piece of national policy, and operated on the basis of pre-existing police common law powers, is, as a result, highly problematic as a 'middle ground' outcome of sorts, when we consider the inconsistent application of the DVDS as a policy regulating disclosures of perpetrators' histories across police forces in England and Wales. A clear statutory basis for the processes involved in the Scheme, and the relevant threshold tests for and parameters of disclosures, might have closed down some of the possible inconsistencies in operating the DVDS, and from the outset. As Jean L. Cohen has observed, "Law has its own efficacy, and the mode of legal regulation matters very much indeed... [since] subject[s] before the law and even the harm being redressed are in part legally constructed."<sup>221</sup> Definitions of perpetrators and victims, intimate partners and former partners, as well as *what* can be disclosed and *when*, within the ambit of the Scheme in England and Wales, and for the purpose of the operation of the 'Right to Know' and the 'Right to Ask', were left to Home Office policy alone. Recent FOI-based research has begun to show, however, that considerable discrepancies exist between police forces in England Wales in terms of how they operationalise risk assessments in relation to potential disclosures, and their

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<sup>218</sup> Paul Strickland (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme' (House of Commons Library 2013).

<sup>219</sup> See Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 13 March 2015

<sup>220</sup> See Paul Strickland (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme' (House of Commons Library 2013).

<sup>221</sup> Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton University Press 2002) 126.

contents<sup>222</sup>. And in terms of the constitutional balance of power in rule-making, it should be noted that Parliament, with the adoption of a DVDS policy on the basis of common law rules, was initially largely shut out of the democratic debate on the issue of the DVDS.

In the public consultation phase of the development of the Scheme as a matter of public policy, Refuge in particular had concerns about the 'victim-blaming' nature of the Scheme. Their consultation response noted 'concerns about the underlying premise of the "Right to Ask" scheme', and were sceptical that:

"...knowing about a partner's history of domestic violence will somehow empower a woman to leave him and seek safety. We are concerned that this expectation simplifies the complex reality of domestic violence. Leaving a violent partner is an incredibly difficult step to take. It is also extremely dangerous: women are at greatest risk of homicide at the point of separation or after leaving a violent partner."<sup>223</sup>

There has been some much more limited journalistic coverage of the Scheme from a civil liberties perspective, criticising the Scheme as an unacceptable policy-based intrusion into the private lives of individuals and their relationships<sup>224</sup>. Early academic criticism of the Scheme has however centred on the following four aspects of the Scheme. Crucially, when the Home Office most recently revised central policy on the operation of the Scheme, and on the issue of new guidance for police forces in late 2016, there was little attention, if any, paid to these criticisms from academic circles.

As for these early academic criticisms: Firstly, there is a degree to which the Scheme can be said to (inappropriately) 'responsibilise' potential and actual victims of domestic violence, potentially feeding into a culture of 'victim blaming'<sup>225</sup>. The latter concern could

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<sup>222</sup> K. Hadjimatheou & J. Grace, 'No black and white answer about how far we can go': police decision making under the domestic violence disclosure scheme, *Policing and Society* (2020) DOI: 10.1080/10439463.2020.1795169 at p.6

<sup>223</sup> Quoted in Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 13 March 2015, 9.

<sup>224</sup> An example is: Luke Gittos, 'Clare's Law: A violation of our private lives' (*Spiked*, 28 November 2013) <[http://www.spiked-online.com/newsite/article/clares\\_law\\_a\\_violation\\_of\\_our\\_private\\_lives/14352](http://www.spiked-online.com/newsite/article/clares_law_a_violation_of_our_private_lives/14352)> accessed 14 March 2015.

<sup>225</sup> Marian Duggan, 'Using Victims' Voices to Prevent Violence Against Women: A Critique', *British Journal of Community Justice*, (2012) 10(2) 25.

be said to arise since under the 'right to ask' strand of the Scheme, potential victims are encouraged to approach the police, and if they do not do so, despite having suspicions or fears about their partner, this could (unfairly) be offered up as a criticism of their own complicity in victimisation<sup>226</sup>. This is nothing new, sadly, in policy terms. In 1997 Esther Madriz concluded that:

"Ideologies of crime and the fear of crime have helped to foster a conservative moral agenda in which women are told to protect themselves and their children... by adhering to specific standards of behaviour that are considered appropriate."<sup>227</sup>

Secondly, there has been criticism that the Scheme is not a policing service which some women, particularly, from certain BME and/or immigrant communities would find culturally easy to engage with<sup>228</sup>. (The Home Office impact assessment in 2013 had already noted that there were potential equality-related issues concerning the operation of the Scheme, such as in relation to issues of first language; potential risks of so-called honour-based violence; a need for police outreach work in particular communities in relation to the Scheme; the importance that the Scheme was perceived as gender neutral; and the involvement of carers in disclosures, where relevant.<sup>229</sup>) Thirdly, there has been criticism of the (lack of an) extent to which the Scheme provides proper protection for the procedural rights of 'subjects' - the (alleged or suspected) repeat domestic violence perpetrators themselves<sup>230</sup>. Fourthly, and finally, the Scheme has not been shown to be objectively efficacious in preventing domestic violence, due to the poor availability of data about the precise operation of the Scheme and any clear trends in its effect on the lives of potential victims of domestic violence<sup>231</sup>.

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<sup>226</sup> Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* 79(1) (2015) 36.

<sup>227</sup> Esther Madriz, *Nothing Bad Happens to Good Girls: Fear of Crime in Women's Lives*, (University of California Press 1997) 92.

<sup>228</sup> Sofia Graca, 'Domestic violence policy and legislation in the UK: A discussion of immigrant women's vulnerabilities', *EJoCLI* 22(1) (2017) online < <http://webjcli.org/article/view/531> > accessed 16 July 2020.

<sup>229</sup> Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 14 March 2015, 20.

<sup>230</sup> Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* 79(1) (2015) 36.

<sup>231</sup> Discussed in Kate Fitz-Gibbon and Sandra Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales', *Criminology & Criminal Justice* (2017) 17(3) 284.

As criticisms of the operation of the Scheme, these four concerns were not amongst those other, more pragmatic concerns listed among the findings of the Home Office evaluation report that assessed the pilot phase of the Scheme undertaken by police forces in Wiltshire, Warwickshire, Gwent and Greater Manchester<sup>232</sup>. This Home Office study did identify a number of practical and policy issues with the pilot Scheme, however, such as a perceived vague nature of the 'pressing need' test which is a core legal threshold in decision-making in relation to potential disclosures under the Scheme.

The Home Office study also identified that the Scheme as piloted seemed to overlap, in the minds of public protection professionals, with MAPPA arrangements, and placed an emphasis on police and social work coordination that had been less well anticipated or planned for than would have been ideal. But ultimately, the study went on to recommend that the Scheme could be adopted across England and Wales as a whole, without any additional legislative measures or policy amendments to support it, though noting a number of ways in which the Scheme needed to improve in operation. At least, this was how the Home Secretary at the time, Theresa May, chose to interpret the findings and recommendations of this report - declaring to Parliament that the Scheme had been adopted across England and Wales on the 8<sup>th</sup> March 2014<sup>233</sup> - International Women's Day. This policy announcement was made without discussing any potential for a change of legal footing for the Scheme, and without simultaneously updating and clarifying the Scheme guidance (an arguable 'regulatory failing')<sup>234</sup>. As a result, the Scheme was initially rolled out across England and Wales on the basis of the same, untouched Home Office guidance document which underpinned the pilot phases of the Scheme<sup>235</sup>.

Given that the Home Office evaluation of the pilot phase of the Scheme highlighted that the legal tests for disclosures as articulated in the Scheme guidance were hard to interpret

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<sup>232</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013).

<sup>233</sup> Theresa May (Home Secretary), 'Written statement to Parliament: Domestic violence protection orders and domestic violence disclosure scheme' (2014) <<https://www.gov.uk/government/speeches/domestic-violence-protection-orders-and-domestic-violence-disclosure-scheme>> accessed 29 May 2014

<sup>234</sup> See Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* 79(1) (2015) 36.

<sup>235</sup> Home Office, *Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013)*, (Home Office 2013)

consistently<sup>236</sup>, it is interesting to note some information which was made available about the operation of the Scheme in early 2015. Freedom of information requests by the Press Association first showed that the disclosure rates under the Scheme, expressed as a proportion of the total number of combined 'Right to Ask' and 'Right to Know' applications received, varied considerably from force area to force area - between 11% in Merseyside and 60% in Greater Manchester<sup>237</sup>. This would appear to support the point expressed in the pilot evaluation that the Home Office should have addressed legal tests for disclosures that were difficult to apply consistently. These disparities in disclosure rates then widened further, as the ONS data from 2017 and 2018, discussed in Chapter 1, have shown. By 2017, the Scheme was into its third year of national operation, and its third set of non-statutory guidance materials in December 2016, though the latter could do nothing but place the common law 'pressing need' test for disclosure front-and-centre once more.

Furthermore, the Home Office evaluation of the DVDS 'one year on' from national roll-out in England and Wales highlighted (again) that the legal tests for disclosures as articulated in the current Scheme guidance are difficult to interpret consistently, meaning disclosure rates continue to vary considerably across force areas in England and Wales<sup>238</sup>. As the introductory chapter to this thesis explored, above, this tendency for disclosure rates to vary across force areas has only been exacerbated up until the time of writing.

Of course, one cannot forget that while the DVDS is an intervention as a policy in England and Wales that purports to safeguard victims, there is added complexity about Clare's Law'. As well as the need to safeguard victims, another consideration must be the right to respect for private life, and the rights to rehabilitation, owed to previously violent perpetrators of domestic abuse and the like. In responding to a summary of consultation submissions on the original development of the DVDS, the Home Office highlighted important questions over the lawfulness of wider-scope disclosures of criminal histories data on Scheme subjects. Consultation respondents had informed the Home Office that

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<sup>236</sup> Home Office, *Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013)*, (Home Office 2013).

<sup>237</sup> BBC News, 'Clare's Law: 1,300 domestic abuse disclosures made' (BBC News, 26 January 2015) <<http://www.bbc.co.uk/news/uk-30977759>> accessed 14 March 2015.

<sup>238</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (Home Office 2016).

there were concerns over the legality of the scope of disclosures under the Scheme, observing that:

"...greater clarity was required on the safety planning, privacy, proportionality and data protection issues concerning disclosure before firm decisions on the scope of disclosure could be made. Respondents also highlighted the need for appropriate safeguards to be built into any disclosure process to prevent malicious allegations and stigmatisation from occurring."<sup>239</sup>

While in terms of what could, or should, be deemed to be reliable material for disclosure:

"on extending disclosure beyond convictions to include intelligence, respondents recognised that many alleged perpetrators would not have convictions, thus strengthening the argument to extend disclosure to include intelligence. However, respondents wished to ensure that such intelligence was robust and reliable to guard against malicious and unfounded allegations that would otherwise stigmatise an innocent person..."<sup>240</sup>

So from its very inception as a Home Office policy, there were concerns over the complexities of operating the DVDS not just in an effective manner but in a balanced and careful one too. Unfortunately, the police in England and Wales have allowed the media narrative over the Scheme to be driven by an assumption of the effectiveness of the DVDS as a policy and policing approach to protecting victims of domestic violence, when it may do far less of the sort - worryingly unevaluated as it is.

#### 4.5 The press and the Scheme

Local press media coverage of the Scheme shows that police forces across England and Wales are promoting the Scheme widely and proactively in their own areas, with a variety of degrees to which the success of the Scheme is represented, or, arguably, misrepresented<sup>241</sup>. This is of course at least partly attributable to journalistic licence, we might assume, but it is concerning for the sake of transparency that some local newspaper articles (or the police press teams that feed them press releases) might conflate the number of disclosures made under the Scheme with the number of individuals who have

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<sup>239</sup> Home Office, 'Domestic Violence Disclosure Scheme: A Consultation - Summary of Responses' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157807/consultation-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf)> accessed 19 June 2020, 12.

<sup>240</sup> *Ibid.*

<sup>241</sup> As discussed in Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* 79(1) (2015) 36.

been definitively protected or 'saved' from the risk of domestic violence. For example, in one local newspaper article from September 2014, notably titled 'Domestic abuse scheme working', Ian Johnston, Police and Crime Commissioner for Gwent, was reported as commenting that:

“Whether it’s male or female victims of domestic abuse, when used properly, the Domestic Violence Disclosure Scheme can provide people with the information they need to escape an abusive situation before it’s too late... [The Scheme] can play a vital role in ensuring that more people can make an informed decision about their relationship.”<sup>242</sup>

But on the sole basis of the Home Office pilot evaluation, the evidence for the actual intended effect of the Scheme - that (principally) women are made sufficiently aware of the risks of a partner or potential partner that they effectively limit or end their contact with that person - was actually rather sparse<sup>243</sup>. It would be hard to state, objectively, that the Scheme as operated by the police in Gwent was 'working' in the *true* sense of protecting victims by helping them know to leave or avoid their partners, without resulting in any harm to their wellbeing, as opposed to 'working' in the *literal* sense of being operated according to Home Office policy. Certainly, like nearly all forces in England and Wales when I asked them using an FOI request, Gwent were unable to produce any evidence that they had ever evaluated the effectiveness of the DVDS as it was operated in their own force area (as discussed further in Chapter 6, below).

Some further (and some rather leading) headlines from the local press, and which convey the presumption that greater use of the Scheme will increase public safety, are, for example:

- 'Ending the fear: Clare's Law saves almost 280 people from domestic abuse in just TWO years'<sup>244</sup>
- 'GMP: Inaction DID leave Katie Cullen to be murdered by ex but we were muzzled before Clare's Law'<sup>245</sup>

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<sup>242</sup> See K. Baker, 'Domestic abuse scheme working' (*South Wales Argus*, 24 September 2014) <[http://www.southwalesargus.co.uk/news/11492624.CRIME FILE Domestic abuse scheme working/](http://www.southwalesargus.co.uk/news/11492624.CRIME%20FILE%20Domestic%20abuse%20scheme%20working/)> accessed 14 March 2015.

<sup>243</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013).

<sup>244</sup> David Cowlshaw, 'Ending the fear: Clare's Law saves almost 280 people from domestic abuse in just TWO years' (*Mancunian Matters*, 4 September 2014) <<http://www.mancunianmatters.co.uk/content/040970505-ending-fear-clares-law-saves-almost-280-people-domestic-abuse-just-two-years>> accessed 19 June 2020.



- 'Notts: 'Groundbreaking' new domestic violence law could save lives, say Police'<sup>246</sup>
- 'Revealed: How Clare's Law is helping people in Leicestershire escape violent partners'<sup>247</sup>
- 'Clare's Law has saved more than 300 Greater Manchester people in three years since introduction'<sup>248</sup>
- 'Domestic killings fall as women use Clare's Law to check partners'<sup>249</sup>

Many local news stories are less leading, and evidence less journalistic licence, than the examples above, of course. But the more reckless sorts of local news headlines will reinforce a perception by the public that the introduction of 'Clare's Law' was an effective policy move by the Home Office. This may in time be proven to be the case - and many local news articles will take at least some care to be accurate about the fundamental difference between a disclosure under the Scheme versus a life being 'saved' by the Scheme. It could be argued that the most objective media reports about the DVDS are likely to be those that in their headlines acknowledge that the operation of the Scheme is 'changing lives'<sup>250</sup>. And there has been some scepticism from media profiles of the Scheme as to its actual efficacy, and concerns from those quarters about the 'victim blaming' qualities of the Scheme<sup>251</sup>. However, media pieces that are critical of the DVDS

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<sup>245</sup> Tommy Wilson, 'GMP: Inaction DID leave Katie Cullen to be murdered by ex but we were muzzled before Clare's Law' (*Mancunian Matters*, 14 November 2014) <<http://www.mancunianmatters.co.uk/content/141171652-gmp-inaction-did-leave-katie-cullen-be-murdered-ex-we-were-muzzled-clares-law>> accessed 19 June 2020.

<sup>246</sup> The Newsroom, 'Notts: 'Groundbreaking' new domestic violence law could save lives, say Police' (*Chad*, 29 December 2014) <<http://www.chad.co.uk/news/notts-groundbreaking-new-domestic-violence-law-could-save-lives-say-police-1-7024494>> accessed 19 June 2020.

<sup>247</sup> Kieran Fagan, 'Revealed: How Clare's Law is helping people in Leicestershire escape violent partners' (*Leicester Mercury*, 26 December 2018) <<https://www.leicestermercury.co.uk/news/leicester-news/revealed-how-clares-law-helping-2357796>> accessed 19 June 2020.

<sup>248</sup> John Scheerhout, 'Clare's Law has saved more than 300 Greater Manchester people in three years since introduction' (*Manchester Evening News*, 6 September 2015) <<http://www.manchestereveningnews.co.uk/news/greater-manchester-news/clares-law-saved-more-300-9999679>> accessed 19 June 2020.

<sup>249</sup> Anthony France, 'Domestic killings fall as women use Clare's Law to check partners' (*London Evening Standard*, 21 February 2020) <<https://www.standard.co.uk/news/crime/domestic-killings-fall-as-women-use-clare-s-law-to-check-partners-a4367966.html>> accessed 16 June 2020.

<sup>250</sup> Pirate FM News Team, 'Claire's Law is 'Changing Lives' in Cornwall' (Pirate FM, 14 March 2015) <<https://www.piratefm.co.uk/news/latest-news/1555993/claies-law-is-changing-lives-in-cornwall/>> accessed 19 June 2020.

<sup>251</sup> See for example Lucy Reed, 'Why Clare's Law won't prevent domestic violence' (*The Guardian*, 22 July 2011) <<https://www.theguardian.com/society/2011/jul/22/why-clares-law-wont-prevent-domestic-violence>> accessed 19 June 2020.

are few and far between - and any critical public media discourse of the Scheme is weak overall. This is salient, in terms of explaining one reason why the DVDS in particular has gone without considerable evaluation as to its effectiveness for over four years, and without statutory codification since its inception. As Adam White has explained, "where critical public discourse is weak and piecemeal, the state is more likely to respond with weak regulation..."<sup>252</sup>.

Of course, police forces do not present, in public or to the media, the kind of qualitative or quantitative data that would allow us to see, in an actuarial sense, how an individual life is saved through a disclosure under the Scheme, or explain whether an individual woman has left their partner without moving on to a relationship with another abuser, or without suffering retaliation from the partner she left. It is of course very much possible that police forces have nowhere near this level of detailed understanding of the lives of (potential) victims of domestic violence in their area, in a longitudinal sense. So it is troubling when one can readily encounter a study like that of the Femicide Census project, which identified 200 women out of at least 586 who had been killed by *former* partners, between 2009 and 2015<sup>253</sup>. So a policy focus on the DVDS as a conveying mechanism for information that empowers a person to end a relationship will by no means keep potential victims of domestic violence safer by virtue of having helped them end their relationship per se. We are left with the conclusion, perhaps, that a better focus of police resources used on the DVDS could be on joining with other agencies in encouraging offenders to desist in perpetrating domestic violence, through making enabling or more therapeutic or restorative interventions - but this is hardly a policy shift that would create the 'right' kind of headlines according to the 'politics of public protection'<sup>254</sup>. Indeed, Phil Scruton is critical of the manner in which the police operate strategically with an eye on headlines:

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<sup>252</sup> Adam White, 'Private security and the politics of accountability', in Stuart Lister and Michael Rowe (eds), *Accountability of Policing* (Routledge 2016) 185.

<sup>253</sup> Femicide Census, *Redefining an Isolated Incident - Annual Report on UK Femicides 2016*, <<https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/12/The-Femicide-Census-2016.pdf>> accessed 19 June 2020, 21.

<sup>254</sup> See Mike Nash, 'The politics of public protection', in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willan 2010).

"During morning briefings, at police headquarters the length and breadth of Britain, it is often difficult to tell police press officers and local journalists apart. They need each other. With the public's seemingly insatiable appetite for crime stories, the police are able to construct stories, [and] control the flow of information..."<sup>255</sup>.

Local media reports working with the police press release 'machine' could well be a cheap way of securing greater public confidence in the role of the police in protecting the public. The national figures for lives lost to acts of domestic violence are horrendous, and while any attempt to reduce this number each year is welcome and important, there could be the concern that unquestioning media support for the Scheme could lend weight to an idea that the police are pioneering and improving in their work to improve on this most vital measure of success in preventing (fatal) harm arising from domestic violence. Police resources are after all, finite, and the media promotion of the operation of the scheme may be cost effective if what is being measured is public uptake of the Scheme - but this still incurs an associated cost for policing resources that could be better devoted to other modes of policing domestic violence, which in turn could be more effective still. This leads us to a discussion of another of the core themes of the policy production process in relation to the DVDS: the costs of the Scheme itself.

#### 4.6 The issue of costs of the DVDS

One further issue which recurs in the policy analyses presented in this thesis is the issue of costs. An issue is that the cost of operating the most prominent DADS, the Domestic Violence Disclosure Scheme, and its resulting burden on police resources, is already outstripping the initial Home Office estimates made when the policy was designed - with more than twice as many applications (under both strands of the Scheme combined) being made per year, and with nearly three times as many disclosures being made per year compared to the numbers of each that were initially predicted<sup>256</sup>. Cost, and a reduction in the cost of domestic violence perpetration to the operation of the criminal justice system and beyond, was a key feature of the policy rationale of adopting a mixed-model for the

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<sup>255</sup> Phil Scraton, *Hillsborough: The Truth* (Mainstream Publishing 2016) 169.

<sup>256</sup> Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf)> accessed 14 March 2015, 15.

DVDS that included both a Right to Ask and a Right to Know strand of the policy, respectively.

The relevant Home Office policy impact assessment explained that for an approach to the DVDS that included both a Right to Ask and a Right to Know, total costs were "estimated at £3.18m, the largest component of which is attendance at the Decision Making Forum"<sup>257</sup>, while a "...reduction in domestic violence and abuse [would] have to reduce total cost of domestic violence and abuse by 0.02% to break even, equivalent to preventing domestic violence and abuse in around a third of cases going through the [DVDS]"<sup>258</sup>. Home Office policymakers, from a purely costs perspective, would be glad that data presented in this thesis in Chapter 6, produced using a series of FOI requests, show that in a best-case scenario the use of the DVDS in England and Wales might reduce or preclude domestic violence in 55% of cases *where disclosures are made*. However, this may be an overestimate, for the reasons explored in Chapter 6, below, but I am sceptical of this notion, however, due to what I think is a sound suspicion: that considerably more than the 45% of recipients of early disclosures who have been *recorded* as victimised by disclosure subjects were in *actual fact* victimised by those subjects. However, this discussion by the Home Office of pragmatic and even somewhat pessimistic calculation about a benchmark of the efficacy of the Scheme to an extent ignored the issue of 'displacement' of risk - namely, that as a 'risky' relationship comes to an end, the perpetrator that made it risky is free to take their risk elsewhere, unless they, or an intervention of some kind makes them, change their behaviour and reduce the risk that that pose, or eliminate it entirely. A third of relationships subject to a disclosure under the Scheme leading to a cessation of a relationship might unfortunately mean up to a third of subjects of disclosures under the Scheme then free to take their violence and abuse of victims on to a new relationship.

The potential displacement of risk from the most serious domestic violence perpetrators from one relationship with a vulnerable victim to another joins a list of obvious and pressing concerns with DADS: assumptions about victim autonomy; the risk posed to

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<sup>257</sup> Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf)> accessed 14 March 2015, 15.

<sup>258</sup> *Ibid*, 5

victims as a relationship ends or had ended; the partial picture of domestic violence perpetration in police intelligence systems and criminal records; the tension with the need to rehabilitate offenders; and the greatly varied rate and manner with which the different police forces of the UK approach the vague test of a 'pressing need' for disclosure. With such significant concerns as these arising from a consideration of DADS as public protection policies, it is useful to consider that one explanation of the spread of DADS policies from pilot force areas, to being a national approach in England and Wales, to then Scotland and Northern Ireland and large parts of the common law world is the policy-process concept of 'isomorphism'.

#### 4.7 An institutional account for the spread of DADS policies

One thing this thesis explores in a later chapters is the extent to which there is a variety versus a similarity of approaches between forces in different jurisdictions in the UK (and in implementing the DVDS in England and Wales), as well as the manner in which different executive bodies, as policy actors and regulators, do, or do not, implement DADS at all. These patterns or groupings of institutional responses to regulation can be seen as a result of different strengths of varying forms of institutional policy 'isomorphism'. As Halliday has explained:

“...organisations within the same field become more alike in their structures and operations... Coercive isomorphism occurs when organisations are put under pressure from other organisations on which they are dependent... However, mimetic isomorphism occurs when organisations copy other organisations, often because of uncertain conditions. Further, normative isomorphism occurs when organisations adopt and apply norms that are shared in wider cultural forums, particularly professional associations.”<sup>259</sup>

These forms of isomorphism are identified in the spread of the DADS across different common law jurisdictions inside and outside of the UK, as discussed later in this thesis, below. It is worth noting at this juncture, however, that within the three UK jurisdictions of England and Wales, Scotland and Northern Ireland, DADS spread as a policy in that order, without initial and genuine evaluation of the efficacy of the DVDS in England and

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<sup>259</sup> Simon Halliday, 'The governance of compliance with public law', P.L. (2013) 312,319-320; referring to P. DiMaggio and W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', (1983) 48 American Sociological Review 147, 150.

Wales, prior to the adoption of the DSDAS in Scotland or the DVADS in Northern Ireland. This state of not knowing, institutionally, about the true efficacy or otherwise of the DVDS became fertile ground for the prerequisite 'uncertain conditions' needed for mimetic isomorphism to occur, in terms of the policy spread of DADS, in the UK and elsewhere.

Police organisations in those jurisdictions with a DVDS-type disclosure scheme have never once spontaneously developed a DADS policy entirely of their own volition; as Chapter 5 of this thesis explores, such policy development of DADS, in each of the jurisdictions where they are to be found, is very much in the remit of government bodies that are 'coercively isomorphic' developers of public protection policies - such as the Home Office, with its overall responsibility for public protection policy, and complement of ministers who can steer relevant legislation through Parliament. There is an observable trend, again explored in Chapter 6 of this thesis, for government agencies in common law jurisdictions to borrow the idea of DADS from one another, regardless of the relative lack of evaluation of the effectiveness of DADS concerned, quite likely due to what Mike Nash has termed 'the politics of public protection'<sup>260</sup>. Indeed, some politicians, such as those in opposition in Queensland in Australia, most recently, have campaigned on the political capital of a promise to introduce the policy of a DADS despite, or perhaps because of, strong policy opposition from the sitting government. Similarly, given the reluctance of policymakers to want to take on any share of blame for policies in the 'politics of public protection' that are not working, it is in many ways entirely unsurprising that there has to date been a failure to properly evaluate any DADS globally for their effectiveness in preventing harm, as opposed to their efficiency in operation in process, time and resources terms. This failure to evaluate the DADS is a regulatory failure on the part of a number of regulators, but is also an exercise in potential blame-avoidance or minimisation in a scenario where reputations must be protected. It is a brave policymaker who admits in public to an avoidable mistake. As Christopher Hood has observed, "... governments and public managers put in a great deal of effort and investment to stress the positive aspects of their performance and achievement in the face of critics accentuating

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<sup>260</sup> See Mike Nash, 'The politics of public protection', in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willan 2010).

the negatives"<sup>261</sup>. Put simply, the *creation* of Clare's Law is worth a degree of political capital to the policymakers who oversaw its creation; while the *operation* of a Clare's Law that is known to be only *partially* effective is something that will only attract blame.

For policymakers, while an evaluation of the effectiveness of the DADS in the UK may actually show a distinct success in reducing the victimisation of *some* recipients of disclosures, leaving the dominant media narrative of Clare's Law as an unmitigated success for *any* recipient of a disclosure is a far better bet (or "policy strategy"). This is the only sound approach, in some respects, in the media-driven game of blame avoidance; except that this 'blame game' has, in terms of the proliferation of DADS in a 'policy spiral', covered up the extent to which the Home Office and other prominent policymakers and criminal justice regulators, have signally failed to get to the bottom of the questionable efficacy of the operation of such Schemes.

#### 4.8 Evaluating the effectiveness of the DADS as a policy consideration

However, any pragmatic and prima-facie calculation about a benchmark of the efficacy of the Scheme from a cost-effectiveness perspective should not, of course, ignore the issue of 'displacement' of risk - with a serial domestic violence perpetrator merely moving on, following a disclosure, to a new relationship as an abuser, if their offending goes unchecked, potentially. A third of relationships subject to a disclosure under the Scheme leading to a cessation of a relationship might unfortunately mean some fraction of a third of subjects of disclosures under the Scheme then free to take their violence and abuse of victims on to a new relationship - or of course, up to a third of potential victims being repeat-victimised by a later, different perpetrator in another, newer relationship too.

The initial Home Office policy impact assessment on the implementation of the DVDS had noted the savings to be made only on a superficial view of the potential effects of the Scheme, observing that:

"Domestic violence and abuse places a significant burden on police time through [increased] repeat victimisation, and wider costs to the criminal justice system of domestic violence and abuse. Every homicide related to domestic violence and

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<sup>261</sup> Christopher Hood, 'What happens when transparency meets blame avoidance?', (2007) *Public Management Review*, 9(2) 191, 199.

abuse costs the CJS approximately £180,000 and bears an overall cost to society of approximately £1.8m..."<sup>262</sup>

What we do not yet know, of course, is how many homicides the DVDS could be said to have directly prevented, something noted by researchers interested in the DVDS and its national operation to date<sup>263</sup>. As has been mentioned already in this thesis, of course, and as is further explained in later chapters, FOI data I have obtained show that it is likely that over 45% of the early recipients of disclosures under a nationally-operated DVDS in England and Wales went on to be victimised by the very same person that 'Clare's Law' was used to warn them about.

#### 4.9 The relevance of the 'right to rehabilitation'

Disclosures of criminal histories under DADS are an ongoing potential for interference by the police with the privacy and private life of (past) domestic violence offenders. This treats these (mainly) men as unreformed and dangerous - and some of them will be - however, some will not pose the risk that others do. These lower or low risk offenders, albeit with a high-risk past, might consider themselves as 'rehabilitated' - certainly where their personal relationships are concerned. However, there are substantial problems defining 'rehabilitation' in policy terms and as a term of legal construction. The UK justice system certainly struggles with a lack of a concrete legal definition of what 'rehabilitation' means, or who can be labelled a 'rehabilitated person', as the discussions later in this thesis of the problems in consistently regulating the (possible) disclosure of spent convictions under the UK DASDS can be seen to show. However, 'rehabilitation' is not just about the concept of a person's series of convictions or cautions etc. all being spent or not: it is the issue of a fluid concept of good character and desistance from offending, that is problematic to translate into an actionable or defensible legal right. However, as Sonja Meijer has highlighted:

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<sup>262</sup> Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf)> accessed 14 March 2015, 10.

<sup>263</sup> See for example Kate Fitz-Gibbon and Sandra Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales' (2017) *Criminology & Criminal Justice*, 17(3) 284.



"Recognising rehabilitation as a positive obligation—grounded in human dignity—is important, because it makes clear that rehabilitation is at all times to be taken into account and cannot be set aside by other concerns such as the effectiveness of rehabilitative efforts and prison authorities['] concerns such as cuts or staff shortage. These other concerns can easily result in a policy that in some circumstances—for instance, depending on the economic situation or ruling political party at some point in time—encourages rehabilitation, while discouraging it at other times."<sup>264</sup>

Certainly the European Court of Human Rights has provided the basis for Meijer's analysis in case law, observing that “the emphasis on rehabilitation and reintegration has become a ‘mandatory factor’ that member states need to take into account when designing their penal policies”<sup>265</sup>, becoming a positive obligation on the part of the contracting state<sup>266</sup>.

There is also an element of the literature on the essence of what 'rehabilitation' might mean as a concept which is problematic when it comes to Domestic Abuse Disclosure Schemes. Disclosures under such Schemes must be proportionate, in the European human rights law sense, and so there might be a practical approach to time-limiting the disclosure of certain pieces of criminality information about a person, but as we will explore in detail later in this thesis, even spent convictions, under UK law, are not absolutely barred from disclosure through the three UK DADS in current operation, not to mention information such as arrest records. Yet, as Heberton and Thomas have explained, rehabilitation is the process designed "...to help the offender return to and remain as a full member of society, with the status and obligations which that membership confers", but if "offenders are not rehabilitated in this sense when formal punishment ends, then de facto punishment persists"<sup>267</sup>. There is then the issue that some ('former') domestic violence perpetrators will be subject to (from their point of view) an ongoing, non-linear and seemingly arbitrary risk of an unusual punishment: the

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<sup>264</sup> Sonja Meijer 'Rehabilitation as a Positive Obligation', *European Journal of Crime, Criminal law and Criminal Justice* 25 (2017) 145, 161.

<sup>265</sup> *Khoroshenko v. Russia*, 30 June 2015, 121.

<sup>266</sup> *Murray v. The Netherlands*, 26 April 2016, 104.

<sup>267</sup> Bill Heberton and Terry Thomas, *Criminal Records: State, citizen and the politics of protection* (Avebury 1993) 113.

encroachment of the state into their personal relationship with a new partner, and, therefore, potentially no "...personal 'year zero' to be the springboard for better times"<sup>268</sup>.

So the DVDS can readily be seen to be a particular policy response to the social and criminological problem of serial domestic violence perpetrators<sup>269</sup>, as opposed to a contribution to the field of rehabilitation work. But how did the Scheme come to be such a steadfast and indeed, rapidly adopted policy measure, quite so quickly? The view expressed in this thesis is that the reason is threefold: firstly, the Scheme was relatively cheap and straight-forward to implement as an initial idea which suited a Home Office conscious of cost savings to be made. As highlighted elsewhere in this thesis, the actuarial approach taken in the relevant Home Office policy impact assessment meant that the view was adopted that for the DVDS to 'break even' each year, domestic violence would need to cease in only one third of the relationships that were the subject of a disclosure under the Scheme, based on the estimates made in 2013 as to how many applications would be made to the Scheme, and of the costs of domestic violence to the criminal justice system as a whole. Secondly, the DVDS policy found favour in purportedly targeting a vulnerable group of people in society (victims of domestic violence) for support, and was purportedly offering them support and empowerment; and thirdly, it was a policy to be adopted in the world of policing in England and Wales: a top-down, hierarchical structure well-suited to policy being implemented (at least on paper) with efficiency and uniformity. As we have seen from responses to the 2012 DVDS consultation by the likes of Refuge and other charities, the Home Office and the police in England and Wales are only some of the policy actors that have, in a process which is still ongoing, helped to shape the manufacture of DVDS policy. This is nothing unusual. As Page has put it:

"Despite the blossoming of theoretical approaches to public policy in the past 40 years, the dominant view of policy-making remains top-down: a policy is "made", in the sense of general principles agreed, approved and legitimised by leading politicians, bureaucrats, interest group members or judges; and then it is carried out (or not carried out) by those lower down. Yet policy is better seen as a production process involving people at all levels adding different bits to the overall product, although it is hardly a linear process that starts with agreement on

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<sup>268</sup> Bill Heberton and Terry Thomas, *Criminal Records: State, citizen and the politics of protection* (Avebury 1993) 1.

<sup>269</sup> See Paul Strickland (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme' (House of Commons Library 2013); and HMIC, *Increasingly everyone's business: A progress report on the police response to domestic abuse* (HMIC 2015).

principle which is followed by elaboration of detail. Issues can be raised at a very late stage in the process, ostensibly about matters of fine detail, that fundamentally shape the nature of the resulting policy. The settling of strategic objectives and agreement on the tactics to be used to pursue them is only part of the production process."<sup>270</sup>

One would hope that, in time, probation organisations, Her Majesty's Prison and Probation Service, and ultimately the Ministry of Justice, would become as responsible for the operation of the DVDS in England and Wales, for example, as clusters of policing bodies and the Home Office. In the longer term this will be essential - as if the goal of DADS is ultimately public protection and/or homicide prevention, then the impact of any DADS on offender rehabilitation becomes an essential policy consideration, perhaps largely overlooked, to date.

#### 4.10 Chapter conclusions

As noted above, Clive Walker has observed that: "...policy spirals arise from inexact and contested meanings, objectives, and mechanisms..."<sup>271</sup>. In addition, Cairney has explained that while "policy processes are complex and often unpredictable", a "division of policymaking into stages helps us analyze the process [of policymaking]... with reference to... five pillars of explanation: institutions, networks, ideas, socio-economic factors and choices"<sup>272</sup>. This Chapter has addressed the institutions and bodies that have helped to shape DADS in the UK; with a primary focus on the DVDS in England and Wales, and the responses of the Home Office to other policy actors, like Refuge, and ACPO/the NPCC. This policy development-mapping continues in respect of the other two UK DADS, in Scotland and Northern Ireland, in the next Chapter. This chapter has explored the costs of the DVDS; and the range of ideas DVDS policy development has included. However, this Chapter has shown that the potential for a 'policy spiral' in relation to DADS in many parts of the common law world has been created by institutions pressing for a DVDS in England and Wales, and in using a choice of 'inexact

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<sup>270</sup> Edward C. Page, 'Their word is law: parliamentary counsel and creative policy analysis', *Public Law* (2009) 790, 790.

<sup>271</sup> Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', P.L. (2018) 725, 726.

<sup>272</sup> Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2012) 288-289.

and contested' ideas, objectives and mechanisms - creating the potentiality for a DADS 'policy spiral'.

At this juncture in this thesis, it can now be stated that the very idea of a DADS, as something that 'operationalises' victim responsabilisation, is controversial. This Chapter has discussed how the shaping of the DVDS in England and Wales was a conscious choice; to avoid the use of statutory codification, and to avoid placing the onus on organisations responsible for offender management, the DVDS was always posited as something the police would use with (potential) victims of domestic violence, rather than as something that probation services, as institutions equally involved in public protection, could establish as their own. This was a natural result, perhaps, of the ownership the police have traditionally assumed over records-keeping concerning offenders - although repositories of conviction and prosecution data subsist with the Ministry of Justice who could cascade it down to probation organisations on a proactive (and statutory) basis to allow for the similarly proactive disclosure of offending histories to the new partners of probationers (and the most serious or the riskiest amongst known serial domestic violence perpetrators). The chosen 'network' for the delivery of Clare's Law in England and Wales was thus the police as a service - and not merely as an equal partner in a new policy process for the whole of the 'public protection network'<sup>273</sup> to follow. This was a choice of political organisation for the sake of policy expediency. ACPO had formulated a case for something like the DVDS as early as 2009; and as a policing oversight body had the ear of the Home Office by 2011-12. This Chapter has made plain that the institutions which have shaped the development and operation of DADS more than any other are the national-level policymakers and regulators, in the form of the Home Office for the DVDS, and as will be seen, the Northern Irish Department of Justice and the Scottish Government for the DVADS and DSDAS respectively (as discussed in the next chapter, Chapter 5).

As to whether the spread of DADS constitutes a 'policy spiral', Chapter 4 has laid the foundations for later conclusions as to whether this is the case. This Chapter has shown a number of contradictions or gaps in DADS policy, as well as inexact or contested

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<sup>273</sup> The 'public protection network' was the description given by Sir Ian Magee of the overall, multi-agency landscape of crime prevention and victim safety policies and practices. See Ian Magee, *Review of Criminality Information: Executive Summary and Recommendations* (2008).

objectives. For one thing, the risk in a violent relationship might peak when it is coming to an end, and DADS seek, ultimately, to convince victims with the necessary autonomy to bring a relationship to an end. Secondly, for women in a violent relationship, being 'responsibilised' through receipt of a disclosure under a DADS, austerity, at least in the UK, means that there are less support services available to assist her. Likewise for a subject of a disclosure under the Scheme, in the sense that it is a theme of the literature on the prevention of domestic violence that the policy and the funding for rehabilitative support is poor. As a result, DADS in the UK have 'spiralled', in the sense Walker would mean in terms of 'policy spiral', above - and no less so since DADS in the UK have 'uncertain outcomes'. The three UK DADS have never been thoroughly evaluated, after all, in terms of their effectiveness at reducing victimisation - only their efficacy in terms of the process of managing an application or referral to the DADS concerned. This clear lack of 'control and reflection' to date, subsequent to the spread of DADS across the UK and common law jurisdictions, is the subject of the next Chapter.

## 5. The growth of Domestic Abuse Disclosure Schemes in common law jurisdictions

### 5.1 Chapter Introduction

This Chapter examines the development of DADS in a range of common law jurisdictions; with arguably similar standards on personal legal rights, and mutually recognisable policymaking processes, as a result. However, the idea of Domestic Abuse Disclosure Schemes (DADS) has arguably caught on with policing policymakers across the Commonwealth before the practices concerned have been consistently or thoroughly evaluated, in a manner that accords with Walker's concerns about policy 'spirals'. In terms of the defining characteristic of a 'policy spiral' as policy proliferation with unclear or competing priorities and objectives, and where that proliferation takes place with little review or reflection, we can borrow an overview of the DADS 'policy spiral' internationally from Jane Wangmann. Wangmann (while not using the term 'policy spiral') has noted that issues of cost-effectiveness are particularly pertinent when in the wider context the prevention of domestic violence is relatively underfunded, and issues of *overall* effectiveness of DADS are again very pertinent when one considers that any potential beneficiaries of their operation are a tiny fraction of the number of women abused by their partners in any one jurisdiction<sup>274</sup>. Wangmann concludes that:

"DVDSs shift the focus away from the structural requirements that are needed to ensure safety, for example improving police consistency in responding to domestic violence, and ensuring that accommodation, counselling and legal services are able to meet demand. It is unfortunate that DVDSs are being rolled out without evidence that indicates they enhance women's safety."<sup>275</sup>

The previous four chapters have i) set out the context of the use of DADS, particularly the DVDS in England and Wales and its development as a piece of public policy; ii) explored the methods of policy, regulatory and legal analysis used in the thesis; iii) discussed the important notion of victim vulnerability in the context of DADS and iv) analysed the extent to which the manner of the development of the DVDS has fed into a 'policy spiral' that has taken hold over the UK Domestic Abuse Disclosure Schemes. But that 'policy spiral' has only been partly established at this juncture in the thesis. This Chapter explores

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<sup>274</sup> See Jane Wangmann, "Has he been violent before? Domestic violence disclosure schemes." *Alternative Law Journal* 41.4 (2016): 230-234.

<sup>275</sup> *Op cit.* 234.

the development and operation of DADS in jurisdictions other than England and Wales; starting with Scotland and Northern Ireland, before moving on to consider parts of both Australia and Canada in turn, as well as New Zealand<sup>276</sup>. This comparative approach will build up the critique that this thesis offers of DADS generally; as well as evidence the extent of the 'policy spiral' concerned.

The focus of this Chapter, however, is to look for similar inconsistencies and issues in other common law contexts of the DADS in operation globally, including:

- Potential 'victim responsabilisation' created by a 'right to ask' strand of any Scheme;
- The issue that there is little or no published evidence that the DVDS actually helps recipients of offending history information end dangerous relationships in a way that is free from a dangerous aggravation of risk;
- The number of issues faced by the subjects of disclosures and potential disclosures to protect their privacy, and preserve their procedural or natural justice rights, under the DADS concerned.

This Chapter thus explores the inconsistencies found in the uncritical adoption of the DADS outside of England and Wales and in other common law jurisdictions, both inside and outside of the UK. As a result, what this Chapter provides for this thesis is a map of the comparative legal, policy and regulatory growth of Domestic Violence Disclosure Schemes in the common law jurisdictions, as a 'legal family', where they have been adopted; albeit in the light of a lack of case law for discussion. Additionally this Chapter begins to build the argument that there is a clear road ahead for a fresh, and crucially, statutory basis jointly for the DVDS and the other two UK DADS. (It is Chapter 6, the next chapter of the thesis, which marshals the evidence that the DVDS and other DADS may not be very effective in a substantive sense of precluding or reducing domestic violence affecting the most vulnerable victims.)

## 5.2 Comparative analysis across the common law 'family'

All legal systems will have the function of regulating comparative social phenomena, such as violence against women, to some degree. However, we might expect there to be

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<sup>276</sup> Each of these jurisdictions - even where they are comprised in part of federal/devolved legal systems - is a common law jurisdiction to some degree.

both a) broad similarities between the legalities of the policing of domestic violence between states on opposite sides of the globe that are nevertheless part of the same common law 'family', and yet b) micro-differences in the way that Domestic Abuse Disclosure Schemes are operated on the ground in different jurisdictions, albeit ones in the same common law 'family'<sup>277</sup>. To a comparative law theorist such as Danneman, a 'macrocomparison' of these members of the common law family should, over a period of years, show the development of similar laws (and policies including those on DADS) to combat domestic violence. But from a policy analysis perspective, the hasty adoption of a policy like a DADS in a jurisdiction that can do so readily and speedily due to possessing a similar constitutional structure and body of law(s) does not mean this is a welcome prospect; instead it could be evidence of the 'policy spiral' discussed above.

It is academically frustrating that, at the time of writing, no instance of the precise operation of any of the three UK DADS has so far been challenged in the courts, and nor has their policy basis or general approach been put to the test in any kind of judicial review case, either. Additionally, from a comparative law perspective, this is compounded by an absence of any case law on disclosures, specifically, from Australia, Canada or New Zealand<sup>278</sup>. This renders it more difficult for this thesis to use a 'deliberative' model of comparative human rights law research to inform analysis of common law-based DADS globally<sup>279</sup> - since the 'deliberative' model of comparative analysis shows that judicial and academic learning can take place cross-jurisdictionally; but that this works best where there is directly relevant material to draw upon.

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<sup>277</sup> See Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?', in M. Reimann and R. Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2006).

<sup>278</sup> Reported cases in the UK and New Zealand context, which highlight an impact of DADS in the family court and immigration tribunal settings respectively, are discussed in some detail elsewhere in this thesis. There exist two reported cases from the UK at the time of writing that mention the DVDS in England, and which feature the reaction of a mother to a disclosure as a part of the rationale to issue a care order in relation to one or more of their children. See *Northumberland County Council v LW, NW The Children* [2018] 2 WLUK 586 at 55-57; and *Tameside Metropolitan Borough Council v KU, DB and another* [2017] 8 WLUK 71 at 8. Meanwhile, in New Zealand, immigration tribunals have on three occasions drawn on the process or content of disclosures under the Family Violence Information Disclosure Scheme (FVIDS) as a feature of decision-making in the context of appeals against deportation orders. See *PX (Partnership)* [2016] NZIPT 203114 (21 October 2016); *AV (Philippines)* [2017] NZIPT 502840 (19 January 2017); and *GK (India)* [2018] NZIPT 504225 (9 November 2018).

<sup>279</sup> Sandra Fredman, 'Foreign fads or fashions? The role of comparativism in human rights law', *I.C.L.Q.* (2015) 64(3) 631.



Having said this, all criminal justice systems in the common law world need to strike a 'fair balance' between potential risks to victims versus maintaining adequate privacy protection for 'rehabilitated' offenders. The operation of any criminal records disclosure system with public protection purposes, is one that every jurisdiction, including those that operate DADS in the common law world, would need to conduct with regulatory care and precision. This is particularly so where intrusions into personal privacy must be proportionate in order to avoid unlawful arbitrariness in disclosures. Privacy can be asserted as a fundamental right, after all, albeit one with qualifications and limitations built into it as a concept. As Marion Oswald has observed, "those tasked with the protection of the vulnerable may well be concerned that premature deletion, or suppression, of intelligence will hamper their ability to use information to make connections."<sup>280</sup> Oswald has also noted that:

"For anyone whose job it is to protect others from harm, one of the most difficult tasks is to decide when to delete personal information. Personal data collection by the public sector, and the sharing of those data, is often subject to criticism in the media, and to the risk of close scrutiny in the courts. Yet taking a decision to delete can never be an exact science, and there is often an underlying fear that a deleted piece of information might turn out to be the missing link that would have identified a risk to another person."<sup>281</sup>

The same could be readily said about decisions to share information for public protection purposes as much as for decisions as to deleting such information, too. As a result, with the policy question of how best to share information for public protection purposes through DADS becoming an increasingly global one, there is a need to look comparatively at DADS as they have developed around the globe, and as they have spread both inside and outside of the UK.

There are three different Domestic Abuse Disclosure Schemes in use in the UK today; in England and Wales; in Northern Ireland, and in Scotland. Additionally, at the time of writing, the Isle of Man is introducing a statutory basis for a scheme to regulate the disclosure of police-held information 'for the purposes of preventing and mitigating the effects of domestic abuse'<sup>282</sup>. Each of the three existing UK DADS is subtly but

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<sup>280</sup> Marion Oswald, 'Joining the dots - intelligence and proportionality', P. & D.P. (2013) 13(5) 6, 8.

<sup>281</sup> *Ibid*, 7.

<sup>282</sup> See House of Keys, Domestic Abuse Bill (2019), Cl. 45 (1)

importantly different in their policy framing and legal operation. These differences, as this Chapter and later Chapters will explore, have important regulatory ramifications. For example, while the DVDS in England and Wales is currently based on the common law power of the police to share information to protect members of the public where there is a 'pressing need' to do so, in Scotland the Disclosure Scheme for Domestic Abuse Scotland (DSDAS) is purportedly based upon the provisions of the Police and Fire Reform (Scotland) Act 2012. However, these relevant provisions of this Act of the Scottish Parliament are somewhat vague. This supposed statutory nature of the DSDAS is something that was in the understanding of Police Scotland and had not been publically linked to the 2012 Act until a freedom of information request I submitted in 2017 saw the release into the public domain of the text of the DSDAS 'Standard Operating Procedure'. In truth, the language in Section 32 of the 2012 Act only arguably creates a statutory duty to consider disclosure under the 'power to tell' strand of the DSDAS (commensurate with the 'right to know' strand of the DVDS), rather than creating an implied statutory power to share information over and above the existing common law powers to respond to a 'pressing need' for a disclosure. This issue and others concerning the legal operation of the DSDAS versus the DVDS are discussed in detail later in this chapter, as part of a comparison between these two Schemes as well as the Domestic Violence and Abuse Disclosure Scheme (DVADS) in Northern Ireland.

As mentioned in earlier Chapters, the 'pressing need' test was found by a Home Office pilot study of the DVDS in 2013 to be hard to apply consistently, and in essence there is little guidance outside a small amount of case law as to what might constitute a 'pressing need' for disclosure through the DVDS under the common law of England and Wales. This lack of clarity over the application of the currently undetailed 'pressing need' test alone created a sound basis for the DVDS to become a policy articulated in statute via the forthcoming Domestic Abuse Act in England and Wales, where it would have sat as an element of the operation of the wider, forthcoming regime of Domestic Abuse Protection Notices and Orders, perhaps<sup>283</sup>. However, there is no prospect of this option of more substantial reform of the DVDS, as the relevant Bill makes its way to the House of Lords from the Commons, at the time of writing, or for there to be a statutory re-working of the

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<sup>283</sup> Victoria Ward, 'Domestic abusers and stalkers should sign national register like sex offenders, commons report says' (*Daily Telegraph*, 22 October 2018) <<https://www.telegraph.co.uk/news/2018/10/21/domestic-abusers-stalkers-should-sign-national-register-like/>> accessed 19 June 2020.

unhelpful 'pressing need' test at common law. Aside from this lack of precision in the current common law-based 'pressing need' test, though, there are a number of other issues that could be addressed along with the creation of a statutory DVDS. As we have seen, the Scheme has been criticised for putting the onus on victims, and responsabilising them through the 'right to ask' strand of the Scheme; and that it could lead to the end of relationships when the end of an abusive relationship in and of itself is thought by researchers to be a trigger in some of those relationships for worse violence. As no longitudinal study of the DVDS has yet been undertaken outside of this thesis (with its FOI-obtained data), a clearest-possible picture on these issues in England and Wales in relation to the Scheme simply does not exist, particularly with regard to the *effectiveness* of the DVDS.

Despite some respected commentary on known inconsistencies in police practice in making disclosures emerging in 2017<sup>284</sup>, and some 'known unknowns' around the effectiveness of the DVDS in actually protecting victims (or helping them to protect themselves) being flagged up by academic researchers, the notion of a DVDS has become politically popular with policing policymakers in the common law world. Outside of the national operation of the Scheme in England and Wales, the DSDAS was piloted in Ayrshire and Aberdeen, before being rolled out across all areas of Scotland in 2015<sup>285</sup>, as well as being adopted in Northern Ireland in the spring of 2018, following a public consultation in early 2016<sup>286</sup>. Further afield in New South Wales, Australia, and more recently in South Australia<sup>287</sup>, projects akin to a Domestic Violence Disclosure Scheme

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<sup>284</sup> Her Majesty's Inspectorate of Constabulary, *PEEL 2016: Police effectiveness 2016 - A national overview* (March 2017) <<https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf>> accessed 16 June 2020, 86.

<sup>285</sup> See Police Scotland, 'Disclosure Scheme for Domestic Abuse Scotland', <<http://www.scotland.police.uk/contact-us/disclosure-scheme-for-domestic-abuse-scotland>> accessed 20 June 2020.

<sup>286</sup> See Department of Justice (Northern Ireland), 'Domestic Abuse Offence and Domestic Violence Disclosure Scheme', from <https://www.justice-ni.gov.uk/consultations/domestic-abuse-offence-and-domestic-violence-disclosure-scheme> (accessed at 20.06.2020)

<sup>287</sup> ABC News, 'SA to bring in Clare's Law for partners to get access to domestic violence criminal history', *ABC News*, 15<sup>th</sup> June 2018, from <http://www.abc.net.au/news/2018-06-15/sa-to-bring-in-clares-law-for-partners-to-find-dv-convictions/9873890> (accessed at 20.06.2020) and The Age, 'Access to partner's data can save women', *The Age*, 5<sup>th</sup> August 2018, from <https://www.theage.com.au/national/access-to-partner-s-data-can-save-women-20180805-p4zv mi.html> (accessed at 20.06.2020)

have also been piloted. A DVDS-model policy has also been adopted in New Zealand<sup>288</sup>. Another has been adopted in the Canadian province of Saskatchewan, with another on the way, at the time of writing, in the province of Alberta. These developments are explored in sections of this Chapter, below. The aim is to seek out comparative lessons in how the different DADS concerned have been established as pieces of public policy, and from a regulatory point of view. It will be seen that some regional governments in Australia, in particular, are more thorough in their oversight of the introduction of DADS than UK authorities have been.

### 5.3 The Disclosure Scheme for Domestic Abuse (Scotland)

Before turning to examine how the Disclosure Scheme for Domestic Abuse (Scotland) (DSDAS) came to be founded in public policy, and the variations in its operation with the DVDS in England and Wales, it must be noted that it has begun to make a considerable contribution to the overall activity involving DADS in the UK. By October 2018 the DSDAS had been in operation across all of Scotland for three full years; resulting in nearly 1,600 disclosures from 3,500 applications under both the 'Right to Ask' and 'Power to Tell' strands of the Scottish Scheme<sup>289</sup>. In April 2020, Police Scotland released some statistics on the use of the DSDAS by members of the public over the previous two years. Police Scotland were responsible for more than an eighth of the comparative number of disclosures that took place in England and Wales in the year to March 2019, albeit in relation to a population only around one eleventh of the size. Police Scotland explained:

"Latest figures show that in the year to 31 March [2020], a total of 2,648 requests were received by the police under the Disclosure Scheme for Domestic Abuse in Scotland, a 66% increase on the 1,596 applications in 2018/19. A total of 1,240 disclosures were made to people indicating that their partner had an abusive past - a 40% increase on the previous year. This takes into account applications under both the Right to Ask, received from individuals, and the Power to Tell, where Police Scotland decides to make a disclosure to safeguard a person."<sup>290</sup>

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<sup>288</sup> New Zealand Police, 'Family Violence Information Disclosure Scheme (FVIDS)', from: <http://www.police.govt.nz/advice/family-violence/family-violence-information-disclosure-scheme-fvids> (accessed at 20.06.2020)

<sup>289</sup> BBC News (Scotland), 'Hundreds told of partner's abusive past', *BBC*, 1<sup>st</sup> August 2018, from <https://www.bbc.co.uk/news/uk-scotland-45697807> (accessed at 20/06.2020)

<sup>290</sup> From Andrew Picken, 'Coronavirus: Rise in requests to reveal partners' abusive pasts' (BBC Scotland News, 29 April 2020) <<https://www.bbc.co.uk/news/uk-scotland-52444555>> accessed 20 June 2020. The effects of a coronavirus-related 'lockdown' in exacerbating domestic violence risks were becoming apparent, as in this BBC report it was explained that: "Police Scotland figures show that between 23 March

The policy of a 'Right to Ask' and a 'Power to Tell', in shaping the DSDAS, was formulated swiftly following the national roll-out of the DVDS in England and Wales from March 2014. Notably, therefore, this Scottish policymaking process took place before the DVDS in England and Wales was subject to a larger-scale, albeit more procedural, evaluation (as came from the Home Office by the end of 2016). In Scotland, the Disclosure Scheme for Domestic Abuse (Scotland) (DSDAS) was announced as a pilot scheme in August 2014, before being trialled in Aberdeen and Ayrshire for six months from the spring of 2015. Scottish Justice Secretary Kenny MacAskill was reported in August 2014 as commenting, on the announcement of the start of a DSDAS policy, as follows:

"It is right that people in relationships should have the opportunity to seek the facts about their partner's background if, for example, they have concerns that their partner has a history of violence and I am particularly interested in the results of the pilot to assess how effective it can be... The scheme has already proved successful in England and Wales and it is important that the practical implementation is tested to ensure that it is suitable for Scotland's unique justice system."<sup>291</sup>

A key issue with MacAskill's position in August 2014 was that a closer reading of the Home Office policy on, and evaluation of the DVDS as it operated in England and Wales was that any evidence for the true effectiveness of the original Scheme was very thin or non-existent, in relation to the pilot evaluation in four force areas south of the border. It is true that the Home Office had rolled out the Scheme across all of England and Wales in March 2014; but that is a sparse meaning of 'success'. This clear evidence of a component of Walker's 'policy spiral': a lack of proper reflection on the implementation of a policy.

MacAskill may have been personally interested in the results of the pilot and its effectiveness - but as a Scottish justice minister he certainly did not achieve, as a policymaker, the step of making public the resulting evaluation of the pilot. Given the mixed findings of the pilot evaluation, discussed below, it is no surprise that the study was not made public by his successor as Scottish justice secretary, Michael Matheson. Matheson made another policy announcement on the DSDAS in November 2014: "It is

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and 27 April [2020], there has been an 18% increase in requests for disclosure over the same period last year (258 compared with 219 in 2019)."

<sup>291</sup> From Scottish Government, 'Domestic abuse pilot areas announced', 18<sup>th</sup> August 2014 <<https://news.gov.scot/news/domestic-abuse-pilot-areas-announced>> accessed 20 June 2020.

important that the practical implementation of the Disclosure Scheme for Domestic Abuse in Scotland, or Clare's Law, is tested to ensure that it is suitable for Scotland's unique justice system"<sup>292</sup>. Matheson also failed to ensure that the findings of the 'testing' of the DSDAS pilot was made public or that the DSDAS was subject to any public consultation prior to introduction across Scotland.

Even if the findings were not initially made public, the pilot DSDAS *was* in fact evaluated by unknown academics at the University of Glasgow by the September of 2015, before the DSDAS was rolled out nationally in Scotland in October 2015. This audit by the University of Glasgow was not publicly available until I obtained it using a freedom-of-information request under the Freedom of Information (Scotland) Act 2002<sup>293</sup>.

Because the Glasgow study is not readily accessible even now it is technically in the public domain, this section of the thesis contains longer extracts from the study to provide full context for the discussion in this section of the thesis of this hitherto unavailable evaluation of the DSDAS. The FOI response from Police Scotland that supplied the candidate with a copy of the Glasgow study highlighted that the audit or study itself was "not a review of the overall Disclosure Scheme for Domestic Abuse Scotland (DSDAS) operation, but an audit of the internal processes involved in DSDAS during the 6 month pilot period in Ayrshire and Aberdeen City divisions" - with Police Scotland also noting that:

"The recommendations and considerations contained within the document have been used to advise and enhance the development of the internal processes surrounding DSDAS and consequently has assisted in shaping the national scheme which was introduced in October 2015."

The DSDAS was rolled out across all of the Police Scotland only a month after the evaluation of the pilot, in October 2015 - suggesting that little if anything was done to reflect on the findings from the focus groups that this Glasgow study was based upon;

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<sup>292</sup> BBC News (Scotland), 'Clare's Law pilot introduced in Aberdeen and Ayrshire' (*BBC News*, 25 November 2014) <<https://www.bbc.co.uk/news/uk-scotland-30191757>> accessed 23 June 2020.

<sup>293</sup> I submitted this FOI request after I spotted a reference to the evaluation report being passed on by Police Scotland to the Queensland Law Reform Commission, who in 2017 had produced a report on the possibility (which they recommended against) of a DADS in that Australian jurisdiction. See Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, Report No. 75, June 2017) <<http://www qlrc.qld.gov.au/ data/assets/pdf file/0010/541189/qlrc-report-no-75.pdf>> accessed 23 June 2020.

entailing that the 'lack of reflection' criterion for Walker's definition of a 'policy spiral' was further met, at least, in relation to the DSDAS in Scotland.

Overall, the study concluded that the DSDAS was considered by the officers who had worked on it as a pilot in Scotland to be a "positive intervention". An extract is set out here in full as the Glasgow study is still not published (in the regular sense of being freely available online) by either Police Scotland or the Scottish government:

"Both Aberdeen and Ayrshire commented that whilst no new legislation had been brought forward for the scheme, it nonetheless introduced a 'legality to disclose' which was considered an important feature for policing in the area of DA [domestic abuse]. In addition, the inter-agency discussions that are possible through the [decision-making forum] setup were said to have added to the more holistic view of and response to DA in both pilot areas. In this sense the scheme was considered to fit in well with other, existing policies and ways of working. In more public-centred terms, DSDA(S) was considered to offer potential vulnerable adults and children another layer of protection, in particular for 'hard to reach' individuals through PTT ['power to tell'], and previous victims of DA through RTA ['right to ask']. In both instances **it was believed that it allowed individuals the opportunity to make 'informed choices' about their future.** Indeed, the making of a disclosure by the police was considered to have the potential to be more authoritative than if it were to have come from a friend or family member. Similarly, DSDA(S) was considered to be of benefit to concerned friends and family. Where such calls to the police might be minimised and left unattended in the past, any application to DSDAS by a third party now ensured a mandatory response into their concerns. Finally, it was also considered by both pilot areas that as the scheme becomes more widely known it might have a preventative effect on DA, promoting self-disclosure on the part of previous perpetrators of DA, and perhaps even acting as a deterrent in that regard."<sup>294</sup> [Emphasis added.]

Clearly, this evaluation of the DSDAS pilot has picked up on the mantra often repeated about DADS; that they help victims make better life choices, and better protect themselves from harm and domestic abuse, all for being more aware of the risks they face. The reported claims by officers in the pilot area that the very existence of the Scheme in Scotland could have a deterrent effect on any offenders with regard to preventing their domestic violence offending frankly seem far-fetched. As discussed above, if the chief aim of a DADS is to empower and inform victims, so that they might end potentially violent relationships before they become violent, this is at odds with the evidence that relationship break-down can be a trigger for domestic violence - something

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<sup>294</sup> University of Glasgow, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015, 9-10, from the author's copy obtained via a freedom-of-information request.

picked up on by the focus groups of Scottish officers involved in the pilot themselves (see below).

Also, it is interesting that while in the words of the Glasgow study the officers who took part in the pilot DSDAS programme identified that 'no new legislation had been brought forward for the scheme', there was no actual mention in the Glasgow study as to the explicit or precise legal basis of the DSDAS - yet only a month later, the (presumably more lawyerly) authors of the Standard Operating Procedure stated that the legal basis of the DSDAS was primarily the language of Section 32 of the Police and Fire Reform (Scotland) Act 2012. In the Glasgow study, the authors merely observed that in "both pilot areas the decision to disclose is made by the [decision making forum] on the grounds that (i) such disclosure would be lawful; (ii) there exists a real and recognisable need for disclosure and (iii) it represents a necessary and proportionate response which will protect a potential victim". However, the DSDAS Standard Operating Procedure of October 2015 also draws explicitly upon the positive obligations of victims under Articles 2, 3 and 8 of the European Convention on Human Rights (and as discussed below in relation to the DSDAS and the other UK DADS). This later (re)drafting and broadening of the legal disclosure criteria shows, however, a degree of (lawyerly) reflection on the findings of the Glasgow study, and perhaps in reaction to the findings, in the publically-available 2014 evaluation of the pilot DVDS for England and Wales, that the 'pressing need' test for disclosures was harder to interpret consistently. However it came about, the DSDAS Standard Operating Procedure from October 2015 certainly tries hard to substantiate the 'legality to disclose' as it applies in Scotland - meeting the test MacAskill and Matheson laid down as to the 'uniqueness' of the Scottish legal system - though not necessarily in the most transparent manner.

In fact, the Glasgow study's authors also found that the focus groups of police officers from Aberdeen and Ayrshire, where the DSDAS had been piloted, raised a number of other worrying concerns about the Scheme overall. Again, a relevant extract is set out here in full as the Glasgow study is not readily available in the public domain [here some emphases have been added]:

"Potential disadvantages of DSDA(S) were also discussed. **While the potential to act as a deterrent in the long run was acknowledged, it was felt that**



**disclosures might escalate and indeed precipitate DA incidents in the short term.** In Aberdeen it was discussed that there was already evidence for this from Police Scotland's online reporting system. Officers talked about a case where a woman had reported her partner's non-violent but concerning behaviour via an online form, and was subsequently assaulted by her partner when he found out that she had reported him. **Likewise, the potential for individuals to change their behaviour towards their previously abusive partner following a disclosure, might raise suspicion and again escalate the potential for abuse.** In such circumstance the officers questioned whether DSDAS was actually about keeping people safe (the rationale by which it is possible to use existing data protection law to disclose information) or was in fact putting them more at risk. Such concerns were echoed also in Ayrshire, where officers felt that there was real potential for such scenarios to occur. **Whilst it was felt that the scheme offered individuals the ability to make informed choices, it was acknowledged that there was no guarantee that the information would necessarily be received in this way.** This was considered less of a concern in RTA applications, where there was already some preparation on the part of the person who made the request. Furthermore, officers in both Aberdeen and Ayrshire considered this to be all the more concerning given that **there was no mandatory mechanism to follow-up on disclosures**, especially in PTT cases where knowledge with the potential to shape the relationships of partners going forward was unsolicited."<sup>295</sup> [Emphases added.]

The difference between the two strands of the DSDAS presented different problems to the focus group participants. The DSDAS features a 'Right to Ask' (RTA) strand, as does the DVDS, but the equivalent to the 'Right to Know' in the DVDS is in the DSDAS called the 'Power To Tell' (PTT) instead. (Later parts of this chapter explore the important points of difference between the legal basis of the DVDS and the newly-uncovered legal basis of the DSDAS.) Issues relating to the different approaches of the RTA and PTT strands were highlighted by participants in the study, as:

"Officers in Ayrshire commented that **the vast majority of RTA applications they process are from individuals who already know that they are in an abusive relationship.** This was believed to have the potential to see police involved in a **considerable administrative workload not necessarily conceived to keep people safe, but for motivations that are more about 'covering their own backs'**. Further, officers in both Aberdeen and Ayrshire commented on applications 'fishing' for information about ex-partners, highlighting the danger of the scheme being abused by the public."<sup>296</sup> [Emphases added.]

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<sup>295</sup> University of Glasgow, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015, 10, from the author's copy obtained via a freedom-of-information request.

<sup>296</sup> *Ibid.*

Lastly, the focus groups for the Glasgow study felt that there could be an undermining of the right to rehabilitation as an effect of disclosures under the DSDAS, noting that:

"In neither pilot area has there been a case where the perpetrator was informed prior to making the disclosure to the potential victim. Some members of the DMF in Aberdeen were concerned about this, feeling that **they were at risk of falling into a pattern of not informing the perpetrator, and that erring on the side of caution in terms of risk to victim was in danger of violating ex-perpetrators' civil liberties and human rights**. Others in Aberdeen and Ayrshire, however, considered it a 'no brainer', believing that the perpetrator should never be informed."<sup>297</sup> [Emphases added.]

The tension revealed by the Glasgow study as to the contrasting views of police officers in the pilot DSDAS areas aligns consistently with the arguments made for and against the introduction of what became the Domestic Violence and Abuse Disclosure Scheme in Northern Ireland, as will be shown in the section below.

#### 5.4 The Domestic Violence and Abuse Disclosure Scheme in Northern Ireland

The DVADS in Northern Ireland, as was noted above at the outset of this chapter, was introduced in the spring of 2018 following a public consultation operated by the Department of Justice for Northern Ireland in the spring of 2016<sup>298</sup>. The summary of responses to the consultation was published by the Department of Justice in the summer of 2016<sup>299</sup>. The summary of responses identifies what might, in terms of the development of this thesis, feel like a typical array of concerns and expectations for the creation of a new domestic abuse disclosure scheme. The responses touched upon issues of victims from some cultures not being as able to approach the police; the dangers of disclosures coming too slowly; the problem of gaps in the knowledge possessed by PSNI about offenders; an impact on the privacy of the subject of the disclosure; and possible

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<sup>297</sup> University of Glasgow, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015, 10, from the author's copy obtained via a freedom-of-information request.

<sup>298</sup> Department of Justice (Northern Ireland), 'Domestic Abuse Offence and Domestic Violence Disclosure Scheme' <<https://www.justice-ni.gov.uk/consultations/domestic-abuse-offence-and-domestic-violence-disclosure-scheme>> accessed 20 June 2020.

<sup>299</sup> See Department of Justice (Northern Ireland), 'Domestic Abuse Offence and Domestic Violence Disclosure Scheme - A consultation: Summary of responses' <<https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/domestic-abuse-offence-domestic-violence-disclosure-scheme-summary-of-responses.pdf>> accessed 23 June 2020.

increased risks to potential victims after a disclosure is made<sup>300</sup>. Furthermore, the summary of responses published by the Department of Justice noted:

"A number of respondents considered that current arrangements with regard to PSNI common law powers may not be effective as the decision to disclose information is solely at the PSNI's discretion. They stated that there may be inconsistency and disclosures may vary across the service. It was highlighted that some officers may be reluctant to disclose as they may not fully understand their powers or the circumstances in which they should/could be used... It was noted that there is no data published with regards to the use and effectiveness of current disclosure arrangements in relation to public protection and PSNI common law powers. It was also proposed that potential and actual victims are unaware that the police had these common law powers."<sup>301</sup>

Overall, however, the summary of responses maintained the standard line on Domestic Abuse Disclosure Schemes that is generally preferred, it would seem, by policymakers - i.e. that each decision to disclose will depend upon the facts, but that there is a duty to empower victims where possible should the circumstances indicate a 'pressing need' to do so. As the summary of responses in Northern Ireland put it: "a well-managed and proportionate domestic violence disclosure scheme could be beneficial in reducing offending and supporting people to make informed choices."<sup>302</sup> Of course, given the prevailing 'politics of public protection'<sup>303</sup> around the combatting of domestic violence, as discussed elsewhere in this thesis, it was in fact the case that despite consultation respondents' concerns, the Domestic Violence and Abuse Disclosure Scheme for Northern Ireland began operation in the spring of 2018<sup>304</sup>, garnering 70 applications under the 'right to ask' strand of the DVADS by July 2018<sup>305</sup>. Interestingly, the summary of responses to the consultation operated by the Department of Justice for Northern

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<sup>300</sup> Department of Justice (Northern Ireland), 'Domestic Abuse Offence and Domestic Violence Disclosure Scheme - A consultation: Summary of responses' <<https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/domestic-abuse-offence-domestic-violence-disclosure-scheme-summary-of-responses.pdf>> accessed 23 June 2020, 36-37.

<sup>301</sup> *Ibid*, 17.

<sup>302</sup> *Ibid*, 35.

<sup>303</sup> See Mike Nash, 'The politics of public protection', in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willan 2010).

<sup>304</sup> Robbie Meredith, 'Domestic violence: Clare's Law equivalent begins in NI' (*BBC News*, 26 March 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-43533426>> accessed 23 June 2020.

<sup>305</sup> Maria McCann, 'Seventy domestic violence checks under new 'right to ask' scheme' (*BBC News (Northern Ireland)*, 6 July 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-44724641>> accessed 23 June 2020.

Ireland also highlighted that, in the view of respondents, "a robust central collection of data would allow effective monitoring of the enquiries, disclosure and outcomes".<sup>306</sup>

These expectations of those submitting consultation responses on a possible Disclosure Scheme for Northern Ireland demonstrate how vital and fundamental it was for the police in England and Wales to be given the same kind of regulatory 'steer' with regard to the ambition of a) making the most consistent disclosure decisions possible, and b) creating an effective means of monitoring and evaluating the actual effectiveness of the Domestic Violence Disclosure Scheme. As is expounded throughout this thesis, this is a failed ambition with regard to the operation and regulation of the Scheme in England and Wales. Whether this ambition can be met in Northern Ireland remains to be seen.

The Department for Justice for Northern Ireland has publically stated its intention to monitor and review the Domestic Violence and Abuse Disclosure Scheme in partnership with the Police Service of Northern Ireland by March 2019, as a particular element of its seven-year strategy to better address and prevent domestic and sexual violence and abuse<sup>307</sup>. This commitment was refined in a later action plan to entail a continuation of a multi-media campaign to raise awareness of the DVADS in Northern Ireland, and a further commitment to "evaluate it (ensuring feedback is sought from all agencies involved) and bring forward any necessary modifications, with PSNI continuing to work with partner agencies to ensure effective delivery."<sup>308</sup> However, details of any evaluation, first slated for March 2020, were not published at the time of finalising this thesis.

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<sup>306</sup> Department of Justice (Northern Ireland), 'Domestic Abuse Offence and Domestic Violence Disclosure Scheme - A consultation: Summary of responses', <<https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/domestic-abuse-offence-domestic-violence-disclosure-scheme-summary-of-responses.pdf>> accessed 23 June 2020, 18-19.

<sup>307</sup> Department of Justice (Northern Ireland), *Stopping Domestic and Sexual Abuse and Violence Strategy - Draft Year 3 Action Plan*, August 2018 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/draft-year-3-action-plan-aug-18.pdf>> accessed 23 June 2020, 6.

<sup>308</sup> Department of Justice (Northern Ireland), *Stopping Domestic and Sexual Abuse and Violence Strategy - Draft Year 4 Action Plan* (No date) <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Year%204%20draft%20Action%20Plan%20Stopping%20Domestic%20and%20Sexual%20Violence%20and%20Abuse%20Strategy.pdf>> accessed 23 June 2020, 4-5.

Done properly, with a focus on whether the DVADS actually helped to protect victims after its implementation, this sort of review would be good evidence that policy leadership, performance management and governance values were thriving in the regulation and oversight of any DADS. A merely procedural examination, or process-review, of the DVADS, while useful on some measures, would not be a true measure of the (dis)benefits of introducing it. So far, all that has been released into the public domain in terms of a measure of the effectiveness of DVADS is simply some figures to show it is up and running; with 70 DVADS application handled between March 2018 and July 2018<sup>309</sup>. This lack of transparency does not compare well with the DVDS and DSDAS.

### 5.5 Comparing and contrasting the legal bases and disclosure tests in the UK DADS

The purpose of this chapter section is to explicitly and in a detailed manner compare and contrast the legal operation of the Domestic Violence Disclosure Scheme (in England and Wales); the Disclosure Scheme Domestic Abuse (in Scotland) and the Domestic Violence and Abuse Disclosure Scheme (in Northern Ireland); in order the lessons can be drawn out from their construction in the relevant guidance in each of the three jurisdictions, and as to how they may be better regulated in a legal sense, jointly or severally.

At the time of writing, the DVDS in England and Wales draws on operational guidance published by the Home Office in December 2016 ('the Home Office guidance'); the DSDAS in Scotland draws on a Standard Operating Procedure ('the SOP') published internally for use by Police Scotland in October 2015; and the DVADS in Northern Ireland operates according to guidance published by the Northern Ireland Department of Justice ('the DoJ guidance') in March 2018.

#### *The legal basis of each of the threes UK DADS*

The purported legal basis for the DADS in each of the three UK jurisdictions is subtly different, judged by what the relevant guidance from the Home Office, the SOP or the DoJ guidance claims it to be. The DVDS has a common law basis, acknowledged in the Home Office guidance; but is undoubtedly regulated by statutory frameworks (human rights, data protection). By way of contrast, according to the SOP for the DSDAS, this is

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<sup>309</sup> Maria McCann, 'Seventy domestic violence checks under new 'right to ask' scheme' (*BBC News (Northern Ireland)*, 6 July 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-44724641>> accessed 23 June 2020.

instead purportedly based on S.32 of the Police and Fire Reform (Scotland) Act 2012, as well as other, similar, statutory frameworks (human rights, data protection, etc.). However, a more specific statutory basis for the Scheme in England and Wales as well as in Scotland would be useful, in terms of the demands of legal certainty required by European human rights law (discussed in later Chapters); as it is difficult to construe a clear statutory power from S.32 of the 2012 Act, despite the claims of the SOP guidance on the DSDAS that this statutory provision is the lawful basis of the DSDAS itself. It should be noted that S.32 of the 2012 ASP contains not policing duties or powers as such, but policing ‘principles’, which are:

- (a) that the main purpose of policing is to improve the safety and well-being of persons, localities and communities in Scotland, and
- (b) that the Police Service, working in collaboration with others where appropriate, should seek to achieve that main purpose by policing in a way which—
  - (i) is accessible to, and engaged with, local communities, and
  - (ii) promotes measures to prevent crime, harm and disorder.

Similarly, the DoJ guidance on the DVADS in operation in Northern Ireland claims a statutory basis for that Scheme too - and equally vaguely. The DOJ guidance maintains that the provisions of Section 32(1) of the Police (Northern Ireland) Act 2000 creates the legal basis of the DVADS, since it purportedly gives police the power to make disclosures of criminal history information where it is part of a general *duty*, as opposed to the Scottish policing *principles*, and which are namely the duties to:

- (a) to protect life and property;
- (b) to preserve order;
- (c) to prevent the commission of offences;
- (d) where an offence has been committed, to take measures to bring the offender to justice.

An important point to make here is that both statutes referred to, i.e. in relation to the DSDAS and the DVADS, were passed long before each of these DADS were considered as policy options, and were not designed as statutory provisions with the operation of DADS in mind. There is another issue here, namely that these vague statutory bases of

both the DSDAS and the DVADS might be said to offend the 'principle of legality'<sup>310</sup>. This entails that interferences with rights should be done on the basis of unambiguous legislation, from the perspective of subjects of disclosures, in the context of DADS, whose right to respect for their private life would be interfered with by such disclosures. It is valuable, for that single reason alone, that the legal basis of the three DADS in the UK (including the DVDS with its rather ambiguous 'pressing need' test for disclosures at common law) are informed in all three of the set of three guidance documents by an approach to applicable human rights law doctrine under the ECHR, including tests of necessity and legality, as well as public law principles such as reasonableness and proportionality. These ECHR-derived principles and tests, as they apply to the UK DADS, are the subject of a closer exposition and analysis in Chapter 8 of this thesis, while the next section of this Chapter undertakes a further analysis of the differences in scope and effects of the tests for disclosures under each of the three UK DADS, in a comparative analytical exercise.

#### 5.6 The tests for disclosure in the three UK Domestic Abuse Disclosure Schemes

Partly as a result of these different purported legal bases, the three sets of guidance for the DADS in operation across the UK present the relevant legal tests for a lawful disclosure of information under the DADS concerned somewhat differently. For the DVDS in England and Wales, the Home Office guidance explains that a lawful disclosure can be made if:

- “a. it is reasonable to conclude that such disclosure is necessary to protect A from being the victim of a crime;
- b. there is a pressing need for such disclosure; and
- c. interfering with the rights of **B**, including **B**'s rights under Article 8 of the European Convention of Human Rights, to have information about his/her previous convictions kept confidential is **necessary and proportionate** for the prevention of crime...”

In Scotland, the SOP for the DSDAS outlines instead that:

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<sup>310</sup> Also known as the 'Simms principle', *per* Lord Brown in *HM Treasury v Ahmed and others* [2010] UKSC 2. Lord Brown described this as the 'Simms principle' after the words of Lord Hoffman in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 A.C. 115 at 131: "Fundamental rights cannot be overridden by general or ambiguous words."

"there is the power to disclose the information (in terms of Section 32, Police and Fire Reform (Scotland) Act 2012 [and in applying] Articles 2,3 and 8 of the European Convention on Human Rights... and [the] Data Protection Act 1998".

In greater detail, the SOP goes on to explain that:

"Accordingly, when considering whether to recommend a disclosure of information, the local DMF ought to follow this 3 stage test...

"5.18.1 That the local DMF has the ability to recommend a disclosure of information by Police Scotland in terms of the Police and Fire Reform (Scotland) Act 2012. Such a disclosure would be **lawful** if it accorded with one of the general policing duties in terms of the 2012 Act.

"5.18.2 Police Scotland must be able to show that it is reasonable to conclude that such disclosure is necessary to protect the public (or particular sections of the public) from crime...

"5.18.3 In the context of this scheme, Police Scotland would have to conclude that disclosure to the applicant is **necessary** to protect 'A' from being a victim of a crime or abusive behaviours: and

"5.18.4 Any disclosure is an interference with the rights of 'B' (under Article 8 of the European Convention of Human Rights) and it must be **proportionate**."

The guidance regulating the operation of the DVADS in Northern Ireland is also built around three key disclosure tests, as follows:

- i. ...As PSNI is relying on its common law and statutory power to disclose, it must be shown that **it is reasonable to conclude that disclosure is necessary to protect the public, or particular sections of the public**, from crime. This would make the disclosure lawful;
- ii. PSNI will be required to conclude that **disclosure is necessary to protect 'A' from harm or being a victim of crime**; and
- iii. any disclosure that interferes with 'B's rights - under Article 6 and Article 8 of the European Convention on Human Rights (ECHR), the Data Protection Act 1998 and the forthcoming General Data Protection Regulation [sic] - must be **proportionate**...<sup>311</sup>

Additionally, the DVADS guidance from the DoJ in Northern Ireland also makes specific reference to the positive obligations to protect victims from imminent risks of harm under

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<sup>311</sup> Department of Justice (Northern Ireland), *Domestic Violence and Abuse Disclosure Scheme guidance*, 2018, 22.



Articles 2 and 3 ECHR<sup>312</sup>. It is also a positive aspect of the DSDAS guidance (or SOP) that it explicitly recognises the issues of positive obligations to protect victims of (potential) domestic violence arising under certain Articles of the ECHR. The DVDS guidance published by the Home Office in December 2016 makes two specific mentions of the Article 8 ECHR rights of *subjects* of (potential) disclosures, but the DSDAS guidance is more oriented than this toward the rights of victims: The positive obligation to preserve life under Article 2 ECHR is impliedly acknowledged by the DSDAS guidance or SOP, which does mention “relevant case law including *Osman v United Kingdom*”. Mention is also made of the need to apply Articles 2, 3 and 8 ECHR in the decision-making forum recommending a possible disclosure decision by Police Scotland<sup>313</sup>.

However, neither the DVADS guidance, nor the DSDAS guidance, highlights positive obligations under the ECHR in such a way as to make them a *practical* aid to decision-making by officers. The application of the right to life as a positive obligation under (Article 2 ECHR) is classically outlined in *Osman v UK* (1998) (87/1997/871/1083) at 116, as follows:

“...where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their [duty] to prevent and suppress offences against the person... it must be established... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”

None of the DADS guidance documents actually paint a test to apply with regard to this positive obligation under Article 2 ECHR. This could be framed in a way such as: 'Given

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<sup>312</sup> Department of Justice (Northern Ireland), *Domestic Violence and Abuse Disclosure Scheme guidance*, 2018, 5, 21.

<sup>313</sup> The right to respect for private life (in the relevant sense of ‘physical and moral integrity’) as a component part of the right in Article 8 ECHR is outlined in case law from the European Court of Human Rights in the context of the attempts by contracting states to prevent, deter and prosecute domestic violence. For example, in the leading case of *A v Croatia* (2010) 55164/08 the Strasbourg court observed that: “Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an *adequate* legal framework affording protection against acts of violence by private individuals...”. (Para. 60, emphasis added.) Later Chapters will consider both the systemic nature and more applied elements of this duty, and that under Article 3 ECHR.

what you know about any real and immediate risk to the life of the applicant, is a disclosure under the Scheme a reasonable part of the measures you must take to safeguard against the risk to life of that person? Do you need to conduct immediate inquiries to determine whether intelligence exists as to the risk to the life of the person?'

Likewise, none of the three UK DADS in their guidance documents stipulate a particular test in applying the positive obligation under Article 3 ECHR. The right to freedom from 'inhuman or degrading treatment' (as part of Article 3 ECHR) is defined in the leading and influential Strasbourg judgment of *Opuz v Turkey* (2009) 33401/02. Under Article 3 ECHR, if the harm suffered by a victim was sufficiently serious "...the Court must next determine whether the national authorities have taken all reasonable measures to prevent the *recurrence* of violent attacks against the applicant's physical integrity." (Paras. 161-162, emphasis added.) One might expect to see a test framed in DADS guidance in the UK, with reference to article 3 ECHR, along the lines of: 'Should there be a risk of serious harm to an applicant, then you must consider whether a disclosure under the DADS would be a reasonable measure to prevent violence or other serious harm against the applicant'. These issues are picked up in more detail in Chapter 8 of the thesis.

### 5.7 Particularly vulnerable victims in UK disclosure scheme guidance

#### *Children in the context of disclosures*

As is further developed in Chapter 8, when certain legal conclusions are being connected in relation to the UK DADS as a set, we should make the assumption that those DADS should be operated in accordance with international law, as it applies in the UK, and amongst which is a set of obligations relating to the rights and welfare of children, specifically. This chapter section begins an analysis of the three UK DADS from this perspective.

With particular regard to the issues of whether the DVDS or DSDAS guidance highlights the need for concerns over vulnerable persons including children as part of the disclosure decision-making process, for the DVDS, the guidance does state the relevant force making a disclosure where children may also be at risk should consider taking steps to follow-up on these issues of particular victim vulnerability:

"An appropriate follow-on plan should be agreed for the person receiving disclosure. This should give consideration to what action the person should now

be advised to take to safeguard their child(ren)... The plan should note which agency is responsible for checking that the person follows advice to safeguard the child(ren) concerned...<sup>314</sup>

The Standard Operating Procedure for the DSDAS also specifies that:

“Officers must be alert to the impact of Domestic Abuse on any children specified in the DSDAS application. The recognition of children who may be at risk (Domestic Abuse or otherwise) is the responsibility of all officers involved in each stage of the scheme. In circumstances where child protection matters are identified, a child protection concern form must be completed and appropriate agencies notified via the Interim Vulnerable Persons Database (IVPD).”<sup>315</sup>

Neither guidance document makes specific reference to standards from within the UNCRC as directly applicable law in the UK context, and so there is no explicit mention of the 'best interest' tests from provisions such as Article 3 of the UNCRC, but it is good to see that there is some detail in the DSDAS guidance/SOP and the DVDS guidance from the Home Office on the issues involving children connected to the 'right to know'/'power to tell' strands of applications.

On the point about compliance with the 'best interests of the child' test at the core of Article 3 UNCRC, on the other hand, the DVADS guidance from the Department of Justice in Northern Ireland goes further, in a positive move for the protection of children in the context of the operation of DADS in the UK:

"In applying the processes of the scheme, officers must be alert to the impact of domestic violence and abuse on any children specified in the DVADS application. The recognition of children who may be at risk (domestic violence and abuse or otherwise) is the responsibility of all officers involved at each stage. In circumstances where child protection matters are identified the information will be passed to the relevant Social Services Trust in written form as soon as possible. Article 3(1) of the UN Convention of the Rights of the Child, should also be observed."<sup>316</sup>

The application of the UNCRC to the three UK Domestic Abuse Disclosure Schemes, and chiefly the workings of the DVDS in England and Wales, is picked up again in Chapter 9, in an analysis of the extent to which the 'best interests of the child' should be

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<sup>314</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 51-52.

<sup>315</sup> Police Scotland, *DSDAS guidance and operational protocol*, 2015, author copy, 4.

<sup>316</sup> Department of Justice (Northern Ireland), *Domestic Violence and Abuse Disclosure Scheme guidance*, 2018, 8.

foregrounded in the relevant Scheme guidance as a 'primary consideration', as per Article 3(1) UNCRC.

### *Cultural barriers and Domestic Abuse Disclosure Schemes*

Language difficulties and cultural barriers to dealing with the police are also acknowledged by the DSDAS guidance as something Police Scotland officers should be conscious of in operating the Scheme:

“Members of the public with whom Police Scotland comes into contact with and who do not speak English as their first language and are potential victims of Domestic Abuse may be particularly vulnerable... There may be additional cultural issues influencing their decision making (e.g. making it more difficult or stressful for them to go ahead with applying to the DSDAS) and/or the language barrier may discourage potential victims during Police contact. Every effort must be made to make Police contact as simple and comfortable as possible for these potentially vulnerable people.”<sup>317</sup>

This particular section from the DSDAS guidance does go some way to addressing the concern, mentioned above in relation to work by Graca, that individuals from cultural minorities in the UK may be more likely to struggle to engage with a policy like a DADS due to some issues including a language barrier<sup>318</sup>. Graca's point is also that women from ethnic and cultural minorities are likely to find it harder to utilise DADS disclosures should they secure one, due to cultural or language barriers in accessing a support system for domestic violence victims that is often 'one size fits all'<sup>319</sup>. Guidance of such

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<sup>317</sup> Police Scotland, DSDAS guidance and operational protocol, 2015, author copy, page 27.

<sup>318</sup> See Sofia Graca, 'Domestic violence policy and legislation in the UK: A discussion of immigrant women's vulnerabilities' 22(1) *EJoCLI* (2017) <<http://webjcli.org/article/view/531>> accessed 17 July 2020.

<sup>319</sup> In a related and concerning way there are some examples that FVIDS disclosures have played a non-public protection role in immigration law processes in New Zealand, meaning that in effect FVIDS disclosures have become a tool of immigration surveillance. In *PX (Partnership)* [2016] NZIPT 203114 (21 October 2016), at 34-39, an FVIDS disclosure about a male partner was used, along with witness statements, to assess the likelihood of stability in the relationship between the male partner and the appellant, a female Fijian citizen (who faced deportation, but whose appeal was successful). In *AV (Philippines)* [2017] NZIPT 502840 (19 January 2017) the appellant, a female citizen of the Philippines, appealed on humanitarian grounds against a deportation order, and while an FVIDS document about her partner showed he had committed two domestic violence offences in 2009, other contextual evidence showed that their partnership was 'genuine and stable' (at 38), and the appellant was allowed to remain in New Zealand on a temporary 12-month work visa. In *GK (India)* [2018] NZIPT 504225 (9 November 2018) an appeal by a female Fijian citizen against deportation, on humanitarian grounds, was successful, and an order was granted awarding her residency status. A FVIDS disclosure concerning GK's partner was taken into account, and the records in this disclosure showed a single mutual allegation between the partners - and a note that the two had made a commitment to speak to a pastor at their church about improving their relationship. So from these three cases, it is unclear what would have been the

rejoinders on cultural and language barriers should be standard, and explicit, however, on all DADS policies.

### 5.8 Spent convictions under the UK Domestic Abuse Disclosure Schemes

There is a considerable discrepancy with regard to the way that 'spent convictions' are to be treated under the DVDS versus the DSDAS and the DVADS. Under the Domestic Violence Disclosure Scheme in England and Wales, in the first iteration of the Scheme guidance, spent convictions were excluded from the ambit of the Scheme, but in the current, revised version of that guidance, spent convictions and cautions may be disclosed in particular circumstances<sup>320</sup>. The change in position in the DVDS guidance published by the Home Office has, in my view, brought the particular element of the guidance in line with the common law position on the permissibility of police disclosures of spent convictions and cautions. The legalities of this are explored in full in Chapter 8 of this thesis, as is the exact nature and purpose of a conviction or caution becoming spent, too - but at this juncture it is sufficient to consider the phrasing of, first, the DVDS guidance on the disclosure of spent convictions:

“Where police officers have the power in the course of their duties to disclose spent convictions under the Domestic Violence Disclosure Scheme it is important that disclosure still needs to be **reasonable and proportionate**. [Emphasis in the original.] The police will want to take into account the age of the spent conviction during the decision-making process. Legal advice should be sought where necessary. Where such disclosure is lawful the Rehabilitation of Offenders Act (ROA) 1974 provides an exemption under that Act from prosecution for the disclosure.”<sup>321</sup>

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result of these three immigration appeals, for migrant women in these situations, if the FVIDS disclosure about their partner had not supported a finding of a 'genuine and stable' relationship.

<sup>320</sup> That there are going to be (spent) cautions to disclose under the DVDS in the right circumstances i.e. when the 'pressing need' test is met is highlighted in research by Westmarland et al. Their freedom of information-based study published in 2017 has shown that in 2014 alone there were likely to be well over 5,000 'out of court resolutions', including cautions (which can become spent), used by the police in response to reported domestic violence offences. See Nicole Westmarland, Kelly Johnson, and Clare McGlynn, 'Under the Radar: The Widespread use of 'Out of Court Resolutions' in Policing Domestic Violence and Abuse in the United Kingdom', *The British Journal of Criminology* 58(1) (2017) 1.

<sup>321</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 July 2020, 16-17.

On the other hand, the Disclosure Scheme for Domestic Abuse in Scotland purportedly cannot disclose spent conviction or cautions, but merely take them into account in making a decision on the disclosure of other criminality information concerning a domestic violence perpetrator. Again, as a later chapter in the thesis will elaborate, and as I have discussed elsewhere in two publications<sup>322</sup>, there are grounds to suggest that an absolute bar on the disclosure of spent convictions and cautions, under the common law concerned, does not in fact reflect the true legal position on the disclosure of spent convictions and cautions in the common law itself. Nonetheless, the Standard Operating Procedure for the DSDAS used by Police Scotland, obtained through a freedom-of-information request for the purposes of analysis in this thesis, explains that:

“Police Scotland may consider the impact of a spent conviction when conducting a risk assessment on ‘A’, regardless of the fact that the spent conviction cannot then be disclosed to the [decision-making forum] or to [an applicant or the person responsible for them]...”<sup>323</sup>

By way of contrast, in relation to Northern Ireland, the Department of Justice guidance on the Domestic Violence and Abuse Disclosure Scheme (DVADS) takes a different position to that used by Police Scotland in their Standard Operating Procedure on the DSDAS, and one that aligns instead with the position adopted by the DVDS guidance, as revised by the Home Office, in England and Wales. The DVADS guidance states, in the relevant section, that:

"Where police consider the disclosure of relevant spent convictions to be applicable under the scheme, it is important that disclosure is reasonable and proportionate. PSNI will want to take account of the age of the spent conviction during the decision making process. Legal advice should be sought where necessary. Where such disclosure is lawful, the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979 provides a legal exemption from prosecution for the disclosure."<sup>324</sup>

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<sup>322</sup> Please see Marian Duggan and Jamie Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145, and Jamie Grace, 'The nature of spent convictions and the common law basis of the Domestic Violence Disclosure Scheme: Limiting the effectiveness of Clare's Law?', (2015) 21(2) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/401/517>> accessed 17 July 2020.

<sup>323</sup> Police Scotland, DSDAS guidance and operational protocol, 2015, author copy, 19.

<sup>324</sup> Department of Justice (Northern Ireland), *Domestic Violence and Abuse Disclosure Scheme guidance*, 2018, 19.

This section of this chapter has shown that, in looking at the examples of the three UK Domestic Abuse Disclosure Schemes as an example of 'micro-comparison', there is plainly regulatory complexity between the three relevant UK jurisdictions on combatting domestic violence generally, and in the way police in those three jurisdictions must operate. With regard to the UK disclosure Schemes considered above, there are disparities in policy and regulation between the three UK DADS with regard to i) the purported and stated legal bases of the different Schemes, ii) how the positive obligations to protect the human rights of victims are framed for the police to consider, iii) whether the Schemes explicitly refer to the UN Convention on the Rights of the Child, and the relevant 'best interests of the child' standard from Article 3 of the UNCRC, as well as iv) the issue of whether spent convictions and cautions can be permissible to disclose under the relevant section of the three DADS guidance documents concerned.

There was at least in theory a possibility that these four elements of regulatory and policy mis-alignment between the UK DADS might in practice be redressed through the forthcoming Domestic Abuse Act, put before Parliament as a Bill in March 2020, and which was first under consultation from early March to the end of May 2018<sup>325</sup>. This was an option so long as the Westminster Parliament determined that it should legislate in a unified way for a new statutory basis for a UK Domestic Abuse Disclosure Scheme overall. However, this would require political consideration of the need for the legislative consent of the devolved administrations in Scotland and Northern Ireland, with respect to criminal justice policies in those jurisdictions. Perhaps as a result, the consultation document on the then Domestic Violence and Abuse Bill made it clear that most of its reforms, at this stage, are likely to affect England and Wales only<sup>326</sup>.

### 5.9 The Family Violence Information Disclosure Scheme in New Zealand

The Family Violence Information Disclosure Scheme (FVIDS) in New Zealand is the domestic abuse disclosure scheme about which the least information is publicly available, to date. The FVIDS was not created by new legislation in New Zealand, but presumably

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<sup>325</sup> See HM Government, *Transforming the Response to Domestic Abuse: Public Consultation*, March 2018 <[https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting\\_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf](https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf)> accessed 23 June 2020.

<sup>326</sup> *Ibid*, 10

operates on a common law basis (although Section 9 of the New Zealand Policing Act 2008 defines crime prevention as a policing function), with disclosures regulated, in practice by statutory checks and balances through the interpretation and application of the New Zealand Privacy Act 1993. The New Zealand Police website states that: "The... Privacy Act already enable[d] Police to disclose family violence information about an individual. Disclosure of information will be considered on a case-by-case basis. Police can only provide information if the relevant legislation permits."<sup>327</sup>

Section 6 of the Privacy Act 1993 as amended<sup>328</sup> creates a number of 'information privacy principles'. Principle 11 ('Limits on disclosure of personal information') requires, amongst its provisions, that "An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds... that the disclosure of the information is necessary to prevent or lessen a serious threat... to... the life or health of the individual concerned or another individual".

In around seven months, from the launch of the FVIDS in December 2015 to early July 2016, there were 38 referrals for disclosures under the Scheme; with a disclosure made after 21 of those 38 referrals<sup>329</sup>. Further information on the uptake or use of the FVIDS is not publically available - and the picture from the New Zealand courts is also only partial, as in New Zealand there is an absence of reported case law on the substantive issues of whether or how disclosures are made under the FVIDS in a particular matter. However, there is a small body of evidence that FVIDS disclosures have played an unexpected role in immigration law processes, and in effect that FVIDS disclosures have become a tool of immigration surveillance.

In *PX (Partnership)* [2016] NZIPT 203114 (21 October 2016), at 34-39, an FVIDS disclosure about a male partner was used, along with witness statements, to assess the likelihood of stability in the relationship between the male partner and the appellant, a female Fijian citizen

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<sup>327</sup> New Zealand Police, 'Family Violence Information Disclosure Scheme (FVIDS)' <<http://www.police.govt.nz/advice/family-violence/family-violence-information-disclosure-scheme-fv-ids>> accessed 23 June 2020.

<sup>328</sup> Section 6 principle 11(f) was amended on 27 February 2013, by section 5(2) of the Privacy Amendment Act 2013 (2013 No 1).

<sup>329</sup> New Zealand Law Society, 'Family Violence Information disclosure details released' (NZ Law Society, 6<sup>th</sup> July 2016) <<https://www.lawsociety.org.nz/news-and-communications/latest-news/news/family-violence-information-disclosure-details-released>> accessed 23 June 2020.



(who faced deportation, but whose appeal was successful). In assessing the relevance of the FVIDS disclosure material to an appeal at hand, in *PX* the tribunal explains (at 39):

"In assessing the stability of the appellant's partnership with her husband, there are a number of factors which the Tribunal takes into account. The husband has a conviction for breach of a protection order and he does not deny that there is history of domestic discord with his ex-wife, AA. The January 2016 incident involving the appellant led to a Police Safety Order, not a conviction, and is denied by both parties. Against these matters, the Tribunal must take into account that the couple have been living together in a genuine partnership for more than three years and are expecting a child together. The Tribunal gives particular consideration to the duration of the partnership, and is satisfied, on balance, that it is stable."

In *AV (Philippines)* [2017] NZIPT 502840 (19 January 2017) the appellant, a female citizen of the Philippines, appealed on humanitarian grounds against a deportation order, and while an FVIDS document about her partner showed he had committed two domestic violence offences in 2009, other contextual evidence showed that their partnership was 'genuine and stable' (at 38), and the appellant was allowed to remain in New Zealand on a temporary 12-month work visa. (Perhaps importantly in the considerations of the appeal tribunal, AV's partner had offended against his ex-wife in 2009, prior to meeting and beginning a relationship with AV, but still shared custody of an older daughter with his ex-wife - a daughter AV helped to care for.)

In *GK (India)* [2018] NZIPT 504225 (9 November 2018) an appeal by a female Fijian citizen against deportation, on humanitarian grounds, was successful, and an order was granted awarding her residency status. A FVIDS disclosure concerning GK's partner was taken into account, and the records in this disclosure showed a single mutual allegation between the partners - and a note that the two had made a commitment to speak to a pastor at their church about improving their relationship. In the report of the *GK* case (at 42) the appeal tribunal explains that an

"[FVIDS] report has been provided which raises concerns regarding events in December 2016, which came to the attention of the police when the husband approached them with concerns about the appellant who, in turn, raised concerns about the husband. No charges resulted and, as noted earlier, the police recorded the intention of the appellant and the husband to obtain assistance with their marriage from their church. The letters from the pastor and the counselling service provided show that this assistance was obtained. Both express the views that the couple and their son/stepson are now a stable happy unit. In her letter of 16 July 2018, the appellant expresses her love for and commitment to the husband."

So from these three cases, information about a partner on an FVIDS disclosure was treated neutrally, or even positively, one might suggest, in the case of *GK*. However, it is unclear what would have been the result of these three immigration appeals, for the migrant women in these situations, if the FVIDS disclosure about their partner had not supported a finding of a 'genuine and stable' relationship. And clearly the approach of the police in New Zealand to preparing and disclosing reports under the DFVIDS is much more permissive and inclusive (since it clearly does not focus solely on convictions of offenders, for example).

### 5.10 The fragmented approach between states in Australia

The approach to adopting DADS in Australia, across its federal state jurisdictions, is somewhat fragmented, with differing legal frameworks relating to privacy rights across those states, for example, and with local political and policy priorities playing out in relation to determining the question as to whether a disclosure scheme of some sort should be adopted. Both New South Wales and South Australia have operated pilots of a DADS-model policy, with a view to rolling them out across those federal Australian states<sup>330</sup>. However, state governments in both Queensland and Victoria have initially taken a position, after investigation, *against* the adoption of a disclosure scheme as state policy; while opposition political parties (particularly the Liberal National Party (LNP) coalition) have attempted to make political capital out of this reluctance on the part of the current Queensland and Victoria to follow New South Wales and South Australia in piloting the adoption of a DADS in those jurisdictions too.

#### *New South Wales*

In New South Wales, a pilot of a Domestic Violence Disclosure Scheme took place from April 2016, and initially had a two year pilot period in which time more than 50 people received disclosures of information<sup>331</sup>. The New South Wales pilot was the first of its

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<sup>330</sup> In July 2019, Will Hodgman, premier of Tasmania, announced there would be a forthcoming feasibility study on a disclosure scheme for the state. See Will Hodgman, 'Family and sexual violence plan receives record funding', 1<sup>st</sup> July 2019 <[http://www.premier.tas.gov.au/releases/family\\_and\\_sexual\\_violence\\_plan\\_receives\\_record\\_funding](http://www.premier.tas.gov.au/releases/family_and_sexual_violence_plan_receives_record_funding)> accessed 02 March 2021

<sup>331</sup> New South Wales Government, 'NSW domestic violence disclosure scheme to continue', 1<sup>st</sup> May 2018 <<https://www.facs.nsw.gov.au/about/media/releases/nsw-domestic-violence-disclosure-scheme-to-continue>> accessed 23 June 2020.

kind in Australia, and was introduced following a public consultation (and a report recommending the adoption of the Domestic Violence Disclosure Scheme and a pilot Scheme as public policy) in 2015<sup>332</sup>. The Scheme in New South Wales was extended on an interim basis, and ran until June 2019, although still only in four pilot areas of New South Wales as a whole<sup>333</sup>. Jane Wangmann has observed that:

"While there are many similarities between the NSW and UK schemes, there are also key differences. The NSW scheme is narrower than the UK scheme; in the UK disclosures may be made not only about convictions but any information that indicates that the subject 'poses a risk of harm' to the potential victim... Despite this breadth it is worth noting that the UK scheme incorporates an additional threshold test which requires satisfaction that there is a 'pressing need' to make the disclosure even if a conviction or other relevant information exists. The NSW scheme does not adopt a similar threshold test. The NSW DVDS also does not incorporate a 'right to know' component which forms part of the UK scheme."<sup>334</sup>

Interestingly, the New South Wales pilot did, though, ostensibly have a statutory basis of sorts, according to the framework available for directions to be given by the New South Wales Privacy Commissioner (with the consent of the Attorney General), in order that the pilot had a legislative underpinning:

"Directions are made under section 41 of the Privacy and Personal Information Protection Act 1998 and section 62 of the Health Records and Information Privacy Act 2002 to permit the collection, withholding, use and disclosure of personal information by NSW public sector agencies and contracted service providers that have an identified role in and for the purpose of the Domestic Violence Disclosure Scheme Pilot."<sup>335</sup>

However, upon closer examination, these directions are intended to be only temporary interventions to ensure the prima facie legality of something like the Domestic Violence Disclosure Scheme pilot, but preserve fundamental safeguards in relation to privacy law

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<sup>332</sup> Urbis, 'NSW Domestic Violence Disclosure Scheme Evaluation and Crisis Assistance Service Review Pilots - Final Report' <[https://www.women.nsw.gov.au/\\_data/assets/pdf\\_file/0004/670009/Domestic-Violence-Disclosure-Scheme-Pilot-Evaluation-and-Crisis-Assistance-Scheme-Review-Final-Report.pdf](https://www.women.nsw.gov.au/_data/assets/pdf_file/0004/670009/Domestic-Violence-Disclosure-Scheme-Pilot-Evaluation-and-Crisis-Assistance-Scheme-Review-Final-Report.pdf)> accessed 23 June 2020.

<sup>333</sup> New South Wales Government, 'NSW domestic violence disclosure scheme to continue', 1<sup>st</sup> May 2018, <<https://www.facs.nsw.gov.au/about/media/releases/nsw-domestic-violence-disclosure-scheme-to-continue>> accessed 23 June 2020.

<sup>334</sup> Jane Wangmann, 'Has he been violent before? Domestic violence disclosure schemes', *Alternative Law Journal* 41(4) (2016) 230, 231.

<sup>335</sup> New South Wales Government, 'Domestic Violence Disclosure Scheme' <[https://www.women.nsw.gov.au/violence\\_prevention/domestic-violence-disclosure-scheme](https://www.women.nsw.gov.au/violence_prevention/domestic-violence-disclosure-scheme)> accessed 23 June 2020.

in Australia or New South Wales as a jurisdiction overall. As the website of the Information and Privacy Commission website explains in relation to the relevant Public Interest Directions:

"Under section 41 of the Privacy and Personal Information Protection Act 1998 (PIPP Act), the Privacy Commissioner, with the approval of the Attorney General, may make a Public Interest Direction (Direction) to waive or make changes to the requirements for a public sector agency to comply with an Information Protection Principle (IPP)... The general intent is for the Directions to apply temporarily. If a longer term waiver or change in the application of an IPP is required, then a Code of Practice may be more appropriate... The Privacy Commissioner must weigh the public interest in considering whether to make a Direction... a Public Interest Direction which modifies IPPs 11 or 12 (the disclosure principles) doesn't necessarily provide a new lawful excuse for a disclosure to occur. The disclosure must itself be lawful under other laws or agreements. Therefore, even with a Public Interest Direction, some disclosures may still be prohibited for other reasons."

In actual fact, under Section 18 of the Privacy and Personal Information Protection Act 1998 ('Limits on the disclosure of personal information') it is stipulated that:

"A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless... 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."

This would seem to suggest that even should a Direction from the Privacy Commissioner expire, or be refused by the Attorney General, then aside from what Jane Wangmann has concluded about the absence of a common law 'pressing need' threshold that applies in New South Wales, there is both an implied statutory basis for the disclosure of the information, and a test that this only be done where a disclosure would be reasonable and *necessary* in preventing an imminent risk of harm. This could be said to be particularly so, given the existence of a core police function in New South Wales of the "protection of persons from injury or death", under Section 6 of the relevant Police Act of 1990.

Such statutory positioning of the Domestic Violence Disclosure Scheme in New South Wales, as based on a Public Interest Direction that is still regulated by wider privacy laws, and with an intention to be on an interim and limited legal basis only, would seem to be a slight constitutional improvement on the original legalities of the Domestic Violence Disclosure Scheme in England and Wales, with its primarily common law basis

and first phases of its existence rooted solely in a non-statutory body of guidance (at the time of writing).

Perhaps even more pertinently from the perspective of this thesis, the government of New South Wales were initially careful, and transparent, about how they planned to evaluate the two-year pilot of the Domestic Violence Disclosure Scheme, stating that:

"Urbis, a professional consulting firm, has been engaged to review and evaluate the Scheme over the two-year pilot period. The evaluation will consider implementation of the Scheme, the level of demand, impacts and outcomes for people applying for and receiving disclosures, impacts on the service sector, strengths and limitations of the model, and lessons learned for rollout of the Scheme."<sup>336</sup>

By promising some analysis on the 'impacts and outcomes for people applying for and receiving disclosures', we might have expected some detail of the substantive *effectiveness* of the New South Wales pilot. The results of the New South Wales pilot programme evaluation were published in April 2019, but were not particularly insightful on the issue of the effectiveness of the initiative. 105 people made an application in the NSW pilot, and 39% of those received disclosures by the end of the pilot period, but only 12 could be interviewed in depth about what they did (or did not do) as a result of receiving information about the convictions of their partners in the past. The Urbis researchers appeared split over the efficacy of the Scheme in NSW, noting that although the "number of DVDS applications is modest, there are early indications that the DVDS is proving of value to individual applicants who are taking safety actions"; yet also summarising their research as showing "no information to indicate whether applicants are safer as a result of using the DVDS"<sup>337</sup>.

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<sup>336</sup> New South Wales Government, *Factsheet: NSW Domestic Violence Disclosure Scheme* <[http://www.domesticviolence.nsw.gov.au/\\_data/assets/pdf\\_file/0008/371195/dvds-fact-sheet.pdf](http://www.domesticviolence.nsw.gov.au/_data/assets/pdf_file/0008/371195/dvds-fact-sheet.pdf) > accessed 23 June 2020, 3.

<sup>337</sup> Urbis, 'NSW Domestic Violence Disclosure Scheme Evaluation and Crisis Assistance Service Review Pilots - Final Report' <[https://www.women.nsw.gov.au/\\_data/assets/pdf\\_file/0004/670009/Domestic-Violence-Disclosure-Scheme-Pilot-Evaluation-and-Crisis-Assistance-Scheme-Review-Final-Report.pdf](https://www.women.nsw.gov.au/_data/assets/pdf_file/0004/670009/Domestic-Violence-Disclosure-Scheme-Pilot-Evaluation-and-Crisis-Assistance-Scheme-Review-Final-Report.pdf) > accessed 23 June 2020, vi.

## *South Australia*

In South Australia, a public consultation in 2016 on policy reforms to address domestic violence placed a possible Domestic Violence Disclosure Scheme as its first point for discussion out of 8 policy points<sup>338</sup>. This eventually led to the South Australian government confirming in October 2017 that a Domestic Violence Disclosure Scheme was something they would pursue as a policy for the state<sup>339</sup>, and to then, in June 2018, announce that from October 2018 there would be a year-long pilot of a Domestic Violence Disclosure Scheme for the state, with support not just from police and government officials but also crisis and support services<sup>340</sup>. By the end of July 2019, nearly two hundred requests to the Scheme in South Australia had been made, in an eight-month period<sup>341</sup>.

In the middle of the COVID-19 pandemic, in June 2020, the Marshall Liberal state government announced that it would continue to fund the DVDS in South Australia for a further year, to the tune of A\$500,000, noting the DVDS in South Australia in total had cost A\$900,000 up to that point, since October 2018 (nineteen months). The Marshall Government explained that:

"Of the 455 applications the DVDS has received since the scheme began on October 2, 2018...317 were deemed eligible for further consideration, with 18 applicants deemed to be at imminent risk... 136 disclosure meetings were completed with a further 22 approved to take place... 62 per cent of applications came from people at risk of domestic and family violence and 38 per cent from someone concerned about another person being at risk... 58 per cent of applications involved children... 39 per cent were from regional areas and 61 per cent from the metropolitan area...440 applicants were women with a male partner, 11 applicants were men with a female partner and four applicants were men with a

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<sup>338</sup> South Australia Government, *Summary: Domestic Violence Discussion Paper* (2016) <[https://www.agd.sa.gov.au/sites/g/files/net2876/f/dvdiscussionpaper\\_web\\_final.pdf?v=1490754880](https://www.agd.sa.gov.au/sites/g/files/net2876/f/dvdiscussionpaper_web_final.pdf?v=1490754880) > accessed 23 June 2020.

<sup>339</sup> SBS News, 'SA to introduce new domestic violence laws' (*SBS News*, 7<sup>th</sup> October 2017) <<https://www.sbs.com.au/news/sa-to-introduce-new-domestic-violence-laws>> accessed 23 June 2020.

<sup>340</sup> ABC News, 'SA to bring in Clare's Law for partners to get access to domestic violence criminal history' (*ABC News*, 15<sup>th</sup> June 2018) <<http://www.abc.net.au/news/2018-06-15/sa-to-bring-in-clares-law-for-partners-to-find-dv-convictions/9873890>> accessed 20 June 2020.

<sup>341</sup> Mirage News, 'Domestic Violence Scheme offers support to South Australians at risk' (*Mirage News*, 31<sup>st</sup> July 2019) <<https://www.miragenews.com/domestic-violence-scheme-offers-support-to-south-australians-at-risk/>> accessed 23 June 2020.

partner of the same gender...61 per cent of applicants had not previously received support from a domestic violence service<sup>342</sup>.

These figures mean that the disclosure rate in the first phase of the DADS in South Australia was 49.8%, and that, without any further information to hand; we can see the overwhelming majority of applicants for disclosures would have been women with male partners (96.7%). It is an interesting and valuable piece of information that 61% of these applicants had not previously drawn on domestic violence services, showing the policy reaching a new audience amongst the public. This does show how a DADS can have a tangible albeit indirect public protection benefit - and which could be boosted, in terms of that benefit, so long as the policing and/or social work and victim-support resources were in place to appropriately and meaningfully deal with this 'new business'. A South Australian Government minister argued that:

“The results really speak for themselves...The fact that at least 18 applicants were deemed to be at imminent risk and more than half of applications had not previously received support from a DV service really highlights this trial is very worthwhile and a potential life-saver...The volume of disclosure scheme applications continues to demonstrate there are people at risk of experiencing domestic and family violence in South Australia and this scheme is an important way to help take control of their situation, and possibly provide a safer environment for themselves and their children.”<sup>343</sup>

This phrasing at the end of this summary from the South Australian government minister is very telling: the Scheme *possibly* provides a safer environment for recipients of disclosures, and their families - and perhaps in time a further evaluation will show that in South Australia this is indeed the case. On the other hand, further evaluation may show what the New South Wales pilot evaluation by Urbis showed, that there is no sufficiently persuasive evidence that the Scheme actually works<sup>344</sup>.

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<sup>342</sup> Steven Marshall (Premier of South Australia), '\$600,000 boost to extend DV disclosure scheme and life-saving app' (June 2020) <[https://www.premier.sa.gov.au/news/media-releases/news/\\$600,000-boost-to-extend-dv-disclosure-scheme-and-life-saving-app](https://www.premier.sa.gov.au/news/media-releases/news/$600,000-boost-to-extend-dv-disclosure-scheme-and-life-saving-app)> accessed 23 June 2020.

<sup>343</sup> Steven Marshall (Premier of South Australia), '\$600,000 boost to extend DV disclosure scheme and life-saving app' (June 2020) <[https://www.premier.sa.gov.au/news/media-releases/news/\\$600,000-boost-to-extend-dv-disclosure-scheme-and-life-saving-app](https://www.premier.sa.gov.au/news/media-releases/news/$600,000-boost-to-extend-dv-disclosure-scheme-and-life-saving-app)> accessed 23 June 2020.

<sup>344</sup> Urbis, 'NSW Domestic Violence Disclosure Scheme Evaluation and Crisis Assistance Service Review Pilots - Final Report' <[https://www.women.nsw.gov.au/\\_data/assets/pdf\\_file/0004/670009/Domestic-Violence-Disclosure-Scheme-Pilot-Evaluation-and-Crisis-Assistance-Scheme-Review-Final-Report.pdf](https://www.women.nsw.gov.au/_data/assets/pdf_file/0004/670009/Domestic-Violence-Disclosure-Scheme-Pilot-Evaluation-and-Crisis-Assistance-Scheme-Review-Final-Report.pdf)> accessed 23 June 2020, vi.

## *Victoria*

The Victorian state government in Australia instigated a Royal Commission report on domestic violence which explored the possibility of a domestic violence 'perpetrator register' that could be used for the basis of disclosures to potential victims, in the manner of the kind recently recommended by the Home Affairs Select Committee and for adoption in England and Wales. However, the Royal Commission report concluded, and in recommending against a DVDS-model approach being adopted, that the 'effect of such a scheme on increasing women's safety has not been demonstrated', and that 'under such a scheme the onus remains on the victim to keep herself safe', while such a scheme is 'usually limited to those perpetrators who have a criminal history' - which is of course a most significant limitation to the practical impact of any model of DVDS-style intervention policy<sup>345</sup>. The Liberal National Party (LNP) coalition manifesto for the November 2018 Victoria state elections made a commitment to move ahead with a pilot of a Family Violence Disclosure Scheme<sup>346</sup>, but the LNP were defeated by the Labor party.

## *Queensland*

In the Australian state of Queensland, the Liberal National Party coalition would have pushed for the eventual adoption of a domestic violence disclosure scheme<sup>347</sup>, despite the recommendations of Queensland Law Reform Commission report<sup>348</sup>, should the party have won the November 2017 state elections in Queensland. The LNP were defeated in those elections<sup>349</sup>, however, and so the decision of the Queensland government in

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<sup>345</sup> See Government of Victoria, *Royal Commission into Family Violence: Report and Recommendations* (2016) <<http://www.rcfv.com.au/Report-Recommendations>> accessed 18 April 2016, 145.

<sup>346</sup> Fair Agenda, 'Where do the parties stand on domestic violence?' <[https://www.fairagenda.org/blog\\_2018viceelection](https://www.fairagenda.org/blog_2018viceelection)> accessed 23 June 2020.

<sup>347</sup> Brisbane Times, 'LNP to name and shame domestic abusers' (Brisbane Times, 7<sup>th</sup> November 2017) <<https://www.brisbanetimes.com.au/queensland-election-2017/lnp-to-name-and-shame-domestic-abusers-20171107-p4ywwf.html>> accessed 23 June 2020

<sup>348</sup> Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, Report No. 75 (June 2017) <[http://www.qlrc.qld.gov.au/\\_data/assets/pdf\\_file/0010/541189/qlrc-report-no-75.pdf](http://www qlrc.qld.gov.au/_data/assets/pdf_file/0010/541189/qlrc-report-no-75.pdf)> accessed 23 June 2020.

<sup>349</sup> Nick Wiggins, 'Queensland election: LNP's Tim Nicholls concedes defeat, quits LNP leadership' (*ABC News*, 8<sup>th</sup> December 2017) <<http://www.abc.net.au/news/2017-12-08/queensland-election-tim-nicholls-concedes-defeat/9239930>> accessed 23 June 2020.



Brisbane in October 2017 not to press ahead with a disclosure scheme policy still stands<sup>350</sup>. The obstinacy of the LNP to include a DVDS in their election manifesto in the face of the QLRC recommendation against such a Scheme for Queensland had attracted strong criticism from some Queensland family lawyers<sup>351</sup>. In actual fact, a disclosure scheme had not featured amongst any of the 140 recommendations made concerning the prevention of domestic and family violence in the Queensland domestic violence task force report *Not Now, Not Ever* first published in 2015<sup>352</sup>. The Queensland Law Reform Commission Report was scathing of the idea of domestic violence disclosure scheme for the state, to the extent that its criticisms are worth repeating in full, and for the degree to which criticisms of the DVDS in England and Wales were precursors to that criticism. The QLRC concluded that:

"The expectation underlying a DVDS is that a person who receives information about their partner's criminal or domestic violence history will, because of that information, be empowered to take steps to protect themselves (and their children), including by seeking to end the relationship... However, the dynamics of domestic and family violence and the responses of victims and potential victims are complex and do not necessarily accord with that expectation... there are many barriers to leaving and reasons why a person might stay in an abusive relationship... Further, there is evidence that separation heightens the risk of violence... A number of specialist domestic and family violence support services have voiced a concern that, based on their experience, there could also be an increased risk of harm if the partner were to discover the disclosure... **Bare disclosure (or a non-disclosure) of information under a DVDS would not address these issues.** For a DVDS to meet its protective purpose, it would ordinarily need to link the person at risk to appropriate specialist support services. However, this poses several challenges; most notably, the current limited availability and accessibility of appropriate services in many parts of Queensland... Further, the possible utility of a DVDS is limited by the fact that domestic and family violence is under-reported... with the result that there may

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<sup>350</sup> Felicity Caldwell, 'Queensland rules out domestic violence disclosure scheme' (*Brisbane Times*, 25<sup>th</sup> October 2017) <<https://www.brisbanetimes.com.au/politics/queensland/queensland-rules-out-domestic-violence-disclosure-scheme-20171025-p4ywn.html>> accessed 23 June 2020.

<sup>351</sup> Emma Ryan, 'Lawyer slams 'pig-headed' policy' (*Lawyers Weekly*, 14<sup>th</sup> November 2017,) <<https://www.lawyersweekly.com.au/sme-law/22253-lawyer-slams-pig-headed-policy>> accessed 23 June 2020.

<sup>352</sup> Amy Mitchell-Whittington, 'Not Now, Not Ever report made 140 recommendations. What happened?' (*Brisbane Times*, 23<sup>rd</sup> September 2016) <<https://www.brisbanetimes.com.au/national/queensland/not-now-not-ever-report-made-140-recommendations-what-happened-20160923-grncyy.html>> accessed 23 June 2020.

not be any complaint, domestic violence order, conviction or other relevant information (as the case may be) to disclose."<sup>353</sup> [Emphasis added.]

Many of these observations by the QLRC not only applied to the use of the DVDS in England and Wales at that time, but would apply to its operation today. Furthermore, the Queensland Law Reform Commission were also critical of the initial Home Office attempts to evaluate the effectiveness of the Domestic Violence Disclosure Scheme in England and Wales, commenting that these "reviews were limited to assessments of how the scheme process was working in practice; they did not consider the impact of the scheme on the incidence of domestic and family violence, or analyse its 'value for money'".<sup>354</sup>

Interestingly, and on the question as to whether a Domestic Violence Disclosure Scheme in Queensland was even necessary as a specific novel public policy from the perspective of needing a new legal footing, the Queensland Law Reform Commission was sceptical. The QLRC also highlighted that the sharing of criminality information for public protection purposes already had a statutory basis, observing that:

"Information about an individual's criminal or domestic violence history can be relevant to an assessment of risk. This information is accessible by relevant agencies, and can be disclosed in certain circumstances, under the new common risk assessment and inter-agency information sharing reforms, along with a full range of other relevant risk indicators... Personal information can also be disclosed to a person (including a person at risk) by police or other government agencies under the *Information Privacy Act 2009* (Qld) if the disclosure is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual, or to public health, safety or welfare..."<sup>355</sup>.

The QLRC report discussed here, and its conclusion to reject the adoption of a DADS, shows an unusually high degree of resistance to the general DADS 'policy spiral'. This 'policy spiral', by October 2017, when the QLRC report was published, had seen 'Clare's Law'-type policies spread to Scotland, as well as New South Wales (in pilot form), while

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<sup>353</sup> Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme: Report*, Report no. 75 (2017), 130-131.

<sup>354</sup> *Ibid*, 143-144.

<sup>355</sup> Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme: Report*, Report no. 75 (2017), 131.

a scheme had been confirmed as policy in South Australia, with another under consultation prior to introduction in Northern Ireland. The 'policy spiral' has continued, however, despite the approach taken by the QLRC, in relation to the spread of DADS policies in Canadian provinces.

### 5.11 'Clare's Law' in Canada

As the policy development of domestic abuse disclosures schemes has begun to spread across different provinces in Canada, from Saskatchewan, to Alberta more recently, there has arisen what has come to be the normal criticism from identifiably feminist academic lawyers and criminologists, due to the 'unintended consequences' for victims of domestic violence that have already been explored in this thesis to a degree, above<sup>356</sup>.

The province of Saskatchewan was the first in Canada to have introduced an Interpersonal Violence Disclosure Protocol, following the passing of an *Interpersonal Violence Disclosure Protocol (Clare's Law) Act 2019*<sup>357</sup>. The Justice Minister and Attorney General for Saskatchewan, Don Morgan, has claimed that if the police in that province "are able to identify risk and inform those at risk, we hope to help protect people in Saskatchewan from violent and abusive behaviour by a partner"<sup>358</sup>.

The Saskatchewan Department of Justice also stated that: "Work will continue with police services and organizations helping survivors of domestic violence on the protocol in the coming months."<sup>359</sup> Importantly, there is as yet no available detail in the public domain as to how, if at all, the Saskatchewan model of 'Clare's Law' will be piloted (and hopefully evaluated for its efficacy) as the newest Domestic Abuse Disclosure Scheme in

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<sup>356</sup> Jennifer Koshan and Wanda Wieggers, 'Clare's Law: Unintended Consequences for Domestic Violence Victims?' (*University of Calgary*, 2019) <<https://ablawg.ca/2019/10/18/clares-law-unintended-consequences-for-domestic-violence-victims/>> accessed 23 June 2020.

<sup>357</sup> Section 3(3) of the 2019 Act indicates that: "A local police service may provide disclosure information to an individual who has been determined to be a person at risk in accordance with the Interpersonal Violence Disclosure Protocol." [Emphasis added.] The relevant Protocol, now published, explains in para. 10 that Clare's Law as enacted in Saskatchewan is "... focused on an assessment of risk taking into account any relevant convictions, warnings, charges, or diversions for violent or abusive offences; and/or information held about **B**'s behaviour which reasonably leads the police service to believe that **B** poses a risk of harm to **A**." [Emphasis added.]

<sup>358</sup> See Saskatchewan Department of Justice, 'Interpersonal Violence Disclosure Protocol Act - Clare's Law - Introduced In Saskatchewan', November 5<sup>th</sup> 2018.

<sup>359</sup> *Ibid.*

the common law world. Journalists in Saskatchewan have picked up already on the issue that in the UK, however, 'Clare's Law'-type policies and the DADS they put into practice are operated 'patchily' and variably between forces in England and Wales and elsewhere in the UK.<sup>360</sup> Furthermore, when a Protocol was brought into force in Saskatchewan in the summer of 2020, to begin the operation of a 'Clare's Law'-model DADS in the province, this was accompanied by an immediate concern that the Royal Canadian Mounted Police (RCMP) would not be part of the operation of the Protocol in Saskatchewan province, since the records it held, as a federal-level policing organisation, were not covered by the regional Protocol - which would not displace any operation of federal-level privacy protections over criminality information about domestic abuse perpetrators<sup>361</sup>.

This scrutiny of the adoption of a DADS in Saskatchewan did not prevent the adoption of the Interpersonal Violence Disclosure Protocol there, nor did it stop the passing of a similar piece of legislation in Alberta, with the passing of a Disclosure to Protect Against Domestic Violence (Clare's Law) Act there in late 2019<sup>362</sup>.

#### 5.12 Chapter conclusions

The broader attitudes amongst policymakers in different jurisdictions on disclosure schemes are more clearly aligned in the UK: three different Domestic Abuse Disclosure Schemes are now in operation in England and Wales, Scotland and Northern Ireland. Their legal bases are somewhat different however, and this chapter has put some inconsistencies of the precise legal decision-making involved under the guidance on each of the three UK DADS into a sharper focus. In Australia, there is less political unity amongst government bodies at the state level over whether a Domestic Abuse Disclosure Scheme is a positive move in public policy terms - with New South Wales and South

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<sup>360</sup> Ryan McKenna, 'Law that allows domestic violence records to be released 'patchy' in the U.K.', *City News*, 11<sup>th</sup> December 2018, from: <https://www.citynews1130.com/2018/12/11/law-that-allows-domestic-violence-records-to-be-released-patchy-in-the-u-k/> (accessed at 23.06.2020)

<sup>361</sup> See Rob Paul, 'RCMP opt out as Saskatchewan becomes first province to enact Clare's Law' (The Star, 30<sup>th</sup> June 2020) <<https://www.thestar.com/news/canada/2020/06/30/rcmp-opt-out-as-saskatchewan-becomes-first-province-to-enact-clares-law.html>> accessed 17 July 2020.

<sup>362</sup> See Government of Alberta, 'Disclosing history of domestic violence' <<https://www.alberta.ca/disclosing-domestic-violence-history.aspx>> accessed 23 June 2020 and Government of Alberta, 'Informing those at risk of domestic violence' <<https://www.alberta.ca/release.cfm?xID=646535E511EDA-90AF-F086-0613C9D66E3E6810>> accessed 23 June 2020.

Australia pushing ahead with such Schemes, and Victoria and Queensland having rejected them, for now.

There is the same jurisdictional difference in legal basis and operation of the Schemes between New South Wales and other federal states as there is between the three jurisdictions in the UK that currently deploy DADS<sup>363</sup>. But in New South Wales, there is the key feature that the explicit statutory basis of the Domestic Violence Disclosure Scheme pilot is only temporary, and intended to last only for the duration of the pilot. In the UK, the legal basis of the DVDS in England and Wales is a vague one (of 'pressing need') at common law, and there are no plans at the time of writing to codify the DVDS in statute, or even to update its non-statutory Home Office guidance, despite the inconsistencies discussed above with regard to the guidance on the DVADS in Northern Ireland, and the DSDAS in Scotland. In addition, the purported statutory bases of the latter two Schemes are, upon examination, again rather vague when it comes to the notion that clear legislative frameworks and guidelines or protocols for making disclosures would ensure more consistency in disclosure decision-making that has been highlighted (at least for England and Wales) in earlier chapters.

The most salient finding for later chapters in this thesis, with regard to the Australian federal state jurisdictions, is that the New South Wales pilot of a Domestic Violence Disclosure Scheme was extended to more than three years in its total length; yet the relevant evaluation report produced no overall evidence of improvements to public protection through the operation of a DADS. Contrast this with the position in Queensland, where the state's Law Reform Commission appear to be the only body in the common law world to have considered the (lack of) evidence of the effectiveness of

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<sup>363</sup> Although as a Crown Dependency not strictly a part of the UK, the Isle of Man is also at the time of writing likely to introduce a domestic abuse disclosure scheme. The upperbody of the Manx legislature, the House of Keys, has deliberated the Domestic Abuse Bill (2019), cl.45 of which will require the Manx justice minister to introduce regulations, specifically circumventing existing obligations of confidentiality, to create a disclosure scheme in relation to police-held information that can be disclosed 'for the purposes of preventing and mitigating the effects of domestic abuse'. See Domestic Abuse Bill (2019), cl.45 <[https://www.tynwald.org.im/business/bills/Bills/Domestic Abuse Bill 2018 as amended by Keys.pdf](https://www.tynwald.org.im/business/bills/Bills/Domestic%20Abuse%20Bill%202018%20as%20amended%20by%20Keys.pdf)> accessed 17 July 2020. See also: BBC News, 'Isle of Man considers domestic abuse disclosure scheme' (BBC, 11 June 2019) <<https://www.bbc.co.uk/news/world-europe-isle-of-man-48602662>> accessed 23 June 2020. Meanwhile, in China, a database has been launched in the eastern city of Yiwu, which will allow couples set to marry an opportunity to determine whether their prospective partner has a history of domestic abuse, recorded across China since 2017. See Maya Oppenheim, 'Domestic abuse database for couples contemplating marriage launched in China' (*The Independent*, 24<sup>th</sup> June 2020) <<https://www.independent.co.uk/news/world/asia/china-domestic-abuse-database-marriage-yiwu-a9583121.html>> accessed 25 June 2020.

Domestic Abuse Disclosures Schemes and applied a brake to the otherwise steady march of DADS policies across the common law world.

With regard to the disclosure schemes in operation in the three UK jurisdictions, the salient finding of this chapter is the existence of variation between the DVDS, DSDAS and DVADS with regard to their stated legal bases, the manner in which they approach the human rights duties of the police toward victims, the way they place (or do not place) emphasis on the rights of children, and the manner in which they treat the potential disclosure of spent convictions. These are, in the light of the incremental method of analysis used in this thesis across policy, regulatory and legal perspectives, a number of issues that show that in the 'policy spiral' of DADS spreading through the UK and globally, a number of key regulatory opportunities to use the law and policy to adapt the operation of the UK DADS, particularly, have been missed.

A recommendation of this thesis, therefore, is that any review by the Home Office of the operation of the DVDS in England and Wales should be co-ordinated with a review of both the DSDAS and the DVADS by the Scottish and Northern Irish governments respectively. This thesis does not, of course, set out to be 'Anglo-Welsh-centric', as the DVDS is hardly better developed, regulated or operated than the other two UK DADS. A reformed DVDS should borrow the best elements of the more comprehensive DVADS and DSDAS disclosure tests. For example, this could mean a strong focus, in particular, on the overt recognition of human rights duties to victims, and duties with regard to the wellbeing of children; while the DSDAS guidance, to give another example, should be updated to align with any reviewed position on the possible disclosure of spent convictions to match the DVDS and DVADS on the issue. Consistency is simply seen in this thesis as a strength of any policy landscape on an issue in practice, and the co-ordinating work to achieve such consistency would be seen as strong and effective regulation. Furthermore, while it is true that legislative competence is devolved on criminal justice matters in Northern Ireland, and has been since 2010<sup>364</sup>, and in Scotland since 1998<sup>365</sup>, it must be remembered that neither the DVADS nor the DSDAS were created with specific legislation developed by elected representatives in their Parliaments,

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<sup>364</sup> HM Government, 'Devolution settlement: Northern Ireland' <<https://www.gov.uk/guidance/devolution-settlement-northern-ireland>> accessed 23 June 2020

<sup>365</sup> The Scottish Parliament, 'Devolved and Reserved Matters' <<http://www.parliament.scot/visitandlearn/Education/18642.aspx>> accessed 23 June 2020

just as the DVDS was not (although it is claimed by both devolved governments that the DADS concerned are underpinned by particular pre-existing legal duties, as noted above). The problem of the lack of legislative/legislature involvement in the development of each Scheme concerned is a weakness that affects all three UK DADS.

Once again, this finding raises the question of a full and detailed statutory basis for the DVDS in England and Wales, if not for each DADS operating in the UK today. There is no reason, *prima facie*, why the DVDS in England and Wales would not operate at least as readily, if not more accountably and consistently, if it were put on a detailed statutory basis, like its pre-existing Child Sex Offender Disclosure Scheme (CSODS). The Home Office consultation on the then draft of a Domestic Violence and Abuse Bill posed the question, however, only as to whether the guidance on the DVDS should become a statutory code of practice to which police forces and police officers, in decision-making around disclosures, should necessarily have due regard. This was not a proposal for a substantive reform of the legal operation of the Domestic Violence Disclosure Scheme, and the consultation document outlines merely that:

"To drive greater use and consistent application of the DVDS we propose to put the guidance underpinning the scheme into law, which would place a duty on the police to have regard to the guidance. We believe that this would strengthen the visibility, and therefore use, of the scheme, resulting in more victims and prospective victims being warned of the dangers posed by a partner and thereby preventing further instances of abuse."<sup>366</sup>

At the time of writing, the extent to which the vague and broad proposal for a statutory basis of the DVDS might lead to the possibility of distinct changes to the DVDS guidance published by the Home Office (and this is discussed a little in Chapter 10 of this thesis) - but equally the guidance might only be changed very superficially. It is all but impossible to gauge whether the guidance on the DVDS, DSDAS and DVADS might be brought into line with one another, *vis a vis* tests for disclosures to be made, and so forth. The disparate nature of the precise operation of the three UK DADS, and the extent, described above, of the adoption of DADS by federal states in Australia to varying degrees, actually highlights Paul Cairney's view of the fragmented manner in which public policy can sometimes spread across jurisdictions:

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<sup>366</sup> HM Government, *Transforming the Response to Domestic Abuse: Public Consultation* (March 2018) <[https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting\\_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf](https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf)> accessed 23 June 2020, 42.

"A combination of multi-level governance and policy transfer suggests that we may no longer witness the straightforward adoption of policies from one country to another. Rather, the importation of policy can take place at various levels - local, regional, national and supranational. This introduction of complexity produces uncertain effects."<sup>367</sup>

With sets of disparities between different DADS established in relation to domestic abuse disclosure schemes from two sides of the globe, the next Chapter of this thesis considers the extent to which information about the actual efficacy of such schemes currently exists in the public domain.

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<sup>367</sup> Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2012) 261.



## 6. Questioning the effectiveness of Domestic Abuse Disclosure Schemes

### 6.1 Chapter Introduction

This chapter aims to review the available evidence for the effectiveness of Domestic Abuse Disclosure Schemes. This will be measured, in particular, in terms of what we can discern about their contribution to public protection, as measured by the proportion of potential or actual victims of domestic abuse who are recipients of a DADS disclosure, but who do not go on to be (re)victimised by the subject of that disclosure. A starting point is actually to acknowledge the shortage of substantive reviews of the effects of Clare's Law in England and Wales<sup>368</sup>. There has been a distinct lack of detailed reviews either by central government bodies, or national or regional policing bodies, of the way that the UK DADS operate in relation to the *effectiveness* of the public protection contribution that they might make. The only previously published (and almost entirely procedurally-focused) reviews of the DVDS were undertaken by the Home Office. These were i) a report on the pilot phase of the DVDS in four police forces areas in England and Wales, across 2012-13, and published before the DVDS was rolled out nationally in March 2014; and ii) a 'one-year-on' report concerning the first full year of operation of the DVDS from March 2014 to March 2015 - which was only published in December 2016.

However, as the Queensland Law Reform Commission have observed, these Home Office reviews of the DVDS were problematic, as these were both procedural "reviews [that] were limited to assessments of how the scheme process was working in practice; they did not consider the impact of the scheme on the incidence of domestic and family violence, or analyse its 'value for money'".<sup>369</sup> Indeed, the reviews by government of the workings of DADS in the UK have not met the key test of proper regulation and evaluation of criminal justice policy, in failing to determine whether the DVDS or the

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<sup>368</sup> Much of the material in this Chapter is refined from a late 2019 draft paper on available evidence on the DVDS, which I posted on the Social Sciences Research Network (SSRN) to help with trying to generate interest in, and impact from my research for this thesis. See Jamie Grace, 'Whatever Happened to 'Clare's Law'? Reviewing the Evidence' (August 7, 2018; Revised 3<sup>rd</sup> December 2019) SSRN <<http://dx.doi.org/10.2139/ssrn.3227956>> accessed 16 June 2020. The analysis of material from inspection reports by HMICFRS (considered more so in this Chapter but at points in other Chapters in this thesis) has also fed into M. Duggan & J. Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145; and Kat Hadjimatheou & Jamie Grace, 'No black and white answer about how far we can go': police decision making under the domestic violence disclosure scheme, *Policing and Society* (2020) DOI: 10.1080/10439463.2020.1795169.

<sup>369</sup> See Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme: Report*, Report no. 75 (2017), 143-144.

other two UK DADS have a positive effect on victim safety when it comes to preventing domestic abuse.

The Home Office impact assessment of the DVDS policy was undertaken in October 2013, following an evaluation (published in November 2013) of the fourteen-month pilot scheme that ran in 2012-13. The pilot saw 111 disclosures from 386 applications (29%). The impact assessment established the policy options for what was launched as the national policy of a Domestic Violence Disclosure Scheme for England and Wales in March 2014. This impact assessment stated that the first 'main objective' of any final DVDS policy would be to "[r]educe incidents of domestic violence and abuse"<sup>370</sup>; but what was undertaken in the course of the pilot evaluation, which took place prior to the impact assessment process, did not really try and measure this first main objective of the DVDS.

The pilot assessment report explains the methods of the evaluation very clearly: it used "...pilot police force monitoring data, focus groups with practitioners who delivered the scheme and a small number (38) of questionnaires completed by those who had applied for and/or received a disclosure"<sup>371</sup>. The pilot evaluation report, however, also highlighted that the pilot evaluation "...aimed to understand: the nature of cases going through the scheme, including the volume and characteristics of applications and disclosures; perceptions of police officers and partner agencies involved in implementing the scheme, to capture lessons learnt; and experiences of those who requested and/or received a disclosure"<sup>372</sup>. The pilot evaluation used questionnaire data from 38 disclosure applicants and recipients to try and gauge their experience of the process, as well as focus groups with police officers and other professionals. However, the authors of the evaluation report were clear that this "...assessment focused on capturing views of the disclosure process and was not designed to assess any impact of the pilot scheme for victims or perpetrators of domestic abuse (for example, changes in potential domestic abuse victimisation or

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<sup>370</sup> Home Office (2013), 'Domestic Violence Disclosure Scheme Impact Assessment', <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf)> accessed 4 March 2021, 1.

<sup>371</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013) 2.

<sup>372</sup> *Ibid.*

recidivism)<sup>373</sup>. In this way, there was a misalignment between the first 'main objective' of the DVDS, as considered by Home Office policymakers (to 'reduce incidents of domestic violence and abuse') and the remit and design of the pilot evaluation itself. Although the questionnaire was completed by 38 respondents, only 23 of these were disclosure recipients (there were 111 disclosure recipients in the fourteen-month pilot in total), the rest being disclosure applicants only<sup>374</sup>. We are also told that "...officers used their professional judgement and risk assessment tools to ensure victim safety was not compromised by completing questionnaires"<sup>375</sup>. This is a useful methodological insight into the pilot assessment process. However, while the authors of the evaluation report note that "most questionnaires were completed with a police officer present, rather than completed directly by the respondent which may affect the content and candour of responses"<sup>376</sup>, this screening through the use of professional judgement might mean that disclosure recipients who were of a higher risk of victimisation were more likely to be excluded from the questionnaire process on the basis of risk.

The pilot assessment evaluation would have been strengthened if, by the time it was published in November 2013, it had been augmented to include an analysis of police-held data to see how many of the 111 disclosure recipients had reported or had been reported in police intelligence as being victimised by their partner in the interim. (Using FOI requests, as discussed below, in this thesis I have been able to build up an estimate of the victimisation rate of disclosure recipients from March 2014, when the DVDS became national policy.) What the pilot assessment report did establish through the use of questionnaires with a mix of 38 applicants and disclosure recipients, at least, was that:

"The majority of respondents who had received disclosures stated that the information the police had given them had helped them to make more informed choices about their relationship. As a result of the information disclosed, respondents stated they would be more likely to keep a closer look out for signs of domestic abuse in their relationship and seek support from family and friends. A

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<sup>373</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013), 9.

<sup>374</sup> *Ibid.*, 10.

<sup>375</sup> *Ibid.*

<sup>376</sup> *Ibid.*

small number of respondents (4) reported that they were likely to seek support from support services following the disclosure."<sup>377</sup>

The focus groups with police officers and other professionals did at least allow the pilot evaluation report authors to conclude that there was a public protection benefit from the DVDS, since "[i]n some cases, [applications] had brought potential victims and perpetrators of domestic abuse to the attention of the police and other agencies for the first time – for example in cases where the potential victim alleged their partner was abusive but the police had no prior intelligence about this."<sup>378</sup>

Unfortunately, the Home Office 'one-year-on' assessment was likewise "not designed to consider any impact [the] DVDS may have had on domestic violence and abuse victims"<sup>379</sup>, drawing as it did on more superficial data on numbers of applications and disclosures from all 43 police forces in England and Wales; while again, a number of focus group workshops were conducted, and these included a total of 29 criminal justice practitioners, though mainly police officers. This means there was a missed opportunity here to undertake any more questionnaires with disclosure recipients, or to undertake a review of police intelligence data to estimate post-disclosure victimisation rates for both applicants and disclosure recipients. The 'one-year-on' study by the Home Office therefore was, as a result, even less of a substantive review of the Scheme, and as much a procedural or 'light touch' review as the pilot assessment. Nevertheless, these workshops did allow the Home Office authors to highlight "...some inconsistency in information given in disclosures and variation in the service provided to victims"<sup>380</sup>; concerns that remain about the Scheme. An overview of these types of concerns is given, along with other issues concerning the operation of the DVDS, in the following part of this Chapter.

#### *An overview of criticisms of DADS to date*

At this juncture it is useful to briefly revisit the scope and nature of criticisms of the DVDS in England and Wales to date, in particular, and specifically those criticisms that have been academic attempts to view the DVDS objectively and in connection with other

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<sup>377</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013) 14.

<sup>378</sup> *Ibid.*

<sup>379</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (Home Office 2016) 3.

<sup>380</sup> *Ibid.*, 5.

issues in the criminal justice system. This focus is on the DVDS in this chapter section because a) it is the proto-Scheme and b) more pragmatically, most of what is written in the academic literature on DADS is about the DVDS alone, or in comparison with other DADS in Australia.

The DVDS had been criticised as being victim-responsibilising - that is, with the quality therefore of being 'victim blaming' to a degree, since the provision of risk information to victims about potential threats from their current or former partners arguably pre-supposes the idea that victims are both fully rational and responsible for their own safety, and that of their children, etc.<sup>381</sup> Academics have also noted that the DVDS is likely to result in disclosures being made to mothers who will feel it much harder to leave a potentially abusive relationship because of the upheaval and/or potential risks their children might face as a result<sup>382</sup>; and have observed that women from some minority communities in the UK, that are affected by distinctly patriarchal cultures, will disproportionately struggle to engage with the DVDS as potential applicants, or to act upon disclosures made to them<sup>383</sup>.

Another particular criticism of the DVDS in England and Wales is the issue that it is based, as a Home Office policy, only upon common law police powers to disclose information about perpetrators to potential victims of domestic violence. This common law basis creates broader problems of inconsistencies between disclosure practices and processes, including on the extent to which the subjects of disclosures should be made aware of the disclosures before or after they take place<sup>384</sup>, and specific complexities around certain issues, including over the extent to which convictions and cautions which

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<sup>381</sup> See Marian Duggan, 'Using Victims' Voices to Prevent Violence Against Women: A Critique', *British Journal of Community Justice*, (2012) 10(2) 25; and Marian Duggan and Jamie Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145.

<sup>382</sup> See Nicole Westmarland, *Violence against Women: Criminological perspectives on men's violence* (Routledge 2015).

<sup>383</sup> Sofia Graca, 'Domestic violence policy and legislation in the UK: A discussion of immigrant women's vulnerabilities', *EJoCLI* 22(1) (2017) online < <http://webjcli.org/article/view/531> > accessed 16 July 2020.

<sup>384</sup> Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* (2015) 79(1) 36.

are 'spent' for the purposes of the Rehabilitation of Offenders Act 1974<sup>385</sup>. A statutory DVDS would be able to adopt the same kind of presumption of disclosure model which the (statutory) Child Sex Offender Disclosure Scheme (CSODS) is based upon; allowing for more detailed statutory regulation to be adopted for the manner in which disclosures under the DVDS may be made. In a similar way, the DSDAS in Scotland and the DVADS in Northern Ireland could also be put on the same unified statutory basis, and the three Schemes made consistent in the legal tests sets out in statutory guidance as a result. The relevant 'pressing need' test currently used for the DVDS could be rejected and clearer benchmarks or tests for disclosures put in place. This issue is explored in later chapters, but for now this Chapter turns to a consideration of the evidence that exists in the public domain as to the effectiveness of the Scheme, and in the light of the main academic criticisms outlined above. One principal aim of this chapter is to communicate the extent to which police forces, chiefly in England and Wales, show a troubling lack of 'organisational learning'<sup>386</sup> around the operation of the DVDS - a measure which is struggling to assert itself as a consistently valuable policing practice in combatting domestic violence.

However, and on judging the benefits of the DVDS, one issue is that the cost-benefits of operating the Scheme, and the resulting burden on police resources, is already outstripping the initial Home Office estimates made when the policy was designed - with more than twice as many applications (under both strands of the Scheme combined) being made per year, and with nearly three times as many disclosures being made per year, compared to the numbers of each that were initially predicted<sup>387</sup>.

Cost, and a reduction in the cost of domestic violence perpetration to the operation of the criminal justice system and beyond, was a key feature of the policy rationale of adopting a mixed-model for the DVDS, which from inception included both a Right to Ask and a

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<sup>385</sup> Jamie Grace, 'The nature of spent convictions and the common law basis of the Domestic Violence Disclosure Scheme: Limiting the effectiveness of Clare's Law?', (2015) 21(2) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/401/517>> accessed 16 July 2020.

<sup>386</sup> Robert Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' (*UK Const. L. Blog*, 9th September 2014) <<https://ukconstitutionallaw.org/2014/09/09/robert-thomas-administrative-justice-better-decisions-and-organisational-learning/>> accessed 26 June 2020.

<sup>387</sup> Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 16 June 2020, 15.

Right to Know strand of the policy, respectively. The relevant Home Office policy impact assessment explained that in relation to a national model for the DVDS that included both a Right to Ask and a Right to Know, "Total costs are estimated at £3.18m [per annum], the largest component of which is attendance at the Decision Making Forum"<sup>388</sup>. This meant that for Home Office policymakers, a "Potential reduction in domestic violence and abuse. [sic] Would have to reduce total cost of domestic violence and abuse by 0.02% to break even, equivalent to preventing domestic violence and abuse in around a third of cases going through the [DVDS]"<sup>389</sup>.

There is some tentative data presented in this Chapter, below, which may suggest that the DVDS, operated across England and Wales, is preventing more than a third of the potential offending against the recipients of disclosures, if we are making the assumption that well-informed (potential) victims are taking steps to safeguard themselves against (potentially) abusive relationships. However, this issue is not clear-cut, as will be discussed, below.

For now, it must be noted this pragmatic position concerning a benchmark of the efficacy of the Scheme at a one-third reduction of the possible victimisation of disclosure recipients also included some consideration of the issue of the 'displacement' of risk. Namely, that as a 'risky' relationship comes to an end, there is the issue that a perpetrator who made it a 'risky' relationship is free to take their potential perpetration of harm elsewhere, unless they or an intervention of some kind makes them change their behaviour and reduce the risk that they pose, or eliminates it entirely. Of course, potential victims in one relationship may also risk, in ending that relationship, being victimised by a later, different perpetrator in another, newer relationship instead. Then there is the issue of 'false negatives': that there is nothing to disclose from police records, even if an individual happens to be violent and to pose a high risk; or that the 'pressing need' test is not met, even though violence eventually occurs.

It may be recalled that a freedom-of-information request I made to Police Scotland in 2017 resulted in the supply of a document which evidenced a review of the DSDAS, and that had not previously been in the public domain. A study had been undertaken of the

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<sup>388</sup> Home Office, 'Domestic Violence Disclosure Scheme Impact Assessment' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260899/DVDS\\_IA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260899/DVDS_IA.pdf) > accessed 16 June 2020, 15

<sup>389</sup> *Ibid*, 5.

operation of the pilot phase of the DSDAS, comprising a set of 59 applications in total, and was concluded by academics at the University of Glasgow in September 2015<sup>390</sup>. This Glasgow study looked at internal records from the DSDAS pilot, and involved focus groups with Police Scotland officers involved in operating the pilot. Overall, the study concluded that the DSDAS was considered by the officers concerned to be a 'positive intervention' since "it was believed that it allowed individuals the opportunity to make 'informed choices' about their future"<sup>391</sup>. This purported standard of success, as opposed to any measure of true effectiveness of leading to the greater safeguarding of potential victims, is a recurring theme, and a problematic one. As Jane Wangmann has concluded about the emerging picture of DADS policies globally:

"[DADS] are invariably framed as promoting empowerment and choice. For example, the NSW Minister for the Prevention of Domestic Violence, Pru Goward stated that the scheme will 'empower victims to make a decision that could ultimately save their lives', ensuring that potential victims are 'no longer ... in the dark about their perpetrator's history' providing victims with 'a sense of control about what they do next'."<sup>392</sup>

But, however, the Glasgow researchers also noted that though the "potential to act as a deterrent in the long run was acknowledged, it was felt that disclosures might escalate and indeed precipitate DA incidents in the short term."<sup>393</sup>

Importantly then, as we can see from different sources of evidence considered in following sections of this chapter, there are concerns that can be raised about the effectiveness of disclosures under DADS-model policies, including the DVDS in England and Wales. As the (unnamed) Glasgow study authors acknowledged themselves, "[w]hilst it was felt that the scheme offered individuals the ability to make informed choices, it was

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<sup>390</sup> University of Glasgow, School of Social and Political Sciences, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015 (author copy).

<sup>391</sup> *Ibid*, 9.

<sup>392</sup> Jane Wangmann, 'Has he been violent before? Domestic violence disclosure schemes', *Alternative Law Journal* 41(4) (2016) 230, 231.

<sup>393</sup> University of Glasgow, School of Social and Political Sciences, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015 (author copy), 10.



acknowledged that there was no guarantee that the information would necessarily be received in this way."<sup>394</sup>

## 6.2 The evidence published by regulators as to the operation of the Scheme

At this juncture in the thesis we can begin to build the case that there are problems with the regulatory responsibility for the Scheme. Later chapters will address the overarching regulatory problems that are created by issues arising from multi-level governance in the wider 'regulatory space' of the Scheme and other parts of the policy landscape concerning the prevention of domestic violence. But for now it is a start to examine the manner in which the most prominent police regulator in England and Wales, Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS) has, or has not, conducted effective, purposeful and responsible regulation of the DVDS to date.

Our starting point in considering the work of Her Majesty's Inspectorate is in some ways a disappointing one; as it is perhaps best to begin with the first HMICFRS inspection report following the publication of the Home Office 'one year on' evaluation of the DVDS in 2016. The HMICFRS National PEEL report for 2017 actually makes no mention of the DVDS, which certainly means no true review of effectiveness, and no review of the great variation in disclosure rates nationally (the 'postcode lottery' outlined in previous chapters).<sup>395</sup> HMICFRS did conclude in the report that in terms of using police powers to protect victims of domestic abuse, in practical terms more consistency is needed, as the Inspectorate still "have concerns about the extent to which police officers keep domestic abuse victims safe and bring their offenders to justice"<sup>396</sup>.

HMICFRS observed in their 2017 national report on policing in England and Wales that in general, options and powers available to the police to be used to protect victims of domestic abuse could be used more rigorously. Around 40% of forces had seen a recent fall in the number of Domestic Violence Protection Orders they were obtaining from the courts against abusers. The national rate of arrests for domestic abuse offences was also

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<sup>394</sup> University of Glasgow, School of Social and Political Sciences, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015 (author copy), 10.

<sup>395</sup> Her Majesty's Inspectorate of Constabulary, *PEEL 2017: Police effectiveness 2017 - A national overview* (March 2018) <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-1.pdf>> accessed 26 June 2020.

<sup>396</sup> *Ibid*, 22.

falling slightly even as the rate of such crimes nationally rose by 18% in 2016-17. Additionally, the rate of conditional bail used to protect victims from perpetrators, and even the rate of prosecutions in relation to the number of reported domestic abuse offences were both falling at the time the report was written<sup>397</sup>.

Moving on to consider force level inspection reports from HMICFRS for 2017, which were the first to capture the operation of the DVDS in England and Wales under the newer Home Office guidance from 2016, a troubling theme develops when looking at how the DVDS is presented in those reports. HMICFRS is not taking thorough regulatory responsibility for its role in relation to the oversight of the DVDS that it performs. Force-level commentary by HMICFRS tends to be scant when it comes to the opportunity to really press for an evaluation of whether the DVDS is truly effective at preventing offending, or increasing victim safety, as opposed to monitoring whether it is administered smoothly. Sometimes mention is made in force-level reports that use of the DVDS is subject to some kind of innovation or improvement. In Avon and Somerset, for example, HMICFRS noted that: "Officers and staff in the safeguarding co-ordinating units process domestic violence disclosure scheme applications. The force makes good use of this scheme..." But there is no explanation of what constitutes 'good use' of the Scheme<sup>398</sup>. HMICFRS is overall not as interested as it should be in answering key questions of efficacy when it inspects forces on how they use the DVDS in England and Wales. This is problematic, because the Inspectorate is a key regulator in relation to maintaining standards in policing and in particular the requirements to safeguard victims of abuse.

Similarly vague plaudits are offered for slight improvements in the use of the DVDS in other force areas, without HMICFRS specifying their measures for the 'good' use of tools to prevent domestic violence. HMICFRS offer these vague assurances in relation to

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<sup>397</sup> Her Majesty's Inspectorate of Constabulary, *PEEL 2017: Police effectiveness 2017 - A national overview* (March 2018) <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-1.pdf>> accessed 26 June 2020, 22-23.

<sup>398</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Avon and Somerset Police*, <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-avon-and-somerset.pdf>> accessed 26 June 2020, 17

Cambridgeshire, Northamptonshire<sup>399</sup>, and in Northumbria, where: "The force is good at using its legal powers to protect vulnerable people."<sup>400</sup> In relation to Cheshire<sup>401</sup> and in Hertfordshire<sup>402</sup>, HMICFRS wish those force areas to use the DVDS more frequently.

However, in relation to some force areas, the report by HMICFRS takes pains to highlight something that a force is doing, or has demonstrated to, which suggests that the forces concerned are in some way considering the effectiveness of DVDS disclosures. In relation to Lancashire, for example, HMICFRS commented that:

"The constabulary's use of the legal powers under the domestic violence disclosure scheme are among the highest for police forces in England and Wales... In order to protect victims from further abuse, the constabulary considers the effectiveness of the use of such powers before making an application and looks for an alternative. This could include participation in a domestic abuse perpetrator programme in an attempt to address the causes of the offending."<sup>403</sup>

On Bedfordshire, HMICFRS commented that: "The force makes little use of the range of legal powers available to protect victims of domestic abuse, such as domestic violence protection notices (DVPNs) and orders (DVPOs) and Clare's Law", but the police Inspectorate did at least make a regulatory recommendation in relation to the use of powers including those underpinning the DVDS: "The force should ensure that effective training, systems and processes are in place to enhance its ability to provide protection for victims."<sup>404</sup>

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<sup>399</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Northamptonshire Police* <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-northamptonshire.pdf>> accessed 26 June 2020, 22.

<sup>400</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Northumbria Police* <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-northumbria.pdf>> accessed 26 June 2020, 18.

<sup>401</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Cheshire Police* <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-cheshire.pdf>> accessed 26 June 2020, 14.

<sup>402</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Hertfordshire Police* <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-hertfordshire.pdf>> accessed 26 June 2020, 16.

<sup>403</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Lancashire Constabulary* <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-lancashire.pdf>> accessed 26 June 2020, 13.

<sup>404</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Lancashire Constabulary* <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-bedfordshire.pdf>> accessed 26 June 2020, 24.

On Lincolnshire, HMICFRS noted that:

"The force promotes the use of domestic violence protection orders (DVPOs) and the domestic violence disclosure scheme, known as Clare's Law, and reports that officers are more aware and confident now about completing an application. The force intends soon to require officers to complete a new public protection notice when attending incidents involving vulnerable victims, which will also help to identify repeat offenders. This replaces the 'stop abuse' form and will automatically pass referrals to different agencies more quickly."<sup>405</sup>

In relation to London and the work of the Metropolitan Police Service, HMICFRS:

"...identified in [a] 2016 inspection that the force was failing to make full use of wider powers available to it which could help in its efforts to prevent domestic abuse and protect victims... There is also limited use of 'Clare's Law' disclosures. In the 12 months to 30 June 2017, 121 disclosures were made under the scheme. The force needs to be more proactive in these disclosures; it is currently reliant on responding when people exercise their 'right to ask', with very limited disclosure under 'right to know'. It is disappointing that more progress has not been made in using these wider powers, especially in the light of the rising levels of domestic abuse crime."<sup>406</sup>

HMICFRS does not provide any evidence for its confidence in the DVDS as something that 'could help in its efforts to prevent domestic abuse and protect victims'. Similarly, in relation to the use of the DVDS in Norfolk, HMICFRS observed that:

"The force has made considerable progress in the use of Clare's Law, and has substantially increased its disclosure levels for 'right to know' cases... However, we found that the force is still taking a significant amount of time to give this information to individuals after it has decided to make the disclosure. This delay in providing the disclosure could have an effect on ensuring that vulnerable victims are appropriately safeguarded at the earliest opportunity."<sup>407</sup> [Emphasis added.]

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<sup>405</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Lincolnshire Constabulary* < <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-lincolnshire.pdf> > accessed 26 June 2020, 19.

<sup>406</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of the Metropolitan Police* < <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-metropolitan.pdf> > accessed 26 June 2020, 20-21.

<sup>407</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Norfolk Constabulary* < <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-norfolk.pdf> > accessed 26 June 2020, 13.

Again, a good deal turns on that use of that phrase 'the disclosure *could* have an effect'.

While in North Yorkshire:

"The force is an active user of the domestic violence disclosure scheme... The force also encourages people to ask for disclosure under Clare's Law... During our inspection, HMICFRS found that domestic abuse officers are proactive in their approach to identifying when new relationships start between either victims or perpetrators, and that they consider use of the scheme to protect domestic abuse victims or those in new relationships with domestic abuse perpetrators."<sup>408</sup>

In South Yorkshire:

"...the force has a low rate of use of the 'right to ask' and 'right to know' legislation (provided for in the domestic violence disclosure scheme) compared to the rate in England and Wales. It could do more to publicise the 'right to ask' and be more proactive in its own disclosure under the 'right to know'."<sup>409</sup>

While in relation to Suffolk:

"We found that the use of Clare's Law is one of the specific considerations included within the secondary assessment of DASH risk forms, which is carried out by the domestic abuse teams. This results in a high number of cases being submitted to the MASH for consideration of disclosure under Clare's Law 'right to know' provisions... We found that the force provided timely disclosures by using appropriately skilled officers and staff throughout the force with support from the three domestic abuse teams throughout the county."<sup>410</sup>

More briefly: of the police in Sussex, HMICFRS reported that: "...the force is actively trying to increase its use of powers to safeguard victims, such as Clare's Law, by highlighting it within the force."<sup>411</sup> And of Wiltshire Constabulary, HMICFRS noted: "The force makes appropriate use of legal powers to protect people from harm... A

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<sup>408</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of North Yorkshire Police* <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-north-yorkshire.pdf>> accessed 26 June 2020, 18.

<sup>409</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of South Yorkshire Police*, <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-south-yorkshire.pdf>> accessed 26 June 2020, 24.

<sup>410</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Suffolk Constabulary* <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-suffolk.pdf>> accessed 26 June 2020, 14.

<sup>411</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Sussex Constabulary* <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-sussex.pdf>> accessed 26 June 2020, 20.

domestic violence disclosure scheme co-ordinator is bringing renewed emphasis on this important legislation."<sup>412</sup>

In reviewing these particular DVDS-focused inspection findings from HMICFRS, it is possible to see there is a body of knowledge about the DVDS in existence, yet it is 'fragmented'<sup>413</sup>, from a regulatory perspective. Either the Home Office or HMICFRS could have chosen to require forces to self-evaluate the DVDS in England and Wales, and with particular regard to the effectiveness of the disclosures to help safeguard vulnerable victims in a given force area, yet have not. Overall, we do not have the ability to conclude that HMICFRS could be said to have a good regulatory grasp of the DVDS in 2017, when they made their first solid attempts to understand forces' use of the Scheme, given the number of forces where they have either not commented on the use of the Scheme by that force, or give only general commentary and no regulatory requirements in the relevant inspection report.

### 6.3 Force-level evaluation of the Scheme conducted by forces themselves

It would seem that *prima facie*, HMICFRS were shown evidence in 2017 by certain forces as to the effectiveness of the DVDS in relation to protecting victims from domestic abuse. Given the extent to which *some* forces were commended in the extracts from HMICFRS reports presented above, one might expect that there would be a careful internal evaluation of the effectiveness of the DVDS going on in those forces at that time. In fact, the opposite appears to be true, as this Chapter section demonstrates. There is an issue arising from the freedom-of-information research for this thesis that belies the idea that there was any kind of self-evaluation of effectiveness of the use of the DVDS, other than for a very small minority of forces.

When an FOI request was submitted by the candidate to all police forces in England and Wales in April 2018, asking about the existence of any kind of internal review of the operation and effectiveness of Clare's Law in each force, there were almost no

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<sup>412</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2017 - An inspection of Wiltshire Police* < <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2017-wiltshire.pdf> > accessed 26 June 2020, 12.

<sup>413</sup> Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world'', *Current Legal Problems* 54(1) (2001) 103, 107.

meaningful responses. All but one force (Cleveland) responding to this FOI request had not reviewed DVDS disclosures for their effectiveness. The significance for the issue of allowing forces to self-regulate on their use of the DVDS and common law powers of disclosure is clear: the police in England and Wales at force level had little interest in seeing if their use of Clare's Law could be said to meet its objectives. Cleveland Constabulary do appear to have begun to address the challenge set by HMIC in 2016 to monitor processes and evaluate data in relation to "their use and promotion of the legislation to ensure that they are making best use of these powers to safeguard victims of domestic abuse"<sup>414</sup>; and a case study of sorts is made of the relevant data provided by Cleveland Constabulary, and is presented here, below<sup>415</sup>.

#### *The Cleveland Constabulary case study*

Responses to a wave of freedom of information requests sent to each force in England and Wales by the author as part of his PhD research have shown that only one force in England and Wales, at least by the summer of 2018, had conducted a substantive review of the effect and operation of the DVDS. This force was Cleveland, who provided a statistical picture of the operation of the DVDS in their force area, in 2017 only. This FOI response data is reproduced without amendment in Table 4, below. To begin with, it should be noted that overall, in the Cleveland force area in 2017, and in relation to the 157 DVDS disclosures in that year, 54 people (34%) went on to be victimised by an offender, and 49 (31%) by the disclosure subject, *by the end of 2017 alone*. The level of victimisation of disclosure recipients would logically be higher by now, to some degree, whether as a result of abuse by the disclosure subject or by another offender in turn.

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<sup>414</sup> Her Majesty's Inspectorate of Constabulary, *PEEL 2016: Police effectiveness 2016 - A national overview* (March 2017) < <https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf> > accessed 16 June 2020, 86.

<sup>415</sup> In terms of other partial responses to this particular FOI request: Durham provided an action plan produced in 2015, but produced no updates or detail of work on this, however. West Mercia provided an extract of an internal report acknowledging the need for more research and training in the force. Warwickshire provided a memo on the need for a secure online application portal for their DVDS. Hertfordshire provided their entire domestic abuse action plan for 2016-19, which noted that more information is needed on the Scheme in the 'welcome pack' for new officers in the force. Northumbria produced a report on internal DVDS processes, such as timescales, but this contained nothing in terms of data or commentary on the outcomes or the effectiveness of those disclosures.

Table 4 - Cleveland Constabulary, 2017 disclosures evaluation data

<i>Cleveland Constabulary: Results of Disclosures across 2017</i>	
<b>Results (Crime and Incidents)</b>	<b>Total</b>
<b>Total number of disclosures</b>	<b>157</b>
How many people who have been disclosed to under Clare's Law have become victims after?	54 (34%)
How many to the same perpetrator?	49 (31%)
How many to different perpetrators?	5
The number of perpetrators that have proceeded to offend against different victims?	19

<i>Cleveland Constabulary: Results of Non-Disclosures across 2017</i>	
<b>Results (Crime and Incidents)</b>	<b>Total</b>
Total number of non disclosures	148
How many people who have not been disclosed to under Clare's Law have become victims after?	23 (15.5%)
How many to the same perpetrator?	19 (12.8%)
How many to different perpetrators?	3
***There has been one unknown perpetrator***	1
The number of perpetrators that have proceeded to offend against different victims?	30

However, if we assume that with the 'pressing need' test for a disclosure being met, that this entailed a *high degree of likelihood* of victimisation in a relationship through domestic abuse of some kind, then this case study from Cleveland may be seen to be very positive for the assessment of the DVDS overall, on the measure of achieving the Home Office impact assessment objective of at least a one-third avoidance rate following disclosures. But it must be emphasised again that this is a case study over a very short timescale only - and from just one smaller force area - with only data concerning 2017 disclosures and 2017 harms as reported to the police.

When it comes to assessing the outcomes for applicants who did not receive disclosures, the key point is that there is evidence of 'false negatives' in Cleveland (again, in 2017 *alone*): 19 out of 148 non-recipients (12.8%) were offended against by the person they in theory could have been warned about, assuming there was information available to



disclose, of course. These were 19 individuals that were not felt to be the object of a 'pressing need' for a disclosure (or again, where there was nothing about the subject of an application to actually disclose).

Worryingly, in the light of studies that predict the greatest risk in a violent relationship may often come at the end of or after that relationship<sup>416</sup>, there is of course the view that in Cleveland in 2017, applicants who received disclosures under the DVDS were more than twice as likely (31% versus 12.8%) to be victimised by those individuals they were warned about than those who were not warned for some reason. This is a crude correlation only, of course, but one cannot escape wondering if disclosures might, counterintuitively, actually increase risk of harm in a relationship that ends as a result of the disclosure.

It must also be noted, before moving on from this 'Cleveland case study' that at the time the data concerned were being compiled in the force, as outlined above, an inspection by HMICFRS found that in the force area across the middle of 2017, the "process for identifying domestic violence incidents as crimes and assessing the correct closure of such incidents within the force control room does not support accurate crime recording"<sup>417</sup>.

Findings from the inspection report on Cleveland's data management problems warrant repeating in full here, given this point:

"...based on the findings of our examination of crime reports for the period 1 May 2017 to 31 October 2017, we estimate that the force fails to record over 10,800 reported crimes each year... Of a total of 1,580 reports of crime that we audited, we found 420 that we assessed to be crimes related to domestic abuse. Of these 420 crimes, the force had recorded 317. The 103 offences not recorded included 75 violent crimes and 28 other crimes. We found that many of these reports involved the reporting of a crime at the first point of contact with the force, but these crime reports were often recorded as a non-crime incident with little rationale to explain why. As domestic abuse often involves victims who are particularly vulnerable to further offences being committed against them, the importance of recording reported crimes of domestic abuse cannot be overstated.

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<sup>416</sup> See for example, Ruth E. Fleury, Cris M. Sullivan, and Deborah I. Bybee, 'When ending the relationship does not end the violence: Women's experiences of violence by former partners', *Violence against women* 6(12) (2000) 1363.

<sup>417</sup> See Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 'Cleveland Police: Crime Data Integrity inspection 2018' (HMICFRS, 7 August 2018) <<https://www.justiceinspectors.gov.uk/hmicfrs/publications/cleveland-police-crime-data-integrity-inspection-2018>> accessed 29 June 2020.

Of further concern, we found that the absence of a crime record resulted in fewer than a quarter of these reports of crime being investigated, and that only around a quarter of victims received adequate safeguarding, thereby increasing the potential risk of harm to the victim. The under-recording of crimes related to domestic incidents, and the failure to provide a satisfactory service to these victims are serious concerns. This is because domestic abuse often involves victims who are particularly vulnerable to further offences being committed against them.<sup>418</sup>

It is a sad fact that in researching this thesis, the one force, Cleveland, who appear to have put some effort into evaluating the effectiveness of the DVDS in their force area in 2017 also happen to be a force rated 'inadequate' for their collection and management of crime reports data, which they likely would have used to compile their DVDS self-evaluation.

#### *A Met police FOI/evaluation case study*

As noted earlier in the thesis, in February 2020 the Metropolitan Police ('the Met') briefed a *London Evening Standard* journalist on the use of the DVDS in London. To follow up the resulting news article, I submitted an FOI request to the Met in order to establish what internal evaluation had taken place, if any, with regard to DVDS effectiveness. I received a response from the Met on 7<sup>th</sup> April 2020. The Met explained the following in their summary of their evaluation: "We analysed 59 cases where a Clare's Law disclosure was issued over 6 months ago. The crime recording system was searched for reports in which the same victim in each case was a victim, and for any reports where the same perpetrator within the disclosure was involved as a suspect."

Of 59 disclosures in the sample used by the Met for their internal study, where there had been offending in a relationship in the last six months prior to a disclosure, 29 relationships between victims and perpetrator saw no further recorded offending in six months after a disclosure, while 12 had not seen any recorded offending in the prior six months nor the following six months. So this makes 41 relationships with no offending for 6 months (69%) following a disclosure. However, of 59 disclosures in the sample, there were 18 relationships where violence was known to continue post-disclosure. So there was a 31% minimum victimisation rate for the sample in 6 months, based on data available to the Met (when there might have been abuse not reported to them, of course).

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<sup>418</sup> From Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 'Cleveland Police: Crime Data Integrity inspection 2018' (HMICFRS, 7 August 2018) <<https://www.justiceinspectors.gov.uk/hmicfrs/publications/cleveland-police-crime-data-integrity-inspection-2018>> accessed 29 June 2020.

Unfortunately, a significant limitation to this evaluation by the Met is the lack of a comparator group, where no disclosure was decided upon following an application to the DVDS - whereas the Cleveland self-evaluation did use this comparison<sup>419</sup>.

#### 6.4 Suggestions from reported court cases that the DVDS is 'victim-blaming'

At the time of writing, the DVDS has yet to be challenged as an entire Scheme in the courts of England and Wales, but there are small case studies that can be observed concerning Clare's Law as drawn from two case law reports on care orders and child protection in the Family Court. In *KU, DB* (2017)<sup>420</sup>, the DVDS was used to proactively disclose information to a pregnant woman and victim of violence perpetrated by the child's father (DB). It transpires that this

"history was shared with KU, via Clare's Law, at an early stage in the pre-birth assessment in order that she could make informed choices regarding her relationship with him and demonstrate whether she could prioritise the needs of her child... [but it] subsequently became apparent that both parents withheld information in the pre-birth assessment process and did not share information regarding the extensive history of physical abuse which is now known".<sup>421</sup>

Even assuming we accept the idea (that a victim can be empowered by information to make informed choices) as a legitimate means of viewing victims, *KU, DB* is some evidence of a situation of a (pregnant) vulnerable potential victim then not only unable to act purposively in response to a disclosure, but deciding or being scared or coerced into refraining from sharing with police or social services the abusive nature of her relationship. Disclosure in this example can be seen to do little or nothing to preclude the 'victim vulnerability' - but is evidence of the way that a disclosure may achieve nothing *due to the vulnerability of a victim*. As for the use by a family courts judge of the 'informed choice' mantra concerning the Scheme, as Patrick O'Connor QC might note,

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<sup>419</sup> HMICFRS inspection reports from 2019 have shown that two police forces in England are now purportedly undertaking their own force-level evaluations of their use of the DVDS, but there is little detail (yet) in the public domain about these. See HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Nottinghamshire Police* (2019) <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-nottinghamshire.pdf>> accessed 16 June 2020, 18; and HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of West Midlands Police* (2019) <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-west-midlands.pdf>> accessed 16 June 2020, 15.

<sup>420</sup> *Tameside Metropolitan Borough Council v KU, DB and another* [2017] 8 WLUK 71.

<sup>421</sup> *Op cit* at 8.

this is perhaps evidence of the way that a neo-liberal philosophy has suffused our society - allowing individual responsibility to be unfairly loaded upon the less fortunate.

O'Connor has written that:

"The central fiction behind the deep penetration of neo-liberal economic theory into our national life is that of the free agent, who makes fully informed and "rational choices" in the marketplace. Everything is a "deal". Everyone is a customer, even school pupils and court users."<sup>422</sup>

Presumably as a result O'Connor would despair of the way KU is highlighted as being at fault, despite being the victim in her case. In Alberta, Canada, Professor Jennifer Koshan has observed that:

"On the plus side, it could be very positive for women to have access to that information that can help them to make decisions about leaving a potentially violent partner. But they need to have strong support systems in place because there's lots of evidence that violence actually increases at the time of separation. **I worry about the unintended consequences for women who perhaps get information about a partner who is violent but then still decide to stay with that person** — for financial dependency reasons in some instances. My concern is that if they don't act the way that society expects them to act, when they get access to this information, then they may then face adverse consequences when they try and use the justice system for other things."<sup>423</sup> [Emphasis added.]

In a second case involving Clare's Law in its background context, *LW, NW* (2018)<sup>424</sup>, a mother of children who were subject to care orders was advised to seek information about the details of a 24-years-old conviction for rape possessed by her new partner (and which she had already learned the gist of, from him), but did not do so. As the court acknowledged (at 55): "...the mother chose not to make a Clare's Law application to find out anything more about the details of his offence." This of course shows that a potential applicant may avoid drawing on the DVDS even when given very good reason to do so - and also that social workers and probation officers either did not seek a Right to Know disclosure in these circumstances, or, potentially, were not successful in demonstrating a 'pressing need' for disclosure to the police if they did indeed seek a Right to Know disclosure.

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<sup>422</sup> Patrick O'Connor QC, 'Neo-liberalism and human rights', E.H.R.L.R. 6 (2018) 541, 542.

<sup>423</sup> Canadian Bar Association, 'Q&A with Jennifer Koshan' (*CBA National*, 20<sup>th</sup> April 2020) <<https://www.nationalmagazine.ca/en-ca/articles/people/q-a/2020/qa-with-jennifer-koshan>> accessed 29 June 2020.

<sup>424</sup> *Northumberland County Council v LW, NW The Children* [2018] 2 WLUK 586 at 55-57.

The notion that probation officers may sometimes fail to seek a Right to Know disclosure to a victim by the police, even where one may then result in a disclosure, is substantiated by a September 2018 inspection report by HM Inspectorate of Probation. This report found that probation officers employed by Community Rehabilitation Companies, and therefore working with the majority of probationers convicted of domestic violence offences, "generally... did not understand the obligations and opportunities this legislation [sic] brings to help provide immediate protection to victims"<sup>425</sup>.

### 6.5 The lessons of a domestic homicide review

The statutory Domestic Homicide Review report on the failings of agencies in Norfolk concerning the January 2017 murder of Kerri McAuley (known as 'April' in the report) makes the recommendation that "...a national evaluation of Clare's Law [should be] commissioned to assess its use and effectiveness in protecting victims"<sup>426</sup>. But this Domestic Homicide Review is suffused with what could be the erroneous assumption that if only a decision to disclose can be made under the DVDS or another DADS, then a victim will not come to harm. This is at least somewhat false, and in several ways, given the difficulties some victims will face in then trying to leave violent or abusive partners; the risk of violence they may face if they do leave, and so forth. In the bigger picture, it does seem that *merely* making disclosures of offenders' histories of violence will not in and of themselves keep victims safe from abusers. The Cleveland police 'case study' detailed above seems to support this, as does the headline figure of at least 45% of disclosure recipients going on to be abused by the person they were warned about, as derived from my own FOI request research, and discussed elsewhere in this thesis. At this juncture, it is worthwhile exploring a number of the factors that might be complicating DADS disclosure processes in terms of their overall effectiveness as a criminal justice policy.

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<sup>425</sup> HM Inspectorate of Probation, *Domestic Abuse: The work undertaken by Community Rehabilitation Companies (CRCs)* (September 2018) 31.

<sup>426</sup> Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017* (May 2018) 68.

*i) 'Risk displacement' issues*

Killed by her boyfriend (an obsessive stalker-type personality with a history of convictions for violence against women), Kerri McAuley was the victim of murder after the 'displacement' of the risk the perpetrator posed - from one woman, and on to Kerri. The DHR report notes: "A pro-active disclosure about the danger he presented to potential partners had been given to a previous woman he was believed to be embarking upon a relationship with."<sup>427</sup> It follows that if she had 'properly' acted on a disclosure under the DVDS, then Kerri would have made herself safer in ending a relationship, but yet another (third) woman in a chain, without proper management of this dangerous offender, could simply have been put at risk, if another disclosure was made without something changing in relation to the risk-based offender management of Joe Storey, the killer concerned.

*ii) Communication issues*

Communicating with, and ultimately convincing a potential victim who is reluctant to involve the police in their relationship space may be very difficult; and in this case "...the police attempted to inform April of the full extent of the perpetrator's offending history but were unsuccessful."<sup>428</sup>

In relation to 'April' (Kerri) the DHR report notes:

"In this case, Norfolk Constabulary decided, after [an attack against April] that an application under Right to Know should be made. At the multi-agency panel meeting, it was agreed that a disclosure to April would be lawful and proportionate and the application was approved... The officer who was authorised to make the disclosure spoke to April on the phone and explained about Clare's Law and why he needed to see her. It was agreed that she would come to the police station but did not attend. Following more phone calls, another appointment was made and again she did not attend. The officer then visited her at her home to make the disclosure, but she would not let the officer in. Of course, we cannot know for certain that the perpetrator was not in the flat at this point. The officer

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<sup>427</sup> Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017* (May 2018) 8.

<sup>428</sup> *Ibid*, 9.

phoned April on a number of times following this, but she did not answer the calls or respond to the messages left for her."<sup>429</sup>

iii) *Fragmentation of knowledge*<sup>430</sup> issues

In actual fact, a victim of domestic violence may already know all too well what a perpetrator is capable of. So too might their friends and family. In relation to Kerri/'April', the DHR report observes that:

"In November 2016, despite [a] restraining order, the perpetrator and April went to Rome. Whilst at their hotel he threatened and assaulted her again. She was so scared that she escaped the hotel running into street intent on escaping him. She was found by refuse collectors upset and scared. They flagged down, and paid for, a taxi who took her to the airport. When she got to the airport the airline staff realised that she needed help and got her on the next flight home. By this time the perpetrator was after her and had begun calling her mother asking where she was and was chasing her to the airport. The airline staff refused to let him board the same plane. Her family describe the panic and rush they had to get to the airport to collect her before the perpetrator arrived on the next plane. She told her family that it really was the end and that she had no intention of ever seeing him again. None of this was reported to the authorities."<sup>431</sup>

Indeed, it is "known that at least one friend told April about the perpetrator's assaults on past girlfriends when learning of their relationship."<sup>432</sup>

iv) *Poor timing of disclosures*

Disclosures under a DADS may well be more effective if they are made earlier in a (potentially) abusive relationship. The DHR report considers that: "...an application under Clare's Law would have been appropriate in January 2016 when the police first knew that the perpetrator was in a relationship with April. We obviously cannot be sure what her reaction would have been if a disclosure had been attempted then, but it is

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<sup>429</sup> Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017* (May 2018), 34.

<sup>430</sup> Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world'', 54 (1) (2001) *Current Legal Problems* 103, 107.

<sup>431</sup> Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017* (May 2018) 34.

<sup>432</sup> *Ibid*, 8.

possible that she may have been more open to this earlier in the relationship before his control on her became stronger."<sup>433</sup>

However, police intelligence practices may well be too poor, at least in some forces, to allow this development of a routine practice of exploring opportunities to disclose information early on in an abusive relationship. As the DHR report notes:

"It is evident that the police were not routinely updating intelligence about the relationships involving repeat perpetrators of domestic abuse... It is recommended that Norfolk Police reviews the way in which intelligence and information about the relationships of known repeat perpetrators is analysed and acted upon. It is further recommended at, as a matter of course, when intelligence or information is received about a known perpetrator being in another relationship an application under the DVDS is always and automatically made."<sup>434</sup>

Christine Graham, the DHR report author, is essentially urging Norfolk Constabulary to tackle the wider issue of their 'fragmentation of knowledge' (as Julia Black would put it<sup>435</sup>) about repeat perpetrators of domestic abuse. While this is a sound and salient recommendation, this would be a great challenge for any police force during a time of resources pressure due to austerity.

*v) Responsibilising the family of a victim?*

The DVDS has been accused of unfairly 'responsibilising' victims in receipt of disclosures. A recommendation made in the report that family members are included in the definition of possible recipients of disclosures is also problematic for that reason. In the DHR it is observed that:

"No information has been provided about whether, when April did not engage with the officer trying to make the disclosure, consideration was given to making the disclosure to her family. If they had understood the danger that the perpetrator posed to April, they may have been in a position to help her to break free from him. A disclosure to a third party, in these circumstances, would rely upon full consideration of a number of additional factors such as the application of the data protection principles, the Human Rights Act and wider considerations such as the

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<sup>433</sup> Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017* (May 2018), 36.

<sup>434</sup> *Ibid*, 36.

<sup>435</sup> Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world'', 54 (1) (2001) *Current Legal Problems* 103, 107.



potential for inappropriate community action such as vigilantism. It remains the view of the police that disclosure to a third-party in this case would not be lawful given that April was able to make 'informed choices'.<sup>436</sup> [Emphasis added.]

I do not seek to engage in 'victim's-family blaming', but it is quite clear that in 'April's' case, Kerri's family did in fact know that her eventual murderer posed a threat to her, following the incidents in relation to their stay in Rome, described above. Kerri's assurances, no doubt heartfelt, that she would no longer continue to see the perpetrator concerned could have assuaged their fears for her at the time.

Overall, a review of the national operation of the DVDS in England and Wales, with the aim of establishing its effectiveness, would be a laudable project, and one the research for this thesis would support. But as highlighted in this Chapter section, above, there are themes identifiable from the DHR report, and relating to the murder of Kerri McAuley, that at least raise wider questions of issues with the DVDS by a possible role for extending disclosures to the family of a victim, if not raising even more fundamental issues as to the overall usefulness and efficacy of the Scheme itself.

#### 6.6. Building a picture of a problem? An FOI request about 'early-wave' recipients

In May 2018, the author sent an FOI request to each of the 43 police forces in England Wales. The request asked each force to identify how many of the first 20 recipients of their DVDS disclosures after the 8<sup>th</sup> March 2014 had been victimised, i) by the person they were *at that time* in a relationship with, and thus the subject of the disclosure, and ii) by any other person in that time - therefore over potentially more than four years for some of the victims concerned. In 2014, under Scheme guidance at the time, disclosures under the DVDS could only be made in respect of a potential perpetrator with whom an applicant was in an intimate relationship. This position was revised by the current (December 2016) Home Office guidance on the Scheme to include both current and former partners as a subject to an application/disclosure<sup>437</sup>. These 'early wave' recipients

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<sup>436</sup> Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017* (May 2018), 35.

<sup>437</sup> The then Independent Police Complaints Commission (IPCC) made a recommendation to the Home Office in February 2016, following a death of a woman in Sussex at the hands of a former partner, and namely that the DVDS should apply to former partners as well as current partners as the possible subjects of valid disclosures. See Independent Office for Police Conduct, 'National recommendation - The Home Office, February 2016' - 2015/052671, 7<sup>th</sup> January 2018 <<https://policeconduct.gov.uk/recommendations/national-recommendation-home-office-february-2016>> accessed 19 June 2020.

therefore could be said to have had the greatest risk of being victimised by the subject of a disclosure, and represent the group of recipients whose experience following disclosure is most crucial to understand or to picture.

Responses were received by the author concerning outcomes for the first 20 disclosure recipients for 26 forces in England and Wales, entailing the creation of a 'sample' of 520 individuals for the key question as to the likelihood that a recipient of a disclosure goes on to be victimised by the very person they were warned about. Many forces which replied to the request for information cited the 'costs exemption' under the Freedom of Information Act 2000 - entailing that requests which would take more than 18 hours to process (at more than a notional cost of £450) can be rejected - resulting in 26 of the 43 forces in England and Wales making a response to the first half of my request. In relation to the slightly smaller sample of 500 people in respect of the question on whether recipients had been victimised by someone other than their partner at the time a disclosure was made, Suffolk Constabulary were unable to retrieve information on whether the 20 individuals concerned were victimised by a person other than the subject of a disclosure within the necessary costs limits of £450 to deal with the FOI request - but were able to supply the information in relation to the number of individuals victimised by the subject of the disclosure concerned.

It can be assumed that in reality these FOI response figures are a *minimum* rate of victimisation for the 'early wave' cohort of recipients of disclosures across c.2014-15; due to potential issues of data quality/poor practices in crime recording by forces<sup>438</sup>, as well as the obvious risk of the under-reporting of domestic violence offences by victims themselves. Forces could also only likely report on the victimisation of the 20 identified individuals as reported on their own local IT systems and databases, and if relevant, having searched on relevant national systems and databases - but such information would be inaccessible in all likelihood if this was retained only on the local systems and databases of another force in England and Wales. And crucially, the under-reporting or non-reporting of victims of harms arising from domestic violence and abuse is staggering. The Office of National Statistics have observed that:

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<sup>438</sup> See for example Caelainn Barr, 'Thousands of rape reports inaccurately recorded by police' (*The Guardian*, 19<sup>th</sup> September 2019) < <https://www.theguardian.com/society/2019/sep/19/thousands-of-reports-inaccurately-recorded-by-police>> accessed 29 June 2020.

"Estimates based on those interviewed in the Crime Survey for England and Wales during the year ending March 2015 showed that around 4 in 5 victims (79%) of partner abuse did not report the abuse to the police. The data held by the police can, therefore, only provide a partial picture of the level of intimate violence experienced in England and Wales."<sup>439</sup>

The year ending March 2015 is the period of time in which the sample of 530 disclosure recipients, described above, would have been receiving their DVDS disclosures - and so this ONS observation further supports the idea that the figure of a 45% victimisation rate in this sample, shown below, is in fact higher, in truth, due to under-reporting of victimisation to the police in the force areas concerned.

<i>Table 5 - FOI data on 20 disclosure recipients per force, c.2014</i>	<b>Number of recipients of disclosures who were victimised by the subject of the disclosure in c.4 years</b>	<b>Number of recipients of disclosures who were victimised by a perpetrator other than the subject of the disclosure in c.4 years</b>
<b>Total reports of victimisation:</b>	<b>234</b>	<b>139</b>
From a sample of:	520	500
% victimisation	<b>45.0%</b>	<b>27.8%</b>

The key statistic here is that 45% of disclosure recipients in my sample were recorded as victimised, post-disclosure, by their partners at the time of the disclosure, across a period of circa four years since the disclosure concerned. This raises a number of quandaries even if it could be assumed to be accurate (which given the chronic issue of non-reporting of harms by victims it very likely is not). Plainly, for one thing, it calls to mind the possibility that victims - in a four-year period - might face a fluctuating level of risk in relation to a fluid relationship status and dynamic with a perpetrator - as staying in a

<sup>439</sup> Office for National Statistics, *Domestic abuse in England and Wales, year ending March 2017*, 23<sup>rd</sup> (November 2017)  
<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017> accessed 19 June 2020

relationship need not guarantee certain, immediate harm - and that ending a relationship does not entail an automatic cessation of risk. Indeed, as Jane Wangmann has observed:

"...the DVDS continues the dichotomous understanding of women's responses to domestic violence as either staying or leaving. This fails to appreciate the multiplicity of ways in which women may respond to a disclosure (for example, monitoring or managing their partner's behaviour, negotiating with him or ending the relationship)."<sup>440</sup>

In terms of individual approaches by forces to handling the freedom-of-information request concerned, Essex Police returned a particularly interesting response, with added levels of detail I had not requested. 13 out of the first 20 individuals to receive disclosures under the DVDS in Essex were victimised by their partner at that time, in the period since c. 2014. But more usefully, and troublingly, the Essex response illustrates very well different instances of *dual victimisation* (with 6 of 20 individuals perpetrated against by both their partner at the time of the disclosure *and* by a third-party since the disclosure); *sole victimisation* (with 7 of 20 only victimised by their partner at the time of the disclosure); *displaced victimisation* (with 4 of 20 only victimised by a third-party since the disclosure) and *no victimisation* (3 out of 20). It is perhaps this sort of troubling picture which means the two-year pilot of a DVDS in New South Wales, discussed in Chapter 5, above, was unsurprisingly unable give any real conclusion as to its effectiveness.

### 6.7 Chapter conclusions

There is mixed evidence available in the public domain as to the overall effectiveness of the DVDS at preventing domestic abuse arising through the bringing to an end of a risky relationship, or the empowerment of victims through the ability to increase their knowledge of their partners abusive past. Before my freedom of information-based research was conducted for this thesis, not a single study had been undertaken to quantify an estimate of the substantive *effectiveness* of this Scheme. Pilot evaluations in England and Wales, Scotland and New South Wales have been, so far, procedural in their nature.

This chapter has presented the findings from two waves of FOI requests to police forces in England and Wales in mid-2018, which show i) that the rate of victimisation of

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<sup>440</sup> Jane Wangmann, 'Has he been violent before? Domestic violence disclosure schemes', *Alternative Law Journal* 41(4) (2016) 230, 232.

individual recipients of disclosures under the DVDS, and by the very person they were warned against as the subject of a disclosure, could very well be at least 45%, and perhaps more than half over a four-year period, and ii) that all but Cleveland Constabulary, of the 43 police forces of England and Wales had failed, by mid-2018, to undertake a review of the substantive effectiveness of the DVDS that they themselves have operated and promoted. This situation should however change over time, as the Metropolitan Police case study shows, above. This self-regulation by forces is to be welcomed, even it is to be on a disparate basis, from force to force.

Police forces in England and Wales should undertake an exercise to establish whether the disclosures they have made under the DVDS in the last 12 months have had an effect; entailing checking to see if recipients have reported victimisation by the subjects of the disclosures concerned. This should be a requirement placed on the 43 forces in England and Wales by the relevant regulator(s), either the Home Office and/or HMICFRS - and a similar evaluation should be carried out in relation to the DADS in Scotland and Northern Ireland by the forces in those regions. This programme of evaluations would partly remedy, when a composite was built of all the findings from these forces, the regulatory failing inherent in poor evaluation of the Scheme(s) to date. In this way, forces and regulators can begin to evaluate whether recent disclosures under the DVDS in England and Wales have been having a positive impact on the safety and empowerment of victims; or whether more needs to be done by the force to establish how 'Clare's Law' disclosures can be managed and made effectively in conjunction with other preventive measures aimed at tackling domestic abuse.

At this juncture in the thesis we have seen the incremental analysis of Domestic Abuse Disclosure Schemes build across the analysis of issues concerning policy choices that were 'baked in' to the original DVDS in England and Wales, and which may heighten victim vulnerability; and analysis of issues concerning the rapid growth of the adoption and use of DADS both in the UK and in other common law jurisdictions, in such a way that shows a mixed report for the level or proper regulatory responsibility toward the development of such Schemes. The next Chapter, Chapter 7, aims to unpick a number of problems in the 'regulatory space' for Domestic Abuse Disclosure Schemes, specifically in the UK context.

## **7. The challenges of operating DADS in a complex 'regulatory space'**

### 7.1 Chapter Introduction

This Chapter considers the concept of 'regulatory space', examines regulatory problems with the UK DADS, and identifies and outlines a group of nine key regulatory problems with the deployment of Domestic Abuse Disclosure Schemes (DADS, or Disclosure Schemes) in the UK today. These DADS are the comparative policies of the Domestic Violence Disclosure Scheme (DVDS) in England and Wales, the Disclosure Scheme for Domestic Abuse (Scotland) (DSDAS), and the Domestic Violence and Abuse Disclosure Scheme (DVADS) in Northern Ireland. By taking a step back and outward to look at the regulation of the 'bigger picture' around DADS, this Chapter allows the thesis to use regulatory theory in detail, and in order to attain new theoretical insights into the operation of the DADS and their place in the general public service architecture of the prevention of domestic violence in UK criminal justice governance today. A further aim of this Chapter is to highlight that as much as the DADS are concerned with the regulation of (the prevention of) domestic violence in a particular manner, it is also about the regulation of potential victims of domestic violence. The nine regulatory problems that this thesis identifies play out across different granular tiers of regulation of DADS - at micro-level (amongst police forces); at meso-level (at a national level amongst police inspectorates and government departments) and at macro-level (dealing with supranational policy and legal frameworks). These divisions of the regulation of DADS are explored below.

Regulatory theory plays a considerable and distinct part in the incremental analysis of the Scheme that is presented in this thesis. A principle of regulatory 'responsibility' emerges from the regulatory lens that this Chapter of the thesis applies to the DVDS, and there are particular conclusions and findings according to the application of regulatory theory to the Scheme that this theme of 'responsibility' in public policy, law and regulatory literature can be connected with. Part of the original contribution to knowledge of this thesis is the novel application of regulatory theory to the nature of DADS as items of policy, underpinned by the common law for the most part, and sometimes more instrumental, formal legal regulation. This Chapter grounds that element of the original contribution to knowledge made by this thesis in the wider perspective offered by the concept of 'regulatory space'; to which the next section of this Chapter now turns.

## 7.2 The concept of 'regulatory space'

As was noted in Chapter 3, the prevention of domestic violence in intimate relationships is, conceptually speaking, a prominent and highly complex 'regulatory space'<sup>441</sup>. The intimacy of a relationship does not preclude, however, given the 'politics of public protection', the increasing interventionism by the state over time into this private sphere<sup>442</sup>. This is because, in part, with the prevention of domestic violence as with all questions of balancing public protection concerns with the perceived limits of state power, there are "no obvious limits of boundaries to regulation"<sup>443</sup>. It is normally seen, in the public protection field, that the UK 'super-regulator' that is Parliament will use its lawmaking sovereignty to set the overall framework for a public protection issue to be regulated. Then there is meso-level regulation carried out by Secretaries of State and their central government departments in issuing guidance underpinned by statute for local policy actors to follow, in turn, in dealing with public protection issues at the micro-regulatory, even case-by-case, level. Media, civil society and the electorate then play a systemic, interrelating role in shaping the priorities of all three tiers of regulatory actor outlined here. As Hancher and Moran have explained, and as mentioned above: "...understanding changes in the notion of what issues should be [regulated] demands attention to the shifting balance of power within and between institutional actors inside the common regulatory sphere."<sup>444</sup>

This Chapter takes as a starting assumption the idea of the DVDS as a policy intervention into a regulatory space. That is, the policing of domestic violence - and in particular, responding to the risk posed to victims in potentially or currently abusive relationships, where there is some track record of abuse in the past of one partner. The DVDS is also a recent example of a newly-made 'regulatory space', in and of itself. The DVDS inserts itself into the relationship/regulatory space between two individuals, who are in or who have been in an intimate relationship with each other, and hitherto unoccupied by the

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<sup>441</sup> See L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998).

<sup>442</sup> See Mike Nash, 'The politics of public protection', in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willan 2010).

<sup>443</sup> L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998) 154.

<sup>444</sup> *Ibid.*

police as a (potential) actor in quite the same manner. Violent relationships have been subject to other forms of regulation under the law as it has developed for some time. These include legal remedies such as non-molestation orders, or the relatively new Domestic Violence Protection Notices and Orders (DVPNs and DVPOs), which came into national operation in March 2014, like the DVDS in England and Wales - although DVPNs and DVPOs benefited from being founded in new statute law, in terms of regulatory control, and clarity of purpose in a public policy sense.

The concept of regulatory space is comprised of a number of key facets or dimensions. As Hancher and Moran have outlined:

"The concept of regulatory space is an analytical construct... First, precisely because it is a space it is available for occupation. Secondly, because it is a space it can be divided unevenly between actors: there could, in other words, be major and minor participants in the regulatory process. Thirdly, just as we can identify a general concept of regulatory space in operation in a particular community we can also speak of specific concepts of regulatory space at work in individual sectors... Fourthly... boundaries which demarcate regulatory space are defined in turn by a range of issues, so it is sensible to speak of regulatory space as encompassing a range of regulatory issues in a community."<sup>445</sup>

When it comes to measuring who are both the major and minor participants in the regulatory space that is a DADS, on a micro-level, it is plain that this varies according to whether one considers the Right to Ask or the Right to Know. In terms of the Right to Ask, the police and an applicant under the Scheme are the relevant principal actors. But in terms of the Right to Know, another public protection-oriented agency, such as a local authority, that itself makes an application to the police under the Scheme then suddenly becomes a key policy actor at that micro-level regulation of the relationship/regulatory space, with regard to one possibly abusive relationship. Furthermore, again with the Right to Know strand of a DADS, the (possible) victim of domestic violence is then arguably relegated to the category, in a sense, of being a secondary actor in the regulatory space of the Scheme at a micro-level - and in a sense is only afforded the same share of the space *always* occupied by the *subject* of a potential disclosure. Thus sometimes, as with the subjects of disclosures, victims can be treated, regardless of whether we mean under the Right to Know or Right to Ask variant of the Scheme, as only a manageable risk of harm.

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<sup>445</sup> L. Hancher and M. Moran, 'Organizing Regulatory Space', in R. Baldwin, C. Scott and C. Hood (eds), *A Reader on Regulation* (OUP 1998) 153.



Different actors will see the regulatory space of the DVDS differently, depending on their policy priorities and regulatory roles. Police would approach a DADS application as an exercise in determining whether a disclosure should be made as an aid to crime prevention (i.e. the prevention of domestic violence). However, other professionals such as probation officers or social workers might see the disclosure of information by the police, responsible for the end of a violent relationship, as something which may, however, generate a different type of public protection work. In this example, the follow-on regulatory challenge is also with regard to the effects on the ongoing rehabilitation of an offender, since, for example, there is evidence to show that the breakdown of a relationship will precipitate offending on the part of a violent (ex-)partner, as noted by Duggan<sup>446</sup>.

The operation of the DVDS is a micro-level *interventionary* regulatory space in and of itself - as disclosures are first considered and then possibly made by the police in an attempt to preclude domestic violence from arising in a relationship between two people. But the DVDS also operates in a wider, meso-level *directive* regulatory space - namely efforts by the police, the Home Office and other policy actors to attempt to prevent domestic violence through a number of other means, taken as a whole. Above those first two regulatory spaces sits a macro-level and *supervisory* regulatory space: of the courts and of Parliament, who ultimately delineate the interventionary and directive regulatory spaces that between them create, sustain and apply the Scheme as a creature of public protection policy. (There is a supranational dimension to the macro-level regulation of a public protection or information disclosure issue, of course. As later Chapters will address in detail, European human rights law and European Union data protection law have played a contextual role in shaping the ambit and operation of DADS in the UK, for example. Later Chapters will make the case that European legal norms should be brought much more centrally into the detail of the guidance on the DVDS in England and Wales, with regard to the ECHR in particular.

However, there is an argument to be made that the Scheme can be viewed as an under-regulated space. On the micro-level, much discretion is afforded the police in interpreting

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<sup>446</sup> Marian Duggan, 'Idealising' domestic violence victims', in Marian Duggan, 'Idealising' domestic violence victims', in M. Duggan (ed), *Revisiting the Ideal Victim: Developments in Critical Victimology* (Policy Press 2018) Pre-print version  
<[https://www.academia.edu/37019884/Idealising\\_Domestic\\_Violence\\_Victims](https://www.academia.edu/37019884/Idealising_Domestic_Violence_Victims)> accessed 16 July 2020.

the existence of the 'pressing need' that is a legal requisite for a disclosure under the Scheme. The Scheme could be said to be an under-regulated space on the meso-level, since little if any clear direction has been given to police forces, to date, by the Home Office or other policy actors, such as HMICFRS, as to how the Scheme should be aligned with the best interests of children (discussed in Chapter 9), or operated with a conscious regard to the human rights of victims of domestic violence (discussed in Chapter 8), or with a view to the experience of domestic violence when it comes to specific issues relating to the ethnicity or sexuality of victims, for example. Finally, at the macro-level, the Scheme could be said to be under-regulated since it remains a creature of policy and ultimately of the common law in terms of its doctrinal underpinnings - whereas many interventions in the realm of the prevention of domestic violence are statutory in nature, with new interventions set to be created on a statutory basis even at the time of writing, in the Domestic Abuse Bill (currently before Parliament at the time of writing in September 2020). The courts have consistently afforded the police an ambit of discretion in local policy-making, but this Chapter must consider whether the approach to the regulation of the Scheme, to date, represents an under-regulation of a policy space. This is part of a thorough analysis, in this Chapter, of the regulatory responsibility shared across an array of policy actors for the operation of the Scheme.

As well as the issue of potential under-regulation of the DADS as regulatory spaces, is the problem that arises from the very nature of the tiered system of regulation at micro-, meso- and macro-levels, when examined from the perspective of literature on 'multi-level governance'. As Bache and Flinders explain:

"It is important to appreciate that not all relationships are channelled hierarchically in terms of passing through every tier of governance. In reality, it is increasingly common for sub-national actors and supra-national actors to communicate directly without working through the national level. This challenges the gatekeeping capacity of national executives."<sup>447</sup>

Hooghe and Marks characterise a less-hierarchical, alternative model of multi-level governance as being recognised by 'task-specific jurisdictions', with an 'intersecting membership', across 'many jurisdictional levels', and with a 'flexible design', and give a name to the governance arrangements that can be categorised in this way: 'Type II

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<sup>447</sup> Ian Bache and Matthew Flinders, 'Multi-level governance and the study of the British state', *Public Policy and Administration* 19(1) (2004) 31, 37.

Governance<sup>448</sup>. Type II Governance is then an apt description for the Domestic Violence Disclosure Scheme, and indeed, for all of the Domestic Abuse Disclosure Schemes (DADS) discussed in this thesis. They are a 'task-specific jurisdiction', with their sole focus the prevention of domestic abuse and violence through the disclosure of criminal histories information; while possessing 'intersecting memberships', as in policy terms DADS are always 'multi-agency' in operation, or at least in intent according to the guidance that regulates them. DADS operate across 'many jurisdictional levels' since they are often conceived of by central or state governments, regulated by national and supranational legal norms, and yet implemented 'on the ground' by local or regional police organisations. By and large DADS (particularly in the UK) are operated on the basis of flexible common law powers, or perhaps a flexible interpretation of implied statutory powers.

The complexities of multi-level governance for Domestic Abuse Disclosure Schemes become a number of distinct regulatory problems. Before this chapter begins to sketch the nine regulatory problems that are a concern in relation to DADS and in particular the DVDS, it is first useful to consider the 'grammar' of the analytical construct that is regulatory space. Briefly, an initial overview must be given of the relationship between law and regulation as tools of the multi-level governance described here.

### 7.3 The status of law within bodies of regulation

There is academic debate, as Julia Black has recorded<sup>449</sup>, over the extent to which positivist law and concepts of regulation overlap. On the one hand is the notion that regulation is subservient to statist, centralist law (where "'regulation' is 'less than law' in that it is a simply a species of the genus 'law'"<sup>450</sup>). On the other is the notion that black-letter law, as well as 'soft law', are all together a method of regulatory governance, where "law is simply a technique or instrument that may or may not be involved, in the practice

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<sup>448</sup> Liesbet Hooghe and Gary Marks, 'Unraveling the central state, but how? Types of multi-level governance', *American Political Science Review* 97(2) (2003) 233, 237-238.

<sup>449</sup> Julia Black, 'Critical reflections on regulation', *Austl. J. Leg. Phil.* 27 (2002) 1, 30.

<sup>450</sup> *Ibid.*

of regulation"<sup>451</sup>. This thesis subscribes to the notion that the law is an instrument which is heavily involved in, but not entirely representative of, regulatory approaches by government to preventing domestic violence. The development and operation of the Domestic Violence Disclosure Scheme is just one approach by government, as utilised by the UK criminal justice system, in purporting to prevent the most harmful offences from across the spectrum of domestic violence.

The DVDS is not a legal innovation, but a policy and regulatory innovation based on previously-existing laws. As such, it is not possible for this thesis to be advanced on the basis that regulation is 'less than law'; instead this is a thesis put forward on the understanding that "law is simply a technique or instrument that may or may not be involved, in the practice of regulation"<sup>452</sup>. Regardless of the exact extent to which law plays a role in regulation, regulation can be said to have a common model to its form and shape or process. Andrew Sanders has noted that:

"Regulation has three elements: the goal (the rule or standard against which behaviour is to be compared and contrasted); monitoring (to monitor or evaluate what happens in pursuance of the goal); and realignment (a mechanism for enforcing rules where monitoring shows significant deviation from them)."<sup>453</sup>

The DVDS is a policy with a *goal* of the regulation of the prevention of domestic violence, in a particular manner, namely by regulating the behaviour of (potential) victims of domestic violence and by regulating the disclosure of information about offenders, as relevant. The DVDS is *monitored* in its operation by different bodies in a hierarchical manner; chiefly the Home Office and Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS). Both of these bodies have shown themselves, in terms of *realignment* and as discussed in Chapters 2 and 3, above, to be 'realigning' the Scheme in a piecemeal fashion, where disparate approaches to police practice and hard-to-define legal tests for disclosure are concerned.

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<sup>451</sup> Julia Black, 'Critical reflections on regulation', *Austl. J. Leg. Phil.* 27 (2002) 1, 30

<sup>452</sup> *Ibid.*

<sup>453</sup> Andrew Sanders, 'Can Coercive Powers be Effectively Controlled or Regulated?', in Edward Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Bloomsbury 2008) 49. Sanders was drawing on Adam Crawford, 'Networked governance and the post-regulatory state? Steering, rowing and anchoring the provision of policing and security', *Theoretical criminology* 10(4) (2006) 449.

The DVDS can be readily said to be an example of structural regulation of policing behaviour, too. For Andrew Sanders, in the policing context, structural regulation stresses:

"the broader social structures which shape police behaviour, and argue that legal rules are in harmony with those structures. An example would be the control of street demonstrations and protest. The control of public order has been at the heart of the police mandate ever since the establishment of the first professional English police forces in the nineteenth century, and for some time before that. The legal rules have always allowed the police great latitude to control order, and they continue to evolve in this way. They allow the police to arrest in huge numbers and then de-arrest without any formalities, because arrest is simply a way of exerting control, with prosecution rarely being the objective, regardless of whether any criminal laws have been broken."<sup>454</sup>

In the same way, the DVDS is an item of structural regulation of the prevention of domestic violence; there might not be 'huge numbers' of applications and disclosures under the Scheme, per capita, but the Scheme gives the police the regulatory mandate to enlist victims in the regulation of the prevention of domestic violence, and so aid them in their mission to maintain order. Such 'regulatory pluralism' has the involvement of third parties (here, victims themselves) as commonplace<sup>455</sup>.

#### 7.4 Broader concepts from regulatory theory

Aside from regulatory pluralism, key concepts of regulatory theory that are useful to this thesis, and which are given an initial overview here in this Chapter, are: regulatory 'formalism'; regulatory 'polycentricity' versus 'decentredness'; regulatory 'responsiveness', and regulatory 'hybridity'. This Chapter now proceeds to introduce a key observation that can be made about the Scheme: that the DVDS operates, *prima facie*, on the basis of legal, rules-based, *formal* regulation - but that this is to overlook the significance of its nature as a decentred, responsive and hybrid regulatory initiative. An initial task is to explore the nature of the Scheme as both simultaneously rules-based and principles-based, as explained below.

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<sup>454</sup> Andrew Sanders, 'Can Coercive Powers be Effectively Controlled or Regulated?', in Edward Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Bloomsbury 2008) 49.

<sup>455</sup> *Ibid*, 50.

If we want to examine *prima facie* how the Domestic Violence Disclosure Scheme operates in practice as a government policy, we might start with the 'rulebook' for the Scheme: the Home Office-published guidance. This guidance is a mixture of rules (which are worded more strictly) and principles (which are worded in the guidance in a way that is still formal but more advisory). In its first two iterations (of three to date), for example, the guidance referred to the non-applicability of the Scheme to records of offences which are spent under the Rehabilitation of Offenders Act 1974<sup>456</sup>. This precise legal stance on the application of the 1974 Act was then abandoned in the third, current version of the guidance. The Home Office had in the interim received some legal opinion or guidance of some kind on the issue - but will not say what or from whom<sup>457</sup> - which led them to abandon their first policy stance and the relevant rule on this issue in the guidance itself. The result is that spent convictions, according to the guidance, can now be disclosed by the police under the Scheme if other legal conditions are met and it is proportionate to do so (this issue is explored in more detail in Chapter 8).

But some of the legal rules that are explained in the guidance as applicable as constraints around the operation of the Scheme are more 'principles-based'; such as data protection law, and relevant strands of the ECHR; or proportionality itself as a standard to be observed in making disclosures. Proportionality is referred to as a principle in case law - and often as a principle with several working parts<sup>458</sup>. However, any difficulties in adjudging and applying disclosure 'tests' (such as exactly what constitutes a 'pressing need' for disclosure) that arise from the nature of the Scheme as common law-based, however, are not explored, advised upon, or even at all anticipated, in the Scheme guidance.

As we have seen from Chapter 3 of this thesis onwards, the common law basis of the Scheme was an eventual policy choice by government, and the author of the Scheme guidance was not tasked with considering the ramifications of this choice, but merely

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<sup>456</sup> See Jamie Grace, 'The nature of spent convictions and the common law basis of the Domestic Violence Disclosure Scheme: Limiting the effectiveness of Clare's Law?', (2015) 21(2) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/401/517>> accessed 16 July 2020.

<sup>457</sup> A freedom-of-information request I made to the Home Office about this matter was refused; then the appeal I then made to the Information Commissioner's Office about this refusal was also rejected.

<sup>458</sup> See for example the exposition given by Gross LJ in *Beghal v Director of Public Prosecutions* [2013] EWHC 2573 (Admin) at para. 100

putting it into practice. As a result, there is not much detail on certain common law standards and thresholds (chiefly, the 'pressing need' test for disclosures) which the Scheme relies upon, to a great extent, for its lawful operation. This focus on pragmatism, and the arguable neglect of emphasis on process in policymaking around the Scheme, is not new, or unique to the Scheme of course. As Sethi explains:

"Principles and rules are omnipresent; they feature within every aspect of our lives. From a regulatory perspective, they are indispensable tools through which behaviour can be regulated. A plethora of legislative provisions and guiding principles are perpetually thrust upon us from legislators, professional bodies, and organisations attempting to govern the ways in which we live. When new regulations are introduced, whether in the form of principles and/or rules, what is most often the topic of analysis is the content which they carry rather than consideration of their appropriateness as regulatory mechanisms for achieving a desired end."<sup>459</sup>

Viewed from the perspective of a potential applicant drawing on their 'Right to Ask' under the Home Office guidance, the Domestic Violence Disclosure Scheme is a 'regulatory mechanism' purportedly in the purview of the police alone. Yet in reality the prominence, use and interconnected nature of the Scheme as a policy innovation in the area of offender management, as well as public protection or victim-safeguarding, is something that impacts upon the work of other agencies and regulatory bodies aside from police organisational structures (see Figure 2 below). This raises considerable questions over the extent to which the operation of the Scheme aligns with notions of 'regulatory formalism'.

The notion that the state should have overall responsibility to strategise, to create policy and to *regulate* in order to prevent and reduce levels of domestic violence, or to regulate to affect any societal behaviour, is characteristic of what Braithwaite would model as an aspect of 'regulatory formalism'<sup>460</sup>. In general, and in the context of this thesis, state actors are more senior actors in a hierarchical formalist regulatory structure. State actors have a greater ability to influence and direct other agencies or actors in a regulatory system. State actors are also senior in the particular context of the operation of the

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<sup>459</sup> Nayha Sethi, 'Reimagining regulatory approaches: On the essential role of principles in health research regulation' 12(2) (2015) *SCRIPTed* 92.

<sup>460</sup> See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002).

Domestic Violence Disclosure Scheme (with the Scheme as only one potential means of preventing domestic violence). State actors rely on the *hierarchical* nature of relevant regulatory systems to exert their influence. As Garland has highlighted, in the context of UK policing:

"The notion that a single sovereign power could govern all social life was enhanced in the mid-nineteenth century by the creation of a strong state apparatus, and in particular, by the development of a public police force which came to be regarded, however inaccurately, as having a professional monopoly over the function of crime control."<sup>461</sup>

While on a superficial level the 'professional monopoly' over the operation of the Scheme is possessed by the 43 different police forces in England Wales today, in reality the control and regulation of the Scheme is a more nuanced issue - not least because, as we will see in more detail, below, (potential) victims of domestic violence are involved in the operation and regulation of the Scheme. But in the sense of an alternative theoretical model of regulation to that of measuring the degree of regulatory *formalism* present as a quality of the Scheme, there is another scale upon which the Scheme also clearly falls: *responsive regulation*. As an alternative theoretical model to regulatory formalism, and with respect to the nature of what is termed *responsive* regulation, Braithwaite has explained that responsive regulation "is about the idea that regulation is more likely to be just and effective when it is contextually responsive to environments, social and physical, particularly to how regulated actors are responding to attempts to regulate them."<sup>462</sup> Thus 'responsive regulation' is regulation which is attuned and recognisant to the need to involve an actor in their own self-regulation<sup>463</sup>. The DVDS is a form of 'responsive regulation' and is one manner of preventing domestic violence, at the level of an individual, potential victim of domestic violence; to whom a disclosure about a 'risky' partner may be made. The recipient of that information is thereby encouraged to manage their own relationship with that 'risky' person; perhaps to leave them or end the relationship in some manner, or to otherwise attempt to reduce their own vulnerability or

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<sup>461</sup> David Garland, 'The limits of the Sovereign state strategies of crime control in contemporary society', *British Journal of Criminology* 36(4) (1996) 445, 448.

<sup>462</sup> John Braithwaite, 'Limits on Violence; Limits on Responsive Regulatory Theory', *Law & Policy* 36(4) (2014) 432, 432.

<sup>463</sup> See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002).



likelihood of victimisation somehow. In this way the Scheme might be thought of as 'responsibilising' victims in a manner that is a gamble with victims' vulnerabilities. If this 'responsive regulation' of the prevention of the domestic violence through the responsabilisation of potential victims as an aspect of the Scheme seems somewhat inappropriate, it is perhaps because the prevention of crime or the deterrence of offenders is most commonly seen as the purview of the state. Figure 2, below, shows the mapping of regulatory responsibilities between institutions and agencies, as well as the individual actors of victims and offenders, with regard to the DVDS in England and Wales.

### 7.5 Applying wider regulatory concepts in an analysis of DADS 'regulatory space'

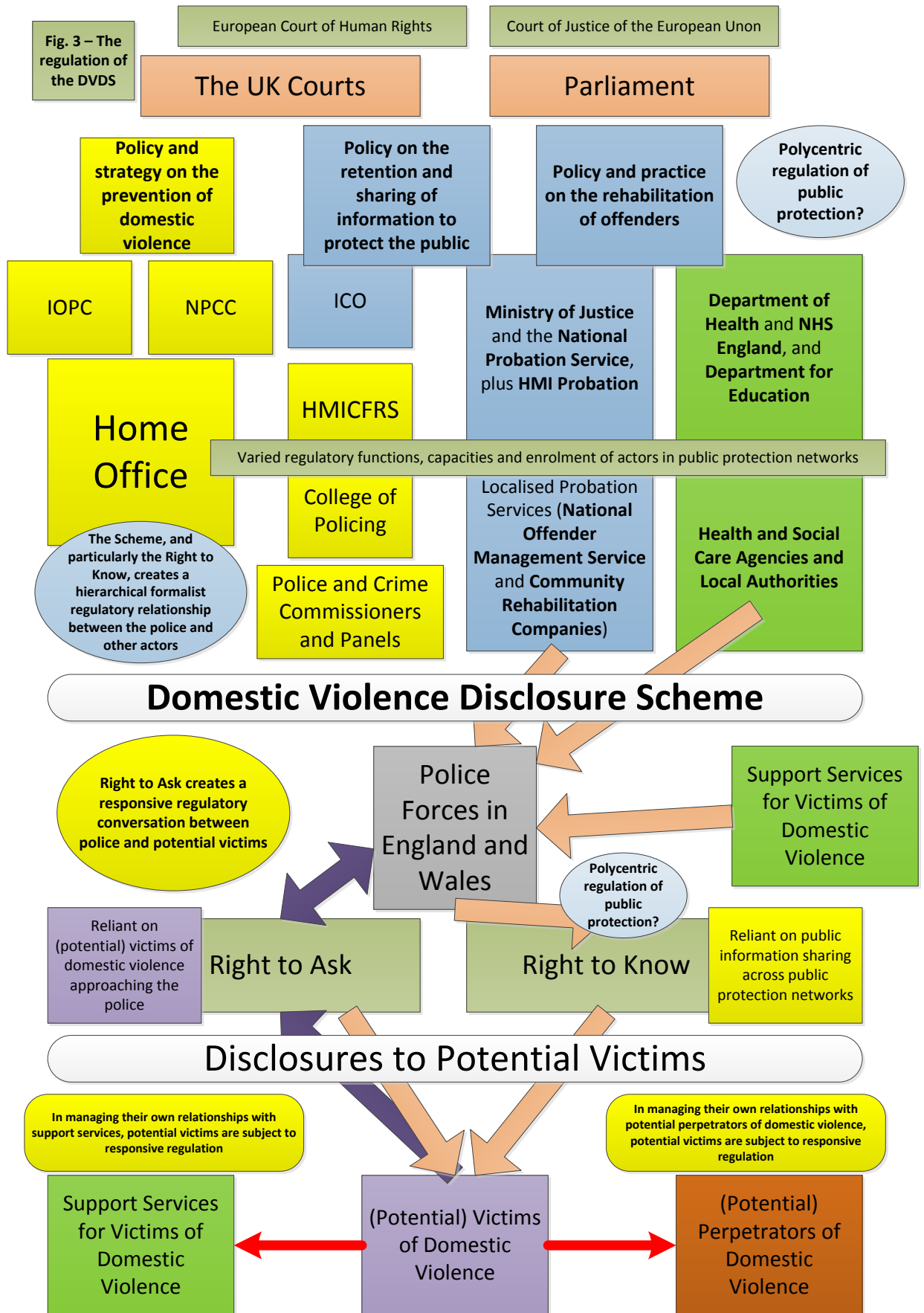
There are of course a number of other regulatory concepts which can be briefly discussed here, and in more detail in relation to the Scheme in the next section of this Chapter, beginning with *regulatory hybridity*. Regulatory 'hybridity' indicates that a *private* body or person (or bodies, and people) are introduced or 'enrolled' into a regulatory system otherwise comprised of public-sector 'actors'. This 'hybrid regulation' is more commonplace in UK criminal justice than in the past, but UK criminal justice has overall been slower as a sector to embrace this culture of regulation and governance. However, private-sector involvement is now a practical reality in UK criminal justice, with the privatisation agendas fully underway in relation to operating police station custody suites<sup>464</sup>, managing prison populations<sup>465</sup>, and supervising offenders in the community<sup>466</sup>. However, regulatory hybridity only adds to the conceptual complexity in an attempt to model the Scheme according to qualities of hierarchical, decentred and polycentric regulation. Nonetheless, it must be recognised that for much of the operation of the DVDS in England and Wales, to date, private bodies, in the form of Community Rehabilitation Companies, have been delivering probation services and will have made considerable contributions to the growing numbers of Right to Know applications made to police forces each year since 2014.

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<sup>464</sup> See for example, on the first privatisation of police custody facilities in the UK in 2012; BBC Lincolnshire, 'Private security firm G4S to run Lincolnshire police station' (*BBC News*, 22<sup>nd</sup> February 2012) <<http://www.bbc.co.uk/news/uk-england-lincolnshire-17119617> > accessed 27 August 2015

<sup>465</sup> See for example, on G4S losing the contract to manage the Wolds prison; Chris Poyner, 'Prison privatisation should be a national scandal', *The Guardian*, 8<sup>th</sup> November 2012.

<sup>466</sup> Jamie Grierson, 'Probation services to return to public control after Grayling disasters' (*The Guardian*, 11<sup>th</sup> June 2020) < <https://www.theguardian.com/society/2020/jun/11/probation-services-to-return-to-public-control-after-grayling-disasters> > accessed 17 July 2020.



The operation of the Domestic Violence Disclosure Scheme is conducted chiefly by the police in the UK, but it is situated within the purview of a number of regulatory agencies with the 'polycentric' regulation of the criminal justice system. Bodies responsible for the oversight of the broader policy aim of the prevention of domestic violence (which the Scheme aligns with) include HMICFRS, the National Police Chiefs' Council (NPCC), the College of Policing, Police and Crime Commissioners and their Police and Crime Panels, as well as, most importantly, the Home Office and Ministry of Justice as key central government departments. These bodies are very much oriented in their work toward particular national strategies such as 'preventing violence against women and girls'<sup>467</sup>.

The operation of the Scheme cuts across the different regulatory capacities of a number of regulatory actors in the criminal justice system, and their regulatory functions in pursuing stated policy objectives; such as the reduction of violence against women and girls (in the case of the Home Office, for example). This occurs in a way that does require in certain instances the application of policy in terms of the management of police information and intelligence, for example<sup>468</sup>. This is an example of 'decentred' or 'polycentric' regulation of policy and practice (in the use of information and intelligence sharing toward the prevention of domestic violence), in effect.

'Polycentric regulation' and 'decentred regulation' are drawn upon here as concepts from work by Black<sup>469</sup>. These concepts support the idea that the Domestic Violence Disclosure Scheme, particularly through the Right to Know strand, is best understood as something that potentially engages large swathes of the criminal justice system. The Scheme may also involve even broader portions of the public protection 'landscape' in its impacts; also involving health and social care agencies and actors. For example, as McCarthy, Hunt and Milne-Skillman have observed in relation to the potential protection of women with learning disabilities from domestic violence:

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<sup>467</sup> The Home Office maintains an online collection of its policies on the prevention of violence against women and girls <<https://www.gov.uk/government/policies/violence-against-women-and-girls>> accessed 29 June 2020.

<sup>468</sup> The national 'picture' of the management of police information and intelligence is something which HMIC have previously inspected, and found wanting at the time. See HMIC, *Building the picture* (Her Majesty's Inspectorate of Constabulary 2015).

<sup>469</sup> See Julia Black, 'Tensions in the regulatory state', P.L. (2007) 58.

"Healthcare and social care professionals have a role in making women with learning disabilities aware of relevant laws and how to invoke them... knowledge of the Domestic Violence Disclosure Scheme... could be very useful to women with learning disabilities entering new relationships and who are worried about their partners behaviour. However, they are likely to need help to understand the process of applying for disclosure, as well as the rights and responsibilities attached to it."<sup>470</sup>

Given the observations of McCarthy, Hunt and Milne-Skillman here, we can see that the creation of the Scheme has presented both an opportunity and a challenge for professionals working outside of the criminal justice system but still connected with the 'politics of public protection'<sup>471</sup>. Just from this one example alone we can see that the Scheme is operated on a 'decentred' basis on the 'frontline' of safeguarding work.

The DVDS is a 'decentred' regulatory approach, rather than an example of *true* regulatory 'polycentrism', because there is no 'de-apexing' of the Domestic Violence Disclosure Scheme. This is because there is still a sole 'apex' (or chief) regulatory actor, as the Home Office clearly write and publish the Scheme guidance. The Home Office are also the chief strategy owners of government work within the criminal justice system to prevent 'violence against women and girls' and other forms of domestic abuse. On the other hand, 'public protection', a broader policy concept than the prevention of domestic violence, is a much more complex 'polycentric' area of regulation - since 'public protection' includes issues such as the management and supervision of all offenders in the community (and not just serial domestic violence perpetrators), or the protection of children in schools, or the safeguarding of vulnerable adults in hospitals, for example - the domains of the Ministry of Justice, the Department of Education and the Department of Health, at the least.

The business of public protection is played out in this way not just between different police organisations, but probation agencies, prison authorities, local authorities, educational establishments (in primary, secondary, further and higher education sectors), as well as National Health Service bodies, central government departments, and so on. These sorts of bodies and agencies all have a distinct political and professional interest in

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<sup>470</sup> Michelle McCarthy, Siobhan Hunt, and Karen Milne-Skillman, 'I know it was every week, but I can't be sure if it was every day': Domestic violence and women with learning disabilities', *Journal of Applied Research in Intellectual Disabilities* 30(2) (2017) 269, 279.

<sup>471</sup> Mike Nash, 'The politics of public protection', in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willan 2010).

crime prevention through the most accurate, effective and prompt sharing of 'criminality information'<sup>472</sup> or public protection risk information. The crimes to be prevented are chiefly viewed, as a more pressing priority, as those potential sexual or violent crimes against the person<sup>473</sup>. In the 'public protection routine' this crime prevention is typically the result of the minimisation or the outright avoidance of vulnerable children and adults coming into inappropriate contact with 'risky' individuals. This process of information sharing-driven efforts to prevent sexual or violent crimes is commonly known as child or adult 'safeguarding'<sup>474</sup>. There are thus, given the wider array of settings where criminality information sharing can facilitate better-informed decision-making in relation to such 'safeguarding' issues, a very considerable number of different contexts and purposes within which that criminality information sharing becomes crucial<sup>475</sup>.

Criminality information sharing can take the form of disclosures by the police and other public protection agencies to members of the public who are at risk of harm themselves, or to parents of child at risk of harm, or to employers, whose places of business might be the potential site of criminal offences by particular 'risky' individuals<sup>476</sup>. This mixture of different strategies for crime prevention based on the disclosure of criminality information includes the Domestic Violence Disclosure Scheme<sup>477</sup>.

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<sup>472</sup> See Jamie Grace, 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK', *International Journal of Law, Crime and Justice* 41 (2013) 303.

<sup>473</sup> Rachel Robbins, Hugh McLaughlin, Concetta Banks, Claire Bellamy and Debbie Thackray, 'Domestic violence and multi-agency risk assessment conferences (MARACs): a scoping review', *The Journal of Adult Protection*, 16(6) (2014) 389; and Home Office, *Multi-Agency Working and Information Sharing Project: Final Report* (Home Office 2014).

<sup>474</sup> Emma Stevens, 'Safeguarding vulnerable adults: exploring the challenges to best practice across multi-agency settings', *The Journal of Adult Protection* (2013) 15(2) 85.

<sup>475</sup> Rachel Robbins, Hugh McLaughlin, Concetta Banks, Claire Bellamy and Debbie Thackray, 'Domestic violence and multi-agency risk assessment conferences (MARACs): a scoping review', *The Journal of Adult Protection*, 16(6) (2014) 389; and Home Office, *Multi-Agency Working and Information Sharing Project: Final Report* (Home Office 2014).

<sup>476</sup> Elena Larrauri Pijoan, 'Criminal record disclosure and the right to privacy', *Crim. L.R.* (2014) 10, 723.

<sup>477</sup> Most of the case law concerning the disclosure of criminality information stems from judicial review claims concerned with employment vetting contexts. For a representative overview of the development, across the last decade, of case law principles on issues around the proportionality of employment vetting-type criminality information sharing, see the *obiter* comments of Blake J in *R (G) Chief Constable of Surrey Police* [2016] EWHC 295 (Admin) at 14.

The careful balance between, on the one hand, public protection, and the protection of the rights and wellbeing of the vulnerable and the at-risk; and on the other hand the protection of the rights of and indeed, proportionate privacy protection for 'risky' individuals, requires a careful and complex 'polycentric' regulatory arrangement for each and every one of the methods or avenues of criminality information sharing and disclosure. As Keehan J highlighted in both *Birmingham City Council v SK* [2016] EWHC 310 (Fam) and *Birmingham City Council v Riaz and others* [2014] EWHC 4247 (Fam), multi-agency (or here, 'polycentric') regulation of public protection work requires careful and detailed collaborative work between police and local authority agencies, in the area of child protection, for example. Sometimes this work-around development of protocols and 'soft' regulation arises because of policy inconsistencies. *SK* was a case concerned with the nature of 'inherent jurisdiction' injunctions (of a type now known as '*Riaz* orders'), which aim to prevent the 'grooming' of vulnerable children, and which are sought by local authorities in the family courts: since only *police* bodies could apply, at the time of the *SK* and *Riaz* cases, for Sexual Risk Orders in magistrates' courts, under the Sexual Offences Act 2003, as amended.

#### 7.6 The 'regulation of self-regulation' by victims

To summarise the key points made by this Chapter so far, while the DVDS itself is a form of decentred regulation in the area of the prevention of domestic violence, the involvement of other regulatory structures in the wider criminal justice system entails that public protection is a polycentric regulatory exercise. For example, the hierarchical, capacity of the Ministry of Justice, and the regulatory functions of MoJ-subordinate bodies in the probation field (such as the National Offender Management Service, NOMS), entail that the management of serial domestic violence perpetrators in the community is a multi-agency, and polycentric, regulatory exercise. This is because the police (subordinate to the Home Office) are also responsible for certain managing individual interventions to prevent offending under statutory multi-agency public protection arrangements (MAPPAs) created under the Criminal Justice Act 2003.

The 'responsive' regulatory nature of the Scheme, that is, the manner in which the regulation of the prevention of domestic violence via the Scheme, is undertaken through the regulatory 'enrolment' of a chief protagonist; namely, the (potential) victim of that domestic violence. According to the model and theory of the *responsive* regulatory

pyramid<sup>478</sup> then the uptake and the use of the Domestic Violence Disclosure Scheme should be, at least in theory, one of the most common, if not the most common, triggers for state actor involvement in the context of preventing domestic violence, at least that committed by serial domestic violence perpetrators. This is because the Scheme is always at least partly about 'responsive' regulation and the involvement of (potential) victims in their own self-regulation. As Braithwaite has noted:

"The regulatory pyramid is an aspect of responsive regulation that designs a mix of regulatory options by arraying them hierarchically, with the least interventionist options intended to be the most common at the base of the pyramid."<sup>479</sup>

Earlier in this Chapter some examples of 'regulatory hybridity' were offered up to demonstrate what is becoming the increasingly common involvement of private-body actors in the operation and regulation of criminal justice in the UK. However, the involvement of corporate, private bodies in the regulation of elements of the criminal justice system, and even expecting them to self-regulate, is very different to the manner in which the Domestic Violence Disclosure Scheme operates with a degree of regulatory hybridity.

By placing the onus on victims and potential victims of domestic violence to regulate themselves (that is, to minimise the risk of coming to harm through domestic violence themselves, through exercising more informed choice over their personal relationships once a relevant disclosure by the police is made to them), the Scheme is clearly an exercise in 'self-regulation' for those victims or potential victims. In this way the Scheme is an example of what Black has referred to as the 'new challenge' of 'regulation of self-regulation'<sup>480</sup>, as well as, more plainly and controversially, what can be referred to as questionable victim responsabilisation<sup>481</sup>. Less controversial in this sense than the operation of the DVDS, and to be welcomed, are the results of the three-year piloting of the 'Drive' programme, which focused on issues of *offender* self-regulation, but which

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<sup>478</sup> See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002).

<sup>479</sup> John Braithwaite, 'Limits on Violence; Limits on Responsive Regulatory Theory', *Law & Policy* 36(4) (2014) 432, 432.

<sup>480</sup> Julia Black, 'Decentering regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world'', *Current Legal Problems* 54(1) (2001) 103, 104.

<sup>481</sup> Marian Duggan, 'Using Victims' Voices to Prevent Violence Against Women: A Critique', *British Journal of Community Justice* (2012) 10(2) 25.

focused on intensive interventions to assist serial domestic violence perpetrators change their offending behaviour<sup>482</sup>.

'Self-regulation' of course also has a certain meaning in an emotional or psychological sense, as reflected in a distinct body of academic literature; it can be seen in that sense as an explicably emotional or rational failure to manage one's own risk more carefully following a disclosure by the police; and can as such also be termed self-'underregulation'<sup>483</sup>. The self-underregulation by potential victims of domestic violence, who do not themselves act upon police disclosures to preclude any risk to them from escalating, in turn, present a regulatory challenge for the police and other agencies in public protection 'networks' to resolve.

The 'responsive regulatory conversation' of the Scheme is understandably something which might be seen as evidence of empowerment for the potential victims of domestic violence, and disclosures of information by the police certainly make victims as self-regulators better aware of potential risks posed to them. But there is a difficulty in seeing the Scheme as enhancing 'informed choices' for potential victims. This could be if, for example, through deciding upon *non-action* ('not leaving him', stereotypically) as the response to a disclosure by the police under the Scheme, a mother is automatically subject to more intense scrutiny or investigation by the social services department of a local authority because of a perceived increased risk to her children. In Chapter 6, I highlighted traces of this by-product of operating the DVDS in England and Wales when presenting two case studies on 'Clare's Law' from reported care order cases. And as Nicole Westmarland has observed, 'In multi-agency meetings I have attended, there seems an almost automatic referral to Children's Services if women with children decide not to leave their partner after being told about his violent past'<sup>484</sup>.

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<sup>482</sup> See Hannah Bows, 'Will changing the focus from victim to perpetrator end domestic violence?' (*The Conversation*, 1 March 2016) <<http://theconversation.com/will-changing-the-focus-from-victim-to-perpetrator-end-domestic-violence-55206>> accessed 18 July 2020; and Danny Shaw, 'Domestic violence prevention work 'should focus on offenders'' (BBC News, 21<sup>st</sup> January 2020) <<https://www.bbc.co.uk/news/uk-51177628>> accessed 18 July 2020.

<sup>483</sup> See Roy F. Baumeister and Todd F. Heatherton, 'Self-regulation failure: An overview', *Psychological Inquiry* 7(1) (1996) 1.

<sup>484</sup> Nicole Westmarland, *Violence Against Women: Criminological perspectives on men's violence* (Routledge 2015) 27.



## 7.7 The role of HMICFRS in the regulatory arrangements for the DVDS

Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS) have wholly bought into the notion that with a greater rate of disclosures, the more likely it is that 'members of the public can make more informed choices about potentially dangerous future partners.'<sup>485</sup> HMICFRS have not fully considered the criticism that the DVDS is 'victim-blaming' of course, in their force level PEEL ('Police effectiveness, efficiency and legitimacy') reports, or the problems of the knowledge gaps in local information systems on offenders, which seriously undermine the operation of the DVDS. Nor have HMICFRS considered the connected issues of the under-reporting of domestic violence, the difficulties some vulnerable victims will have in leaving the partners, or the inflation of risk this might cause, in any event. Instead, the force level focus in HMICFRS PEEL reports has tended to be upon the extent of the use of legal powers, including the power to make DVDS disclosures. As Inspectors, they are cheerleaders, not investigators.

In November 2017, HMICFRS continued in their criticism of forces' overall use of powers that can be used to prevent domestic violence, in the view of the Inspectorate, since:

"Nationally, arrest rates for domestic abuse are falling, with large variations across forces. There are considerable variations in the use of preventative measures. Forces need monitoring processes, supported by accurate data, to ensure that they are taking positive action such as arrest, and are making effective use of powers, for example Domestic Violence Protection Orders and the Domestic Violence Disclosure Scheme. Where orders or bail conditions are breached, forces need to ensure that there are appropriately robust processes in place to take action."<sup>486</sup>

HMICFRS found in their round of inspections that forces did not engage victims well enough to make full possible use of the Scheme, observing that:

"During the focus groups we carried out with victims, it was clear that very few had heard about Clare's Law. Data collected as part of the HMICFRS inspection shows that, despite increases in the number of domestic abuse related crimes

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<sup>485</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2016 - An inspection of Northamptonshire Police* <<https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-northamptonshire.pdf>> accessed 26 June 2020, 37.

<sup>486</sup> HMICFRS, *A progress report on the police response to domestic abuse* (November 2017) <<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/progress-report-on-the-police-response-to-domestic-abuse.pdf>> accessed 29 June 2020, 13.

recorded, the frequency of use of both Right to Ask and Right to Know per 100 domestic abuse-related crimes has decreased across many forces. Forces need to raise awareness of this safeguarding method and ensure that victims are linked into specialist domestic abuse organisations who can provide additional support and advice. If people do not know about Clare's Law, then the numbers of requests to know whether a partner has a violent past will not increase."<sup>487</sup>

This problem with lower-than-ideal levels engagement with victims over the use of the Scheme was linked by HMICFRS to a second problem, in the form of the inconsistent use of the DVDS over a national picture in England and Wales, concluding that:

"...the variation of use of 'Right to Know' and 'Right to Ask' across forces is extremely wide... For example, Suffolk processes nearly four times as many 'Right to Know' as 'Right to Ask' applications per head of population. In Northumbria, the situation is reversed with over five times as many 'Right to Ask' applications being made."<sup>488</sup>

There were qualitative problems found in the processes of deliberating, and in making disclosures under the auspices of the Scheme. In the terms put by HMICFRS:

"We found unacceptable delays regarding the use of Clare's Law in one force. In some 'Right to Know' cases, we were made aware of lengthy delays before the disclosure was made. The disclosure period in these cases, which are generally directly linked to a domestic abuse incident, should be as short as possible, as it often forms part of the safeguarding plan for the victim. We found information being disclosed to the victim some months after the original decision to disclose had been made. Many of these cases are high-risk and include cases where children are present in the family home. Opportunities are being missed to provide better support and protection to victims."<sup>489</sup>

Finally, officer engagement with the Scheme was thought to be key, and was highlighted as an important issue in the final analysis of HMICFRS, who found that:

"It is disappointing that despite an increase in the number of recorded domestic abuse related crimes, there does not appear to have been a corresponding increase in the use of Clare's Law. It is important that both members of the public and officers are aware of the scheme's purpose and the application process. Both

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<sup>487</sup> HMICFRS, *A progress report on the police response to domestic abuse* (November 2017) <<https://www.justiceinspectrates.gov.uk/hmicfrs/wp-content/uploads/progress-report-on-the-police-response-to-domestic-abuse.pdf>> accessed 29 June 2020, 39.

<sup>488</sup> *Ibid.*

<sup>489</sup> *Ibid.*

external and internal force communications and awareness-raising activity are crucial here."<sup>490</sup>

Officer engagement with DADS may be a struggle, in the view of a regulator like HMICFRS that is concerned with frontline actor awareness of a policy dimension which in institutional terms is complex, and outside of the main business of police work, or even the main public protection element of police work. But certainly as an issue or opportunity for policymakers at national or federal state/devolved government levels in common law jurisdictions, the idea of a Domestic Abuse Disclosure Scheme as a potential new addition to any stable of public protection measure is proving attractive. It is possible to give a theoretical account of the means by which a policy idea, even one with its criticisms and which has never been rigorously evaluated, may spread; perhaps because of the political capital to be won by a 'director' agency like a central government department (like the Home Office) keen to be seen throwing the proverbial kitchen sink at a blight on society such as domestic violence. The Department of Justice in one jurisdiction will face the public protection challenges, and associated political problems and pressures faced by any other, and so the 'mimetic isomorphism'<sup>491</sup> entailed in adopting an unevaluated but attractive-looking policy initiative from another jurisdiction may be hard to resist. And the junior partners in any arrangement within that jurisdiction (including mid-level regulators such as an Inspectorate of Constabulary, or any number of regional police forces themselves) will struggle to resist evolving national policy, in any hierarchical regulatory arrangement; thus producing a 'coercive isomorphism' in relation to the 'regulatory space' that defines a quickly-spreading policy notion such as Domestic Abuse Disclosure Schemes. However, overly-hasty 'coercive isomorphism' could produce what Paul Cairney would describe as 'uninformed' policy transfer: "when the borrowing country has incomplete information about the crucial elements that made the policy a success in the lending country"<sup>492</sup>. If the policy concerned was in fact not a success in its original jurisdiction, however, this can result in Cairney's 'inappropriate transfer': "when

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<sup>490</sup> HMICFRS, *A progress report on the police response to domestic abuse* (November 2017) <<https://www.justiceinspectrates.gov.uk/hmicfrs/wp-content/uploads/progress-report-on-the-police-response-to-domestic-abuse.pdf>> accessed 29 June 2020, 40.

<sup>491</sup> Simon Halliday, 'The governance of compliance with public law', P.L. (2013) 312, 319.

<sup>492</sup> Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2012) 259.

not enough attention is paid to adaptation or the differences in policy conditions, structures and aims of the lending country"<sup>493</sup>.

It may well be that the difficulties with officer engagement with the DVDS in England and Wales, that HMICFRS has observed in some forces, may well stem from a lack of 'normative isomorphism'<sup>494</sup> in relation to the Scheme; with perhaps some frontline officers unable to accept the mantra of disclosures under 'Clare's Law' as something that can empower a potential victim of domestic violence to make 'informed choices' about their own safeguarding: it must be difficult to be optimistic about this purported aspect of the DVDS when one has professional experience of the struggles that victims of an abusive or controlling relationship may often face to re-acquire a sense of autonomy and empowerment.

At this juncture it is appropriate to catalogue a thorough set of the regulatory problems in existence across different tiers of the multi-level governance of the DADS in the UK, as have come to light through the application of the regulatory tools explored up to this point in this Chapter, as well as the policy analyses of previous chapters.

### 7.8 Nine regulatory problems concerning the operation of DADS in the UK

There are nine regulatory problems which amount, between them, as to why Domestic Abuse Disclosure Schemes in the UK today may be a poor series of criminal justice policy developments, in the 'regulatory spaces' of domestic violence prevention, whether at 'micro-levels', 'meso-levels' or 'macro-levels' of that public protection regulatory space. In this Chapter section, a 'regulatory problem' is taken to mean a breach of the standards of sound and appropriate regulation, in a judgment informed by the regulatory literature surveyed by the earlier sections of this Chapter. Overall, the argument is built in this section of this Chapter that there has been a failure of *regulatory responsibility* on the part of national government when it comes to DADS in the UK today.

The nine regulatory problems highlighted in this Chapter can be characterised in many ways as problems stemming from under-regulation, and are broken down into three groups, each with three problems. The three groupings of problems each focus at regulation at a particular level of the 'regulatory space' that is a Disclosure Scheme.

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<sup>493</sup> Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2012) 259.

<sup>494</sup> Simon Halliday, 'The governance of compliance with public law', P.L. (2013) 312, 319.

### *Regulatory problems at the micro-level of the DADS*

Firstly, there is a considerable problem, at the micro-level of the regulation of the DADS, and the micro-regulation of abusive relationships that is a Disclosure Scheme, when it comes to the issues of 'fragmentation of knowledge' concerned<sup>495</sup>. Police organisations may not know of all the risk-related information it is possible to know about an individual, potential offender and domestic violence perpetrator. As Fitz-Gibbon and Walklate have observed:

"A key impediment to the effectiveness of Clare's Law lies in the hidden nature of domestic violence. Both elements of the Scheme [rely] on the accuracy of information contained in the Police National Computer (PNC), available to all police forces carrying details of convictions, bail conditions, custodial history, pending prosecutions, cautions, driving records, reprimands formal warnings among other details..."<sup>496</sup>

As Duggan has put it:

"The DVDS is predicated on preventing future victimisation (the abuse of the new partner) through a reliance on the commission of a previous crime and existing victim, thus in order for future criminality to be prevented it must have been committed (and recorded) for the necessary information to exist."<sup>497</sup>

This gives rise to the regulatory problem of the 'false negative', from a public protection perspective - where the police wrongly but rationally conclude an individual situation does not warrant a disclosure under the rules of the DADS concerned, given the information that is known at that time. The capacity and ability of the police to disclose only what they know (as part of Julia Black's 'fragmentation of knowledge', discussed earlier), as Duggan and Grace have concluded, entails that the framework for DADS in the UK today:

"...fundamentally overlooks the abuser who has hitherto escaped detection. These are the 'false negatives' that result in a *non-disclosure* under the Scheme following a 'right to ask' application. Just because there is no relevant information for the police to disclose does not mean a person's fears are unfounded; therefore, care should be taken not to create a false sense of security for individuals who may in

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<sup>495</sup> Julia Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory world', *Current Legal Problems* 54(1) (2001) 103, 107.

<sup>496</sup> Kate Fitz-Gibbon and Sandra Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales', *Criminology & Criminal Justice* (2017) 17(3) 284, 291.

<sup>497</sup> Marian Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' (2018) 24(2) 199, 213.

fact be at future risk of domestic abuse. While the Scheme guidance has noted that efforts should be made to indicate this to applicants, it is a pressing concern for those tasked with implementing this policy. It is also an indication that initiatives such as the Scheme must clearly form part of a wider package of adequately resourced, effective measures that are designed to address and reduce domestic violence victimisation. Without these, the Scheme risks potentially exacerbating a victim's likelihood of suffering harm as a result of seeking help."<sup>498</sup>

At the same time, albeit as less of a public protection concern, there is the issue of 'false positives', where the police rationally but unhelpfully make a disclosure about a risky individual under the Scheme, to their partner, when in truth that individual does not then go on to offend against that partner, or any other partner. 'False negatives' put the rights and wellbeing of victims at risk. For example, the Queensland Law Reform Commission, in concluding that a DVDS for Queensland was not to be recommended, noted that a key theme of their consultation were the "safety concerns arising from inaccurate disclosure or non-disclosure, which might give rise to a false sense of safety" on the part of potential or future victims.<sup>499</sup>. As well as these issue, it should also be noted that the 'false positives' described put the privacy rights of reformed or reforming offenders at risk.

The second problem at the micro-regulatory level of DADS is the disparity in the outcome of applications under the two strands of each DADS in operation in the UK today, expressed as a rate of disclosures vs. applications for disclosures; and the rate of applications and disclosures per capita by police force area. Disparities in the operation of DADS in the UK have rendered the application of 'Clare's Law' by police forces a 'postcode lottery' and a serious regulatory concern, therefore. There is no obvious benchmark to be sought for the rate of applications per capita, and no obvious standard by which the rate of disclosures versus potential disclosures should be judged. I have previously noted that:

"... while the usage of the DVDS is clearly increasing nationally, the disclosure decision-making process is clearly operating on a very different basis from force to force. Recently released statistics show that there must be a great variation in the application of the 'pressing need' test for disclosure. Disclosure rates across forces in England and Wales in the year ending 31<sup>st</sup> March 2017, in relation to the Right to Know, varied greatly, ranging from 97.8% in Cumbria, down to 3.2% in

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<sup>498</sup> M. Duggan & J. Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145, 165-166.

<sup>499</sup> See Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme: Report*, Report no. 75 (2017), iii.

Kent. Disclosure rates for Right to Ask applications also varied greatly, ranging from 76% resulting in disclosures in Cumbria, down to 6.7% resulting in disclosures in Northumbria."<sup>500</sup>

In November 2018, however, the BBC revealed, following a series of their own freedom-of-information requests, that there are issues with forces not recording disclosure decision-making in a standardised way. BBC journalist Francesca Williams specifically cited Cumbria police, with their high disclosure rates as reported by the ONS, as a force acknowledging their own exclusion of 'mischief-making' applications, and applications for which there was nothing to disclose about a subject, from the data returned to the Home Office and the ONS about the DVDS<sup>501</sup>. Other forces would presumably not take this approach, resulting in lower disclosure rates overall in that case. However, it should also be noted that ONS data on the DVDS in the year to March 2019, reported publically in November 2019, still saw some outlier forces reporting extremely high disclosure rates - so perhaps little has been done by the Home Office or the ONS as regulator to check this poor consistency in data reporting, if indeed this is an issue.

The third problem at the micro-regulatory level of DADS in the UK today is the qualitatively different practices that occur with regard to the operation of DADS at force level, as revealed by inspection reports and policy overviews from police monitoring bodies, and as explored in earlier work in this thesis. As Duggan and Grace have highlighted<sup>502</sup>, the police inspectorate have been urging individual police forces to review their use of the Scheme but little evidence is in the public domain to suggest this practice of evaluation in detail of the force-level use of DADS has begun to take off. At the time of writing, by the end of the summer of 2020, only two English police forces seem to have publically acknowledged the need to respond to this prompt from HMICFRS<sup>503</sup>.

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<sup>500</sup> J. Grace, 'Four years on: The postcode lottery of Clare's Law' (*SIPS blog*, 8 March 2018) <<https://sheffieldinstituteforpolicystudies.com/2018/03/08/four-years-on-the-postcode-lottery-of-clares-law/>> accessed 18 July 2020.

<sup>501</sup> See Francesca Williams, 'Clare's Law: The women who risk their lives by refusing information' (BBC News, 29<sup>th</sup> November 2018) <<https://www.bbc.co.uk/news/uk-england-42920020>> accessed at 19 June 2020.

<sup>502</sup> M. Duggan & J. Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145

<sup>503</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Nottinghamshire Police* (2019) <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-nottinghamshire.pdf>> accessed 16 June 2020, 18; and HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of West Midlands Police* (2019)

### *Regulatory problems at the meso-level of the DADS*

At the meso-regulatory level, DADS in the UK to date have suffered from the following three regulatory problems: the first of these is a lack of an offender management and rehabilitation emphasis, in policy development terms. Richard Ericson and Kevin Haggerty would not have been surprised by an under-emphasis on the rehabilitation rights of serial domestic violence perpetrators in relation to the lack of a complete bar on the disclosure of spent convictions and cautions under the DVDS, for example. As the authors of *Policing the Risk Society* explained in 1997, one "may possibly escape one's past, but never institutional futures"<sup>504</sup>.

Official guidance on DADS in the UK is published for a police audience only, and places an emphasis on police roles in public protection and the prevention of domestic violence - no official guidance exists for probation officers or social workers as to how DADS should be approached, even though DADS in the UK today are each to some extent based around multi-agency decision making, which would include non-police agencies, as part of the disclosure-making processes concerned. No substantial evidence is yet available that shows how social workers or probation officers may feel about the operation of DADS with regard to an offender rehabilitation perspective, for example, and the Home Office have hardly sought this out, beyond involving some non-police agency participants in the DVDS pilot evaluation focus groups<sup>505</sup>. This Home Office failure arguably has serious repercussions in the longer-term for a subset of reformed and reforming perpetrators. Writing about the practice of disclosures of non-conviction information and other items of police intelligence with lower levels of provenance in Enhanced Criminal Record Certificates, Joe Purshouse has noted that while "it may seem counterintuitive, selective protection against non-conviction disclosure may also serve the public's interest in crime prevention and public safety...", since, in the employment context:

"Non-conviction disclosure is, essentially, a form of disintegrative stigmatisation: it outcasts the subject of the disclosure, blocking his or her access to an avenue of

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<<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-west-midlands.pdf>> accessed 16 June 2020, 15.

<sup>504</sup> Richard V. Ericson and Kevin D. Haggerty, *Policing the Risk Society*, 1997, Clarendon Press: Oxford, p.119

<sup>505</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (Home Office 2013).



legitimate participation in society (namely, through the pursuit of a chosen career). In doing so, such disclosure may... diminish the individual's social bonds to the community, increasing the likelihood that the individual will engage in offending behaviour."<sup>506</sup>

Secondly, there have been a series of uncritical steps and policy moves with regard to the roll-out of DADS in the UK. As the Queensland Law Reform Commission have observed, Home Office reviews of the pilot of Clare's Law and of the roll-out of the DVDS 'one year on' were problematic, as these 'reviews were limited to assessments of how the Scheme process was working in practice; they did not consider the impact of the scheme on the incidence of domestic and family violence, or analyse its 'value for money'".<sup>507</sup>.

Thirdly, there are problems arising, in a regulatory sense, from a minimal, non-transparent process of evaluation in relation to DADS in the UK. For example, before it was rolled out across the whole of Scotland, the DSDAS had a pilot phase in Ayrshire and Aberdeen, which was evaluated by academics from the University of Glasgow. This study was not published<sup>508</sup>, and the DSDAS was ultimately rolled out across Scotland without any public reference to or discussion of the study, even though the Glasgow study's authors did also find that the focus groups of police officers from Aberdeen and Ayrshire, where the DSDAS had been piloted, raised a number of concerns about the Scheme, since although the "potential to act as a deterrent in the long run was acknowledged, it was felt that disclosures might escalate and indeed precipitate [domestic abuse] incidents in the short term"<sup>509</sup>. As the Glasgow study went on to observe:

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<sup>506</sup> Joe Purshouse, 'Non-conviction disclosure as part of an enhanced criminal record certificate: assessing the legal framework from a fundamental human rights perspective', P.L. (2018) 668, 684.

<sup>507</sup> Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme: Report*, Report no. 75 (2017), 143-144.

<sup>508</sup> As explained in an earlier Chapter, not only was the Glasgow study of the pilot of the DSDAS not published before a Scotland-wide roll-out was decided upon, but the 'standard operating procedures' for the DSDAS were also not made public until I asked for a copy of them. A freedom of information request I made saw the release of the text of the DSDAS 'Standard Operating Procedure' by Police Scotland under the Freedom of Information (Scotland) Act 2002.

<sup>509</sup> University of Glasgow, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015 (author's copy obtained via freedom-of-information request) 10.

"In Aberdeen it was discussed that there was already evidence for [a risk of escalation of harm to some victims from the DSDAS] from Police Scotland's online reporting system. Officers talked about a case where a woman had reported her partner's non-violent but concerning behaviour via an online form, and was subsequently assaulted by her partner when he found out that she had reported him. Likewise, the potential for individuals to change their behaviour towards their previously abusive partner following a disclosure, might raise suspicion and again escalate the potential for abuse. In such circumstance the officers questioned whether DSDAS was actually about keeping people safe (the rationale by which it is possible to use existing data protection law to disclose information) or was in fact putting them more at risk."<sup>510</sup>

The three meso-level or national-scope regulatory problems focus on here have been the lack of focus on offender rehabilitation on drawing up the scope and system of the UK DADS, a lack of proper assessment of disclosures (under the DVDS, as the original UK DADS), and a lack of transparency in evaluating the DSDAS before it was adopted for the whole of Scotland, despite some misgivings from officers involved in the pilot. However, these problems are not insurmountable, and could readily be addressed by policymakers across the UK, if they could summon the political will.

#### *Regulatory problems at the macro-level of the DADS*

At the macro-regulatory level, DADS in the UK continue to be faced by three key regulatory problems - and these have a kind of near-permanency, in the current status quo, compared to the manner in which the three meso-level regulatory problems, as outlined above, could be addressed in actions and programmes of regulatory reform.

Firstly, the continuing legal basis of the three DADS in operation in the UK today is varied, and varies, that is, between the three jurisdictions of England and Wales, Scotland, and Northern Ireland. The DVDS in England and Wales is based upon police common law powers to disclose information for public protection purposes where there is a 'pressing need' to do so, and in a proportionate and reasonable way. In Scotland, the DSDAS draws, according to its 'standard operating procedures', on the language of an additional, very broad 'policing principle' found in S.32 of the Police and Fire Reform (Scotland) Act 2012, 'to improve the safety and well-being of persons' in Scotland. In Northern Ireland, the legal basis of the DVDAS, and the common law power to disclose,

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<sup>510</sup> University of Glasgow, *Audit of the Disclosure Scheme for Domestic Abuse (Scotland)*, September 2015 (author's copy obtained via freedom-of-information request) 10.

is enhanced by a statutory duty, under S.32 of the Police (Northern Ireland) Act 2000 to protect life and property and prevent the commission of offences. This variety of legal bases across these three DADS ultimately has a knock-on effect as to how they are evaluated, in connection with a meso-level regulatory concern, and how they are operated at the micro-regulatory level of decision-making in a particular case. Disclosure tests, and processes, vary between the three jurisdictions in the UK today. The guidance regulating the DVADS in Northern Ireland, and the DSDAS in Scotland, both refer explicitly to the positive obligation to protect the human rights of potential domestic violence victims as part of the disclosure decision-making tests and processes concerned; while the DVDS guidance does not.

Secondly, at the macro-level of regulation of DADS in the UK today, there is also the issue and problem of disparities in the treatment of the categories of what police intelligence can be disclosed under each of the DADS in the UK today, caused by approaches that differ in policy on DADS set by devolved government versus central government. Spent convictions and other arguably problematic-to-disclosure 'intelligence' will be treated differently by the three Schemes concerned, stemming at least in part from their different legal bases but also the issue that three different government departments, across the three jurisdictions in the UK, are involved in setting guidance on the Scheme. This devolved approach to precise DADS policy in the UK today is again, near-permanent as a problem, given the current devolved political settlement between the three jurisdictions in the UK today. As an example of the disparities this can create, and in considering how the Rehabilitation of Offenders Act 1974 is applied by each of the three DADS in the UK today, a different approach is taken by the regulation and guidance on the DSDAS, which prohibits the disclosure of spent convictions, as opposed to the regulation and guidance on the DVDS and the DVADS, which do allow disclosure of spent convictions and cautions (see Table 6, below).

<p><b>Table 6: Regulation of the (non) disclosure of spent convictions in DADS guidance:</b></p> <p><i>Spent convictions can be taken into account in decision-making under all three DADS, but:</i></p>	<p><b>DVDS:</b></p> <p>“Where police officers have the power in the course of their duties to disclose spent convictions under the Domestic Violence Disclosure Scheme it is important that disclosure still needs to be reasonable and proportionate. The police will want to take into account the age of the spent conviction during the decision-making process.”</p>	<p><b>DSDAS:</b></p> <p>“Police Scotland may consider the impact of a spent conviction when conducting a risk assessment on ‘A’, regardless of the fact that <b>the spent conviction cannot then be disclosed</b> to the DMF or to ‘A’ (or ‘C’)...” [Emphasis added.]</p>	<p><b>DVADS:</b></p> <p>"Where police consider the disclosure of relevant spent convictions to be applicable under the scheme, it is important that disclosure is reasonable and proportionate... [taking] account of the age of the spent conviction during the decision making process."</p>
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Thirdly and finally (and as the last of the nine separate regulatory problems with UK DADS given an overview here), each of the separate DADS will need to take steps in their operational guidance, produced by three different bodies or sets of bodies, in order to keep abreast of changes to supra-national legal changes or shifts in the way that the law in the UK evolves to take into account its changing relationship with bodies of supra-national law and regulation. The approach taken will differ on whether an issue is reserved to the policymaking ambit of the Westminster government, or not.

On data protection, for example, since this has been a matter of the UK's relationship with EU law, the Westminster government can create regulation in statutory form which applies across the three DADS in operation in the UK today. As the relationship of the UK with European Union law shifts through the process of Brexit, the central UK government has needed to build the principles of the EU Law Enforcement Directive on personal data in the criminal justice sector into the Data Protection Act 2018, for example. But the central and devolved UK governments, across England and Wales, Scotland and Northern Ireland, in developing DADS guidance and regulation post-Brexit, may subtly take into account shifts in, say, European Court of Human Rights case law over time, since criminal justice policy is devolved in Northern Ireland and Scotland, in

particular, to a much greater extent than data protection policy can currently be. The devolved governments can create domestic violence-related offences, potentially, which will differ from the offences which can be disclosed under the ambit of the DVDS in England and Wales. The Scottish Parliament and government recently, for example, created a specific criminal offence of 'domestic abuse' that, in the UK, currently exists in Scotland only<sup>511</sup>.

### 7.9 Chapter conclusions

Under the Domestic Abuse Bill, at the time of writing, the extent of the statutory basis of the DVDS in England and Wales, at least, is simply that police forces would have a legal duty to have (due) regard to Scheme guidance published by government, as an attempt, purportedly, to increase police deployments of the Scheme. This does not mean that this guidance would go entirely un-reformed, per se, and no doubt HMICFRS will continue to detail police use of the Scheme in their inspections of forces, but it is only a very limited proposal. Statutory duties to review DADS in the UK on a regular basis, to set minimum standards about police processes, support for victims making applications under DADS, and regulating disclosure tests to standardise them across the UK jurisdictions as well as to clarify them, therefore, have been overlooked.

These sorts of regulatory interventions, in a fuller, more substantial and comprehensive statutory codification of DADS in the UK, would at least be an attempt to address a number of the micro- and macro-level regulatory problems outlined above. The regulatory issues outlined above on a macro-level are problematised, when we examine their underpinnings, by constitutional and supranational politics, not least the legal fluidities of Brexit and devolution. But a failure to make use of the regulatory opportunity of a Domestic Abuse Bill, in order to address several micro-level and meso-level regulatory problems with DADS, would be a considerable failing in terms of regulatory responsibility on the part of UK central government.

As noted in an earlier Chapter, Mark Taylor observed in his 2012 book that a good regulatory framework would result in 'clarity', 'generality', 'certainty' and 'relative

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<sup>511</sup> See Part 1 of the Domestic Abuse (Scotland) Act 2018 asp 5.

constancy'...<sup>512</sup>. Again, and as noted above, Christina Lienen has observed that a legal system "should strive for coherence; the adjudicative process should produce results the underlying reasoning of which is intelligible and, to some extent, predictable"<sup>513</sup>. As well as seeking to foster these values, any attempt to codify the DADS in the UK today should also attempt to manage risks of domestic violence in such a way that they are a positive contribution to the public protection landscape. But the regulation of risk in the domestic violence prevention context presents considerable challenges that any reform of the DADS must be cognisant of. As Julia Black has argued:

“...in setting out what are considered to be acceptable and unacceptable risks, risk-based regulation implicitly or explicitly defines what risks the regulator should be expected to prevent, and those which it should not. In so doing, it in effect attempts to define the parameters of blame: of what risks an agency should prevent, and be blamed for not preventing, and those which it should not seek to prevent, or at least not seek so actively to prevent, and thus by implication those for which it should not be blamed for not preventing.”<sup>514</sup>

A considerable (and politically unacceptable) risk in a regulatory sense is that disclosures under DADS will in some cases, precipitate an escalation or risk to a victim (as they might be harmed in the process of a relationship coming to an end) - or by contrast that a failure or inability to disclose information might do so, as a kind of false reassurance, as has been noted at several points above. Better, politically, to ignore that these risks exist, where policymakers are concerned. Aside from these issues, which this thesis have already explored to a greater extent, there is the problem of a regulatory risk occurring from the effects, or damage, that disclosures under the DADS may have on the rehabilitation, in practice, of domestic violence perpetrators. There is also the impact on their legal right to rehabilitation to consider. Black's point, above, is that part of the task of risk-based regulation is determining what it is that regulators should be accountable for. There is an issue here for the DADS under discussion in this thesis: they are all framed in policy terms as a policing exercise, and the guidance published or produced which regulates their operation is aimed at a police audience and police actors; and yet

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<sup>512</sup> Mark Taylor, *Genetic data and the law: a critical perspective on privacy protection* (Cambridge University Press 2012) 15.

<sup>513</sup> Christina Lienen, 'Common law constitutional rights: Public law at a crossroads?', P.L. (2018) 649, 665.

<sup>514</sup> Julia Black, 'The emergence of risk-based regulation and the new public risk management in the United Kingdom', P.L. (2005) 512, 522.

literally a sizeable proportion of the individual parties affected by the ongoing operation of DADS are, of course, offenders. And yet there is no real attention paid in the Home Office guidance on the DVDS for police, for example, on how to work with probation services in managing the after-effects of a disclosure on a (possibly former) domestic violence perpetrator; nor does the UK Ministry of Justice produce its own guidance on the DVDS or its 'Right to Know' strand, under which probation officers might be expected, for example, to be most actively involved in 'Clare's Law'. And yet given the requirements of the (qualified) right to rehabilitation under the ECHR, as discussed in Chapter 4, above, probation organisations and ultimately the Ministry of Justice should be included as essential secondary policy actors or regulators in helping to shape ambit and operation of the Scheme.

In an attempt to be fair to Home Office policymakers, perhaps it is still too early to be the case that secondary policy actors or groups of actors have begun to shape the nature of the DVDS as a creature of policy. In terms of the DADS in the UK, these secondary policy actors are the local and regional police forces themselves, who operate the Scheme; and the media which they have relied upon to promote the Scheme amongst members of the public. And these secondary actors are being pushed the line that the DVDS is, from the perspective of the Home Office and Her Majesty's Inspectorate in particular, an unqualified success in term of its substantive efficacy - with merely more of a procedural push needed to secure more usage of the DVDS and the other DADS over time.

Having used a variety of regulatory tools of analysis to present findings around a theme of regulatory responsibility, it is now an appropriate juncture to present the group of findings from this thesis that cluster thematically around the issue of the legality of the DVDS and other DADS, according to several different jurisprudential and doctrinal measures. It is the task of the next two Chapters, Chapters 8 and 9, to explore and justify these findings from a wider legal analysis of the DADS in the UK.

## **8. Multi-level governance and the developing legalities of DADS**

### 8.1 Chapter Introduction

This Chapter begins the deeper examination of the legalities of Domestic Abuse Disclosure Schemes in the UK. This Chapter makes the case for more detailed statutory reform of the DVDS, in particular, and more generally the other two DADS in the UK (the DSDAS in Scotland, and the DVADS in Northern Ireland). The general position of this Chapter is in favour of full statutory codification of the UK DADS; and a section of this Chapter, below, explores the constitutional and doctrinal benefits of this type of possible reform of the DADS. This Chapter begins to consider some of the specific legal irregularities created for DADS in the UK by issues of 'multi-level governance'. This Chapter also frames some initial legally-related questions about the prevention of domestic violence in the UK: In particular, what kind of progress has there been so far, on the legal-cultural shift towards the intolerance, and the rooting out, of domestic violence? And how has the legal landscape on the prevention of domestic violence played a role in this shift? In order to better contextualise the implications of the common law foundation of the DVDS, as the original DADS policy, this Chapter begins with an overview of the key legislative moves to address domestic violence in England and Wales in the last several decades<sup>515</sup>.

### 8.2 A brief overview of domestic violence legislation

In introducing landmark pieces of legislation such as the Human Rights Act 1998 (which substantively came into force in late 2000), for example, the UK government has made some foundational efforts to produce a climate of respect for gender, and an intolerance of gender discrimination and gendered interpersonal violence. However, the deployment of law and policy for the prevention of domestic violence, as one strand of this governmental work, is an example of the kind of polycentric regulation highlighted in Chapter 7 of this thesis. A highly-complex social problem, domestic violence continues to defy the similarly complex regulatory efforts to combat it in England and Wales. As will

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<sup>515</sup> Elements of this Chapter were first drafted when I was contributing to an article with Dr. Marian Duggan on the DVDS in England and Wales, and some of the observations made in this Chapter can be found in that piece in more condensed form. See Marian Duggan & Jamie Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme' (2018) 2 *Child and Family Law Quarterly* 145.



be shown in this Chapter, below, some of the more legalistic efforts to engage in the regulation of domestic violence and its perpetrators, and the efforts to support its victims, can be critiqued. As Crowther-Dowey and Silvestri have highlighted, with regard to the Human Rights Act 1998, for example, that "...not everyone has benefited equally from the [1998 Act] and certain behaviour carried out by one gender disproportionately disadvantages the other, in this instance it is violence against women".<sup>516</sup>

There were some policy initiatives that New Labour governments introduced as significant legal measures, between 1997 and 2010, in order to combat particular behaviour tantamount to, or included within concepts of, domestic violence, such as stalking. The Protection from Harassment Act 1997 was revisited on more than one occasion. For example, the Domestic Violence Crimes and Victims Act 2004 "amended the 1997 Act to provide for courts to be able to issue restraining orders to a defendant acquitted of an offence where the court considers it necessary to do so to protect a person from harassment from that defendant"<sup>517</sup>.

The 2004 Act additionally introduced a criminal offence for breaches of non-molestation orders that can be obtained under the Family Law Act 1996<sup>518</sup>. The Protection from Harassment Act 1997 was amended by the Serious and Organised Crime Act 2005, in order to allow for victims of stalking to apply for civil injunctions to attempt to stop stalkers, allowing for the award of a restraining order in the civil courts and on the basis of the lower civil standard of proof - with breach of any order obtained a criminal offence. But the 1997 Act was admittedly not the finished article: "In 2012 the Coalition Government added two specific criminal offences of stalking to the 1997 Act following widespread concern that the Act was not dealing adequately with this problem."<sup>519</sup>

Because of a mixed legacy on criminal justice and the punitive ethos engendered by the Blair and Brown years in terms of criminal justice policy more generally, there is some

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<sup>516</sup> C. Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach' (2017) *British Journal of Community Justice* 14(3), 4.

<sup>517</sup> House of Commons Library, 'The Protection from Harassment Act 1997' (2017) <<https://commonslibrary.parliament.uk/research-briefings/sn06648/>> accessed 30 June 2020, 7.

<sup>518</sup> Duncan Adam, 'A history of violence' (*Law Society Gazette*, 17<sup>th</sup> August 2007) <<https://www.lawgazette.co.uk/law/a-history-of-violence/4416.article>> accessed 30 June 2020.

<sup>519</sup> House of Commons Library, 'The Protection from Harassment Act 1997' (2017) <<https://commonslibrary.parliament.uk/research-briefings/sn06648/>> accessed 30 June 2020, 3.

scathing academic criticism of the lack of a sustained focus from New Labour on domestic violence:

"Between 1997 and 2010 the Blair and Brown governments were widely criticised for their authoritarian and repressive responses to various types of offending behaviour but attempts to augment crime control through surveillance and other draconian measures have not significantly touched men who are violent towards women. By contrast there [were] calls for the state to do more to control this group of offenders."<sup>520</sup>

It can be argued that although they were piecemeal rather than wholesale, transformative developments, several policy initiatives by the New Labour governments of 1997 to 2010 still showed a general trajectory toward a greater focus on domestic violence<sup>521</sup>. At the very end of the New Labour project the Crime and Security Act 2010 gained Royal Assent. This put Domestic Violence Prevention Notices (DVPNs) and Orders (DVPOs) onto the statute book. These important measures were new ideas that put a capability, if not a specific onus, in the hands of the police, to be proactive in a particular manner to prevent domestic violence. This is because the DVPNs/Os allow for the means of temporarily barring a possible or known domestic violence perpetrator from the home they may or may not share with their possible or future victim - and importantly, in order to be issued, they do not require the consent or support of the victim concerned<sup>522</sup>. However, the provisions on which DVPNs and DVPOs are based were not brought into force by the Coalition government until March 2014; when the DVDS similarly became a national policing policy across England and Wales.

By way of contrast to David Cameron, Theresa May, when Conservative Prime Minister, and previously when Home Secretary in the Coalition and Cameron governments, has gained a public perception for a commitment to combating domestic violence in society - and there are considerable policy measures adopted in law during her Home Office and Prime Ministerial tenure to validate this view, as discussed below. The speed of this policy change has somewhat accelerated of late under the current and previous

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<sup>520</sup> C Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach', (2017) *British Journal of Community Justice* 14(3), 3.

<sup>521</sup> C Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach', (2017) *British Journal of Community Justice* 14(3), 3.

<sup>522</sup> See HM Government, 'DVPO Guidance' (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575363/DVPO\\_guidance\\_FINAL\\_3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575363/DVPO_guidance_FINAL_3.pdf)> accessed 30 June 2020.

Conservative governments, mainly thanks to the development of what became the Domestic Abuse Bill (2020), and latterly the first debates on the provisions in the Bill before Parliament.

Overall, then, the last decade has seen *creativity* in policy measures aimed at tackling domestic violence. For example, since 2010, not only has the DVDS itself been introduced as a pilot (2012-13) and then rolled out in England and Wales (2014) and then to Scotland (2015-16), but statutory Domestic Homicide Reviews have also been brought into force<sup>523</sup>. These reviews are a vehicle for police forces and other agencies linked to a domestic violence case involving a death to learn lessons and improve practices around countering potentially fatal domestic violence in a particular area of the UK<sup>524</sup>. Just as significantly, a 'coercive control' offence was enacted under the Coalition government. As a result, under Section 76 of the Serious Crime Act 2015 ('Controlling or Coercive Behaviour in an Intimate or Family Relationship') non-physical forms of domestic abuse can now be prosecuted under this heading that encompasses such harmful behaviours as financial abuse or emotional abuse<sup>525</sup>.

However, the period 2010-2020 has not seen much *consistency* in the way of policy from HM Government on dealing with domestic violence, not least because the prospect of new legal powers and processes to tackle domestic violence, such as there have been, have been undermined by reductions in funding to wider public services that support victims of violence and abuse. According to Women's Aid, there is a shortfall of 30% in terms of the number of refuge places required in the UK<sup>526</sup>, which should be space for one family per 10,000 residents in a population, as recommended by the Council of

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<sup>523</sup> New Labour had created the DHR within the Domestic Violence, Crime and Victims Act 2004, but the Coalition government brought them into statutory force by order in April 2011.

<sup>524</sup> HM Government, *Domestic Homicide Reviews: Statutory guidance* (2016) <<https://www.gov.uk/government/publications/revised-statutory-guidance-for-the-conduct-of-domestic-homicide-reviews>> accessed 30 June 2020

<sup>525</sup> Crown Prosecution Service, *Controlling or Coercive Behaviour in an Intimate or Family Relationship - Legal Guidance* <[http://www.cps.gov.uk/legal/a\\_to\\_c/controlling\\_or\\_coercive\\_behaviour/](http://www.cps.gov.uk/legal/a_to_c/controlling_or_coercive_behaviour/)> accessed 30 June 2020.

<sup>526</sup> Women's Aid (2020) *The Domestic Abuse Report 2020: The Annual Audit*, Bristol: Women's Aid, 20.

Europe<sup>527</sup>. As has already been highlighted above, at the time of introducing the DVDS on a national scale in England and Wales, the Home Office, in their policy impact analysis, undertook estimates of costs of introducing and operating the DVDS in its current form (with a 'Right to Ask' strand allied to a 'Right to Know' strand). Total operating costs per annum in England and Wales were put at £3.18m; and for the DVDS to 'break even' it was estimated that one in three of the individuals who received a disclosure of risk information under the Scheme would need to make a decision to end a relationship in order to preclude becoming victimised by their then partner. However this modest costs commitment to operating a DVDS is at odds with the evidence of reduced funding for domestic violence prevention services and support in an era of austerity<sup>528</sup>.

Austerity policies have had a harmful effect on the rights of women who are the victims of domestic violence. For example, in the case of *R (DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), two of the four claimants had been victims of domestic violence. In *DA*, the courts had to examine the issue of whether a 'benefits cap' unlawfully and disproportionately impacts upon single mothers, and whether this was a breach of the principle of non-discrimination under Article 14 ECHR taken with Article 8 ECHR. This was because a disproportionate number of lone parents with children under two are women struggling to find employment that pays well enough to cover costs of childcare and housing, but when working less than 16 hours per week are caught by the benefits cap (reduced in November 2016 to £20,000 per annum outside of London, and £23,000 per annum inside London).

While under the Coalition and Conservative governments, as discussed above, domestic violence prevention laws and policies have proliferated and will do so in the future via the forthcoming Domestic Violence Act. But it is arguable that fresh emphases on the prevention of domestic violence by government is in the wider view much limited by 'austerity' - that is to say, wholesale cuts to public services<sup>529</sup>. The provision of women's

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<sup>527</sup> Council of Europe (CoE). (2008) *The Final Activity Report of the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV)* Strasbourg: Gender Equality & Anti-Trafficking Division Directorate General of Human Rights & Legal Affairs, Council of Europe, 51.

<sup>528</sup> See Trust for London, 'Measuring the impact of Cuts in public expenditure on the provision of services to prevent violence against women and girls' <<https://www.trustforlondon.org.uk/publications/measuring-impact-cuts-public-expenditure-provision-services-prevent-violence-against-women-and-girls/>> accessed 30 June 2020.

<sup>529</sup> As acknowledged by C Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach', *British Journal of Community Justice* 14(3) (2017), 15.

refuge services has been hard hit in terms of reduced funding<sup>530</sup>. This is particularly incoherent as contiguous issues of government policy, given the interrelationship between the operation of the DVDS (explicitly designed to bring relationships to an end, in simple terms) and domestic violence refuges (much used by women who need the physical space and safety on offer to bring a dangerous relationship to a close). In effect, it is possible that the more successful the DVDS, the more pressure is put on the refuges in a given area, or in another light, the fewer the number of refuge spaces for victims of domestic violence in a given area, the more reluctant a recipient of information under the Scheme might be to end a dangerous relationship.

The last two Conservative governments laid claim to the status of administrations with a priority focus on preventing domestic violence when announcements were made of a Domestic Abuse Bill. This, it was stated, would include a specific new statutory definition of domestic abuse in order to standardise policy across that government which relates to the term. Confirmed in the Queen's Speech on 21<sup>st</sup> June 2017, plans announced for the Bill also saw direct mention made of both a new Domestic Violence and Abuse Commissioner, and a "consolidated new domestic abuse civil prevention and protection order regime"<sup>531</sup>. In relation to the main object of analysis for this thesis, however, while there was mention made of some other specific regulatory measures<sup>532</sup>, there was no mention in the relevant Queen's Speech guidance notes as to the DVDS. When the Domestic Abuse Bill consultation was set out, there was only a proposal to turn the current Home Office guidance on the DVDS into statutory guidance, to which forces would be required to have regard in operating the Scheme in their force area, as was observed above. At the time of writing, what we can expect from the forthcoming Domestic Abuse Act in late 2020 or in 2021 is a DVDS operated on the basis of statutory guidance, to which chief constables would be required to have regard. Ambiguity around

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<sup>530</sup> Niamh McIntyre, 'London refuges have funding slashed as rates of domestic violence soar' (*The Independent*, 7<sup>th</sup> March 2017) <<http://www.independent.co.uk/news/uk/home-news/london-councils-funding-refuges-domestic-violence-cut-38-percent-2010-a7612871.html>> accessed 30 June 2020.

<sup>531</sup> HM Government, *The Queen's Speech and associated background briefing, on the occasion of the opening of Parliament on Wednesday 21<sup>st</sup> June 2017* (HM Government, 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/620838/Queens\\_speech\\_2017\\_background\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf)> accessed 18 July 2020, 37.

<sup>532</sup> For example, the Bill was initially to ensure that "if abusive behaviour involves a child, then the court can hand down a sentence that reflects the devastating life-long impact that abuse can have on the child". *Ibid.*

the legalities of the 'pressing need'-based disclosure threshold might well continue. This Chapter now explores these legal ambiguities around disclosures under both the DVDS and the other UK DADS.

Issues with any potential unlawfulness of the DVDS fall into one of two broad groups: the more fundamental, constitutional issues raised by the operation of the Scheme on the basis of police common law powers; and the more specific, more technical issues, such as those arising from the need for compliance with a body of case law from the European Court of Human Rights concerning the ECHR, and the further requirements of (EU) data protection law, and so on. This Chapter of the thesis explores the issues of the legalities of the Scheme from a broader constitutional perspective, while Chapter 9 picks up in more detail on discrete issues around proportionality, data protection rules and the breadth of what is retained or disclosed from police databases.

### 8.3 The common law basis of the Domestic Violence Disclosure Scheme

A statutory DVDS would be able to adopt the same kind of presumption of disclosure model which the (statutory) child Sex Offender Disclosure Scheme (CSODS) is based upon; allowing for a detailed statutory explanation to be given of the manner in which disclosures under the DVDS may be made. In a similar way, the DSDAS and the DVADS could also be placed on the same specific statutory basis, and the three Schemes unified. A statutory, unified Scheme in England, Wales, Scotland and Northern Ireland, after a careful drafting and legislative process, would be less likely to suffer from inconsistencies in determining what is and what is not a 'pressing need' for disclosure. The following four sections of this Chapter address the key advantages in having a fully codified statutory Scheme for the DVDS in England and Wales, if not the Scheme for DADS in all parts of the UK. In section 8.4, below, this Chapter addresses the constitutional law preference, if not a principle of legality, that has grown up in terms of having the powers of public bodies founded as part of statutory public law frameworks. Section 8.5 of this Chapter explores DVDS disclosures as police discretionary decisions which signify a considerable interference with rights created as *accessible* and *foreseeable* statutory codes; while section 8.6 addresses the difficulty in delineating and applying the common law pressing need test for disclosures under the three UK DADS, and in particular the DVDS in England and Wales.

As highlighted in section 8.7 of this Chapter, below, a statutory DVDS would also allow for the removal of the difficulties that police forces have in knowing when or indeed whether spent convictions can be disclosed, as the effect of a conviction becoming spent under the Rehabilitation of Offenders Act 1974 could be disapplied, as it is for the operation of the CSODS by provision of the Criminal Justice Act 2003 (as amended). The exact details of this argument are discussed in full in a section of this Chapter, below, but suffice for now to say that in this way, the DSDAS, as part of a combined Scheme across Britain, could also have spent convictions more clearly brought within its ambit.

At the moment, there is a disparity between jurisdictions on this issue within the UK. Home Office guidance makes it clear that in circumstances where it is both necessary and proportionate, and where the spent conditions is of sufficient relevance to the 'pressing need' in question, then such information can be disclosed under the DVDS; while the standard operating procedure for the DSDAS makes it plain that spent convictions should not be disclosed under the common law basis of the 'right to ask' and the 'power to tell' of the DSDAS.

Although all the UK DADS are based largely upon common law powers of the police to share information for public protection purposes, the Human Rights Act 1998 is central to the regulation of the operation of all three such Schemes. A single statutory guidance document for a combined Scheme in England, Wales, Northern Ireland and Scotland would be able to, amongst other things, redress the issue that little or no attention is given, in the current Home Office guidance on the DVDS, to relevant positive obligations under the ECHR. These relate to the positive obligations to uphold the rights to life, freedom from inhuman or degrading treatment and to respect for private and family life, as defined under the ECHR by the developed, and developing, European Court of Human Rights. The current standard operating procedure for the DSDAS, however, and by way of contrast with the DVDS guidance, features a considerable (and laudable) emphasis on Articles 2, 3 and 8 ECHR. A unified statutory Scheme would also benefit the operation of the DVDS in this manner.

On a different point about interrelating statutes, the idea of a detailed basis in the Domestic Abuse Bill or Act for a combined statutory Scheme would mean that provisions of the new Data Protection Act 2018 could be navigated and referenced by an updated piece of statutory Scheme guidance. This new guidance needs to be produced in any

event, given the provisions of Part 3 of the new Data Protection Act 2018 (which is discussed below in this thesis as it applies to the three UK Domestic Abuse Disclosure Schemes) introducing the requirements of the EU Law Enforcement Directive on data protection in criminal justice contexts into UK law. However, this new guidance needs to perhaps revisit the way that the common law powers to disclose information through the DVDS are outlined and framed for police practitioners.

Current DVDS guidance can probably be criticised for its glossing over, and to a degree its over-simplification, of the relevant common law powers and duties of the police<sup>533</sup>. This guidance highlights the nature of the Scheme as a lens to focus the common law power of the police to disclose information when it is 'necessary to prevent crime', explaining that:

"The Domestic Violence Disclosure Scheme did not introduce any new legislation. The scheme is based on the police's common law power to disclose information where it is necessary to prevent crime. The scheme provides structure and processes for the exercise of the powers. It does not, in itself, provide the power to disclose or to prevent disclosures being made in situations which fall outside this scheme."<sup>534</sup>[Emphasis added.]

The Home Office guidance also explains that in relation to considering a disclosure to a potential victim of domestic violence (A), under the DVDS, and concerning a past offender (B), then: "The police have the common law power to disclose information about an individual where it is necessary to do so to protect another individual from harm..."<sup>535</sup>. Is the common law power of the police to disclose information under the DVDS only bounded by 'necessity to prevent crime', or 'necessity to prevent harm', however? This is, to a degree, a shifting and context-dependent parameter to define through the common law. As Lord Nolan explained in *Marcel v Commissioner of Police*

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<sup>533</sup> In *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 at 195, Lady Hale, in dissenting on the finding that police did not owe a duty under the tort of negligence to a victim of murder, explained that this position of the majority of the Supreme Court was incorrect, partly because there was already a common law position on the public law duty on the police in parallel: "There is no doubt that the police owe a positive duty in public law to protect members of the public from harm caused by third parties." However, this section of this thesis now focuses on the more relevant common law position of police powers to share information as part of their role in public protection and crime prevention.

<sup>534</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 4.

<sup>535</sup> *Ibid*, 18.



of the Metropolis [1992] Ch. 225 at 261:

"The statutory powers given to the police are plainly coupled with a public law duty. The precise extent of the duty is, I think, difficult to define in general terms beyond saying that the powers must be exercised only in the public interest and with due regard to the rights of individuals."

Mr Justice Laws (as he then was) highlighted in his respected judgment in *Hellewell v Chief Constable of Derbyshire* [1995] 1 W.L.R. 804 that the sharing of information by the police with possible victims of crime had to be for reasonable crime prevention purposes. The emphasis in the DVDS guidance on disclosing only a limited amount of information where possible<sup>536</sup> accords well with the decision of Laws J in *Hellewell* and the emphasis placed in that judgment upon the nature of a lawful disclosure of police-held information as one made reasonably<sup>537</sup>, with the information disclosed to be used in good faith and to be disclosed to those with a 'reasonable concern' to know<sup>538</sup>. In *Hellewell*, Mr Justice Laws concluded (at 810) that, in relation to the sharing of a photograph of a convicted shoplifter with shopkeepers, the police:

"...may make reasonable use of it for the purpose of the prevention and detection of crime, the investigation of alleged offences and the apprehension of suspects or persons unlawfully at large. They may do so whether or not the photograph is of any person they seek to arrest or of a suspected accomplice or of anyone else. The key is that they must have these and only these purposes in mind and must, as I have said, make no more than reasonable use of the picture in seeking to accomplish them... the term "reasonable," as in so many areas of the law, is fluid and its application will depend on the circumstances of a particular case. I recognise also that it is as impossible as it is undesirable to lay down anything like a lexicon of the kinds of facts that will amount to reasonable use of such a picture by the police. However, where the use in question is decided upon by the honest judgment of professional police officers, that will, of itself, go a long way to

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<sup>536</sup> The Home Office guidance states that: "...it may not be necessary to tell the applicant the precise details of the offence for the applicant to take steps to protect A". Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021, 19.

<sup>537</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 W.L.R. 804, 810. *Hellewell* concerns the Long Eaton Shop Watch Scheme, begun in 1992, with the dissemination of posters to shopkeeper-members in the town, with the posters featuring 'mugshots' of local thieves. It is just as well that the plaintiff in *Hellewell* sought judicial review of the use of these posters and declaratory relief against the Chief Constable of Derbyshire, as opposed to against the Shop Watch themselves. In *R (Boyle) v Haverhill Pubwatch* [2009] EWHC 2441 (Admin) at 56 the Haverhill Pubwatch, even as an entity supported by the Suffolk Constabulary, was determined to be a body not amenable to judicial review, with its decisions seen to be lacking sufficient public law elements.

<sup>538</sup> *Hellewell*, 811.

establish its reasonableness. Provided these bounds of principle are not transgressed, there will be an obvious and vital public interest in the use made of such photographs which the courts will uphold."

So the common law looks to a fluid concept of reasonable purposes to shape the lawful use of information in the prevention of crime. The common law certainly does not justify an aggressive and uniform policy as treating all convicted persons as a disclosure subject outright and without careful thought. Lord Bingham took the view in the Divisional Court in *R v Chief Constable of North Wales ex p Thorpe* [1997] 3 W.L.R. 724 at 733 that: "It would plainly be objectionable if a police force were to adopt a blanket policy of disseminating information about previous offenders regardless of the facts of the individual case or the nature of the previous offending or the risk of further offending." Furthermore, Lord Bingham also highlighted in the Divisional Court in *Thorpe*, in reviewing a body of case law, that:

"When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty."<sup>539</sup>

There is an important qualification to be made, of course, about the role of the police in managing risks to the public. Lord Bingham further concluded in the Divisional Court in *Thorpe* that:

"...if the police, having obtained information about an individual which it would be damaging to that individual to disclose, and which should not be disclosed without some public justification, consider in the exercise of a careful and bona fide judgment that it is desirable or necessary in the public interest to make disclosure, whether for the purpose of preventing crime or alerting members of the public to an apprehended danger, it is proper for them to make such limited disclosure as is judged necessary to achieve that purpose."<sup>540</sup>

Furthermore, in *Thorpe* in the Court of Appeal, Lord Woolf determined that "...as a matter of English administrative law, the police are entitled to use information when they reasonably conclude this is what is required (after taking into account the interests of the

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<sup>539</sup> *R v Chief Constable of North Wales ex p Thorpe* [1997] 3 W.L.R. 724, 732.

<sup>540</sup> *Op. Cit.* 733.

applicants), in order to protect the public and in particular children"<sup>541</sup>. Finally, in *Thorpe* in the Court of Appeal, Lord Woolf also addressed not just the *parameters* of the common law power of the police to disclose information to protect the public through preventing an apprehended danger, or public protection risk, but also the threshold for that risk to warrant disclosure: "Disclosure should only be made when there is a pressing need for that disclosure."<sup>542</sup>

As a result, then, it does appear that in the key case law concerned, the common law power of the police to disclose information is indeed broadly founded, and on the power to share information where necessary to prevent crime. However, the DVDS guidance should in truth be phrased more comprehensively, describing disclosure under a common law power as permissible *where necessary in the public interest to make limited disclosure, and in good faith, as is reasonable to achieve the purpose of preventing crime or alerting members of the public to an apprehended danger, and where there is a pressing need for that disclosure, per Mr Justice Laws (as he then was) in Hellewell, Lord Bingham in Thorpe in the Divisional Court and Lord Woolf in Thorpe in the Court of Appeal.*

This more nuanced appreciation of the boundaries and thresholds in relation to disclosure powers in common law terms is important, from the perspective of the DVDS in particular as a DADS that is founded, the time of writing, on a purely common law basis. Keith Syrett has written that "a public body in which legal power is vested must act within the scope of the power allocated to it", and while "public bodies are permitted to do that which is 'reasonably incidental' to their allotted powers, a court may consider that certain actions are not incidental"<sup>543</sup>. Lord Bingham outlined in his work *The Rule of Law*<sup>544</sup> several dimensions to the concept of the rule of law that build upon this principle of acts or decisions that are *ultra vires*. Bingham wrote, as noted by Dominic Grieve QC, that "Ministers and public officials must exercise the powers conferred in good faith,

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<sup>541</sup> *R v Chief Constable of North Wales ex p Thorpe* [1999] Q.B. 396 at 409-410, 429.

<sup>542</sup> *Op. Cit.* 428

<sup>543</sup> Keith Syrett, *The Foundations of Public Law: Principles and Problems of Power in the British Constitution* (Palgrave Macmillan 2014) 198.

<sup>544</sup> Tom Bingham, *The Rule of Law* (Penguin UK 2011); cited in Dominic Grieve QC, 'The rule of the law and the prosecutor' <<https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor>> accessed 10 April 2017.

fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers"<sup>545</sup>. As Keith Syrett has written, "a public body in which legal power is vested must act within the scope of the power allocated to it", and while "public bodies are permitted to do that which is 'reasonably incidental' to their allotted powers, a court may consider that certain actions are not incidental"<sup>546</sup>. Lord Bingham outlined in his work *The Rule of Law*<sup>547</sup> several dimensions to the concept of the rule of law that build upon this principle of acts or decisions that are *ultra vires*. Bingham wrote, as noted by Dominic Grieve QC, that "Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers"<sup>548</sup>. There are at least four further interconnected and problematic issues with the DVDS having a common law basis, given our understanding of the overarching principle of the rule of law. These four issues are the next series of perspectives developed by this Chapter. By approaching each of these issues in turn, and in using the overall benchmark of the pursuit of the rule of law, this Chapter builds the argument for the statutory codification, in particular, of the DVDS amongst the three UK DADS. These four related issues are problems for the DVDS with respect to rule of law values for differing reasons and to different degrees. First, this common law basis for the Scheme transgresses a constitutional 'trend' or tendency that public bodies should act under statutory powers. This is a principle in UK constitutional and administrative law that in most situations, if acting without either an express or implied statutory basis for their decision-making, or without the support of the Royal Prerogative, a public body will be acting unlawfully, in excess of their powers<sup>549</sup>.

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<sup>545</sup> Dominic Grieve QC, 'The rule of the law and the prosecutor' <<https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor>> accessed 10 April 2017.

<sup>546</sup> Keith Syrett, *The Foundations of Public Law: Principles and Problems of Power in the British Constitution* (Palgrave Macmillan 2014) 198.

<sup>547</sup> Tom Bingham, *The Rule of Law* (Penguin UK 2011); cited in Dominic Grieve QC, 'The rule of the law and the prosecutor' <<https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor>> accessed 10 April 2017.

<sup>548</sup> Dominic Grieve QC, 'The rule of the law and the prosecutor' <<https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor>> accessed 10 April 2017.

<sup>549</sup> See, for example, the classic case of *Attorney General v Fulham Corporation* [1921] 1 CH 440 where the House of Lords held there was unlawful provision of a laundry service by a local authority; because the court felt that the statute only allowed for the provision of washroom services where an individual would do their own laundry.

Secondly, where a public body uses common law powers to interfere with the rights of an individual, it is arguably difficult to see as this interference as fully coherent with an emphasis upon precise legal language and foreseeability in the application of the law. This issue relates to the broader principle that the non-arbitrary interference with rights is a fundamental aspect of the rule of law. Thirdly, an opportunity has been lost to ensure that the workings of the DVDS are more clearly-drawn and better-defined in relation to the possible scope of, and criteria for disclosures under the Scheme. This is because, in the context of the DVDS, as has been explored above, the key guiding principle and basis for a disclosure is the presence, in any given situation, of the 'pressing need' for that disclosure; a subjective term without detailed definition in statute or otherwise. The latter issue entails concern as to whether the operation of the DVDS is sufficiently 'foreseeable' as a criterion of its 'legitimacy' in relation to the European Convention on Human Rights. Fourthly, no more is the 'foreseeability' criterion more at issue, and with respect to rule of law value, and given the non-statutory and common law basis underpinning the core legal operation of the UK DADS, than when we consider the key question as to the permissibility of the disclosure of spent convictions and cautions under those Schemes. However, it is important to first examine the wider-scale issue of how the UK DADS, and the purely common law DVDS, can be seen given the core rule of law principle of legality, in the light of the constitutional development of statutory powers for public bodies in ways that interfere with the fundamental rights of individuals.

#### 8.4 The rule of law and the constitutional 'trend' for powers of public bodies

Thanks to the constitutional doctrine of the separation of powers, the courts can determine the difference between the limits of the statutory powers of government ministers (and public bodies), and the (increasingly residual) power of those ministers to act under the Royal Prerogative, on behalf of the Crown. And as Parliament, increasingly, and over time, has seen fit to legislate upon the issues hitherto contained within the ambit of the Royal Prerogative<sup>550</sup>, then the ministerial remit for the use of prerogative powers shrinks in turn. This has been recently revisited by the Supreme Court as a core constitutional principle, in the famous 'Article 50' case of *Miller*<sup>551</sup>, where rights afforded under EU law,

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<sup>550</sup> For example, on the (now) part-Parliamentary process for the ratification of treaties under the Constitutional Reform and Governance Act 2010.

<sup>551</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

adopted in UK law through the language of the European Communities Act 1972, could not be put at stake by the use of prerogative powers to begin 'Brexit' negotiations with the European Council. In the end a statute was enacted, in the form of the European Union (Withdrawal) Act 2017, to give HM government the administrative power to 'trigger' Article 50 of the Treaty of the European and begin the (initial) two-year process of withdrawal by the UK from the EU.

We have come to expect in terms of the UK constitution that public power is exercised under authority granted by Parliament in the form of statute; or perhaps under the residual parameters of the Royal Prerogative that has been chipped away over centuries. But police common law powers are neither statutory, nor are they powers still extant under the Royal Prerogative. However, the key 'gap-filling' nature of police common law powers to take action to protect the public has been established by the courts over a long period. For example, where there is no statutory power for the police to take particular action to protect members of the public from harm in situations of public disorder during protests, there exists a common law power of arrest (and a power to take action short of arrest) for an imminent or ongoing breach of the peace. This is because "the common law is necessary to supplement statutory powers of arrest"<sup>552</sup>, where the latter exist only in relation to more precise and well-defined crimes than the concept of a 'breach of the peace'<sup>553</sup>. This 'gap filling' process through the deployment of the common law can go a long way, however. For example, in *Humphries v Connor* (1864) 17 I.C.L.R. 1, 8-9, as cited in *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, the common law power of the police to take action short of arrest (in *Humphries* to remove sectarian regalia lest a person wearing it come to harm) extends to taking action to halt or prevent otherwise *lawful* activities that may still incite third parties to commit a breach of the peace. In this 19<sup>th</sup> century case, Fitzgerald J said that the "primary duty" of a police constable is "to preserve the peace; and he may for that purpose interfere, and, in the case of an affray, arrest the wrongdoer; or, if a breach of the peace is imminent, may, if necessary, arrest those who are about to commit it, if it cannot otherwise be prevented." This long-standing principle of police intervention to prevent a violent breach of the

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<sup>552</sup> Kiron Reid and Donald Nicholson, 'Arrest for breach of the peace and the European Convention on Human Rights', *Crim. L.R.* (1996) 764, 774.

<sup>553</sup> See Helen Fenwick, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest', *P.L.* (2009) 737, 738.

peace arising from prima facie lawful behaviour is restrained by what can be characterised as the rule from *Redmond-Bate v DPP* [2000] H.R.L.R. 249; which in essence stipulates that freedom of expression should be enjoyed by those acting lawfully, not restrained because of the animosity from those other parties who might be offended and so cause a breach of the peace.

But just as the residual powers of Crown ministers under the Royal Prerogative are supplanted by the creation of a relevant statute, the common law on the use of a police power will ordinarily be either overridden or delineated by the creation of an Act of Parliament. For example, the case of *W v Chief Constable of Northumbria* [2009] EWHC 747 (Admin) makes it clear that where Parliament created a statutory system for the disclosure of 'spent' convictions or related 'soft intelligence' about an offender to an employer in a sector where Enhanced Criminal Records Certificates are required of employees (given exemptions from the Rehabilitation of Offenders Act 1974 created by the Police Act 1997), then police common law powers of disclosure should not be used to circumvent that statutory system and process of such disclosures. In addition, police common law powers must still respect rights afforded to individuals by statute law not directly overriding or limiting those common law powers - such as, importantly, the rights enjoyed under the European Convention on Human Rights through the structure of the Human Rights Act 1998.

In *Redmond-Bate v DPP* [2000] H.R.L.R. 249, for example, Christian preachers were unlawfully arrested for breach of the peace; since their rights under Article 9 and 10 of the ECHR entailed that they could preach their strict views so long as they did not exhort violence. In this case, the High Court found that arrests and actions short of arrest for breach of the peace should have instead been directed at those threatening Redmond-Bate. But it is possible for the common law power of the police to make arrests for (imminent) breaches of the peace, or the power to take action short of arrest for the same, to be deemed by the courts to be thoroughly encompassing of the ECHR value of freedom of expression, for instance; despite what might be seen as a *prima facie* 'chilling' of that freedom of expression. For example, in the recent Supreme Court case of *R (Hicks) v Metropolitan Police* [2017] UKSC 9, what were deemed necessary arrests for an imminent breach of the peace were held to be reasonable and proportionate even if they

were knowingly undertaken with a view to releasing individuals before charge, given burdens on police resources around space in custody. This use of police common law powers to disrupt planned protests and demonstrations in London on the day of a Royal Wedding was held to be no procedural breach of Article 5 ECHR (the right to liberty and security of the person).

It may be possible to plot a way through the foggy landscape of case law on police powers to take action for imminent breach of the peace. But we are left with an uncomfortable feeling that without, as Helen Fenwick has argued, a dedicated statutory framework we are dealing with "immensely broad and bewilderingly imprecise powers under the breach of the peace doctrine, which is unaffected by parliamentary attention"<sup>554</sup>. As Fenwick observes, the concept of common law police powers relating to the prevention of breaches of the peace are merely preserved in their complexity in S.40(4) of the Public Order Act 1986. This provision states that nothing in the 1986 Act itself "affects the common law powers in England and Wales to deal with or prevent a breach of the peace".

Unfortunately, from the perspective of the overall coherence of the DVDS with UK constitutional values, and similarly to the police policy emphasis on actions to prevent imminent breaches of the peace during protests<sup>555</sup>, the DVDS represents a significant police policy emphasis<sup>556</sup> on the use of those same common law powers. It is also a great operational expansion of the use of common law powers to disclose criminality information; even if overall the numbers of such disclosures are still low per annum with regard to the amount of domestic violence offences perpetrated in the UK each year, as discussed in Chapter 3.

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<sup>554</sup> Helen Fenwick, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest', P.L. (2009) 737, 738.

<sup>555</sup> See College of Policing, *Authorised Professional Practice - Public order index* <<https://www.app.college.police.uk/public-order-index>> accessed 30 June 2020.

<sup>556</sup> See the relevant section of College of Policing, *Authorised Professional Practice - Major investigation and public protection* <<https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/leadership-strategic-oversight-and-management/#domestic-violence-disclosure-scheme-clares-law>> accessed 20 June 2020.



The legal effect of the operation of the DVDS is to interfere with the right to respect for private and family life of the subjects of disclosures, under Article 8 ECHR. As such, police and Home Office policy on the DVDS promotes and substantiates an invasive use of those common law powers (even if in the context of protecting potential victims of domestic violence) that interferes with fundamental human rights, and on a non-statutory basis. This raises questions of the constitutional coherence of these powers, and the DVDS therefore, in relation to the 'principle of legality' given the lack of precise and express statutory language to underpin the DVDS<sup>557</sup>.

### 8.5 The rule of law, the principle of legality, and the common law DVDS

As noted earlier in this Chapter, there is an issue for the coherence of the DVDS that its common law basis offends the normal understanding of the 'principle of legality'. This Chapter section explains why this can be said to be so. In essence, the kind of common law basis for an interference with rights that we observe in relation to the DVDS is difficult to see as fully coherent. This common law basis is arguably at more risk of being used arbitrarily, compared to a statutory Scheme based on precise legal language in an Act of Parliament. Such codification would provide statutory foreseeability in application of the law, as required by the 'principle of legality', particularly given that the non-arbitrary interference with rights is a fundamental aspect of the rule of law.

In the words of Lord Bingham in his work on *The Rule of Law*<sup>558</sup>, and as set out by Dominic Grieve QC, the law must "afford adequate protection of fundamental Human

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<sup>557</sup> There is also an issue that guidance on the DVDS in England and Wales, including statutory guidance in the future, has to be produced by the Home Secretary in such a way that it meets the public sector equality duty (PSED), which in this context requires 'due regard' to the need to prevent victimisation (through disproportionate levels of domestic violence) against women (as a group with a 'protected characteristic' of sex). This requirement under Section 149 of the Equality Act 2010, as it applies in this policymaking context, entails a duty, the courts have determined, on ministers to be 'properly informed' in their decision making. The failure of the Home Office or national policing bodies to examine the overall *efficacy* of the Scheme across several iterations of guidance on it could be seen as evidence that a Home Secretary creating the most recent guide to the operation of the DVDS was not so 'properly informed' in relation to issues of domestic violence and sex, and so, it could be argued 'had not had 'due regard' to the PSED. On the 'properly informed' standard required, in order to have shown 'due regard' to equality issues in policymaking, see *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)*.

<sup>558</sup> Tom Bingham, *The Rule of Law* (Allen Lane 2010), cited in Dominic Grieve QC, 'The rule of the law and the prosecutor' <<https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor>> accessed 10 April 2017.

Rights", but must also be "accessible, intelligible, clear and predictable"; while matters "of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion"<sup>559</sup>. These principles concerning the rule of law can be connected in a particular way with a certain conceptualisation of the principle of legality. One outline of the principle of legality, or as it sometimes known, the '*Simms* principle'<sup>560</sup>, stems from a particular view of the interaction between Parliamentary sovereignty and the ethics of fundamental human rights. It should be noted at the outset of this point being made, of course, that the DVDS is non-statutory, and as such this application of the principle of legality to the discussion presented here is undertaken only by way of analogy with the police use of common law powers. It is argued that the constitution and the rule of law (with its principles of accessibility, intelligibility, clarity and predictability, as above) demands that common law powers conform in their usage to the same legal and political principles as would statutory powers. A particular version of the principle of legality that causes a problem for the DVDS in this regard was outlined by Lord Hoffman in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 A.C. 115 at 131, who noted that:

"...the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process... [but without] express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

To summarise, the principle of legality could be said to be intolerant of blatant ambiguity in legal language or 'tests' that determine the use of executive power. It is possible to use this particular outline of the principle of legality, however, to raise a serious concern about the operation and basis of the DVDS in common law, and the legal 'tests' that demarcate its operation. There was, of course, no Parliamentary 'democratic process'

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<sup>559</sup> See Dominic Grieve QC, 'The rule of the law and the prosecutor' <<https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor>> accessed 10 April 2017.

<sup>560</sup> Per Lord Brown in *HM Treasury v Ahmed and others* [2010] UKSC 2.

underpinning the creation of the DVDS, since it is non-statutory. Instead the DVDS must be seen as an extension of general policing policy; and as a matter of the exercise of legal power by the executive over the 'basic rights of the individual'. It is this less democratically-rooted nature of police common law powers, with the attendant, commensurately higher risk of them being used more arbitrarily, which led Reid and Nicholson to conclude approvingly that for the police, "statutory powers have democratic backing and are more clearly defined"<sup>561</sup>. In essence, the argument is being made here at this point that the fundamental rights of subjects of disclosures under the DVDS are at risk of being overridden in the generality and breadth of the language of police common law powers and the underpinning common law tests for such disclosures, discussed below, and in breach of the principle of legality.

The balancing consideration in favour of a space in the constitution for *residual* common law police powers, however, was outlined by Lady Hale in *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 at 195, when she said that: "There is no doubt that the police owe a positive duty in public law to protect members of the public from harm caused by third parties." This public *common law* duty also connects with positive obligations under the ECHR to protect an individual from victimisation, including from domestic violence. In fact, it is the need for the police to protect the rights of victims (particularly in relation to positive obligations created by the ECHR) which entails that we cannot simply conclude that the DVDS is completely in contravention of *the spirit of* Lord Hoffman's formulation of the principle of legality.

#### *Principles under the ECHR*

The ECHR, through the Human Rights Act 1998, puts duties and responsibilities on the police in relation to protecting (potential and actual) victims of domestic violence that stem most strongly from certain 'absolute' rights within the ECHR. These 'positive obligations', arising principally under Article 2 ECHR (the 'right to life') and Article 3 ECHR (in this context entailing the prevention of inhuman or degrading treatment in the form of domestic violence), actually apply to the operation of the DVDS given its place in the panoply of measures to combat domestic violence.

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<sup>561</sup> Kiron Reid and Donald Nicholson, 'Arrest for breach of the peace and the European Convention on Human Rights', *Crim. L.R.* (1996) 764, 774.

In building upon the common law position on a *public law* duty on the police to protect the public, as noted by Lady Hale in *Michael*, above, the courts have recognised that the police are under a duty under the ECHR to intervene only in certain circumstances. Article 2 ECHR requires the police to intervene in order to protect the lives of members of the public only where a real and immediate or imminent risk to life posed by an offender is known to the police, or could reasonably be said to have been something they should have known<sup>562</sup>. As a result, since Article 2 ECHR entails that these are duties under a positive obligation to protect life in certain circumstances, then the operation of the DVDS (and a timely disclosure under the Scheme) might play a part in taking the requisite sufficient steps to intervene where there is a known, real and immediate risk to life<sup>563</sup>. By contrast, case law from the ECtHR suggests that failures in individual cases to closely support (possibly even *repeat*) victims of domestic violence in a jurisdiction might not necessarily entail that Art. 3 ECHR rights (around the prevention of domestic violence constituting inhuman or degrading treatment) are systematically violated<sup>564</sup>.

As a result of these essential points, it can initially be concluded that for potential victims of domestic violence, Article 2 ECHR and the ‘right to life’ is the most powerful element of the ECHR as a principle to force the police to act to intervene to protect them. Indeed, the police in the UK have grown accustomed to deploying warnings to those at risk from threats to life, known as ‘Osman warnings’<sup>565</sup>, in order to help safeguard them from that risk, by putting the potential victims concerned in a state of alertness to that risk<sup>566</sup>. The DVDS might arguably fulfil something of a similar role in certain cases of the gravest seriousness – but there are other means of the police securing victim safety aside from using *Osman* warnings or disclosures under the Scheme. These other measures include Domestic Violence Protection Orders and Notices, civil Non-Molestation Orders, Sexual

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<sup>562</sup> *Chief Constable of Hertfordshire v Van Colle* [2008] UKHL 50

<sup>563</sup> *Osman v UK* [1998] ECHR 101

<sup>564</sup> *Rumor v Italy* [2014] ECHR 557

<sup>565</sup> See *Regan v Chief Constable of the West Midlands* [2010] EWHC 2297 (Admin) at 4.

<sup>566</sup> BBC News, ‘Police letters warn 1,900 people of ‘threat to life’’ (*BBC News*, 28<sup>th</sup> October 2015) <<http://www.bbc.co.uk/news/uk-34651682>> accessed 30 June 2020; and Department for Communities and Local Government, ‘The effectiveness of schemes to enable households at risk of domestic violence to remain in their homes’ (August 2010) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6363/1697772.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/6363/1697772.pdf)> accessed 30 June 2020.

Offences Prevention Orders, *Riaz* orders, and so forth. In a particularly recent development, a Criminal Behaviour Order has been formulated for the first time to interact specifically with the framework of the DVDS<sup>567</sup>.

Under section 6 of the Human Rights Act 1998, police bodies must uphold the right to respect to private and family life of potential subjects of disclosures under the Scheme as far as is required under Article 8 of the ECHR. Article 8 states that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As to the ambit of Article 8 ECHR, this is not easily drawn, or sharply defined. Lord Bingham once observed that:

"While the core of the right to which Article 8 is directed is clear enough, the outer reaches of the protection are more nebulous... the drawing of lines which is a violation of Article 8 from one which, however unwelcome, is no violation involves a difficult exercise of judgment. Difficult this area may be; unimportant it is not. As the material gathered about the public by government agencies multiplies exponentially... the need to decide when the legitimate interest of government becomes the intrusive surveillance of Big Brother seems likely to become ever more pressing."<sup>568</sup>

Subjects' perspectives on the operation of the Scheme entail that the chief element of the ECHR which they might draw on would be Article 8 ECHR – the qualified right to respect for their private and family life; which would undoubtedly be engaged by a police disclosure to an intimate partner of theirs, with or without their knowledge. It is, after all, commonly recognized by the courts that a disclosure of criminal records information,

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<sup>567</sup> BBC News, 'Abuser ordered to tell police about new relationships' (BBC News, 4<sup>th</sup> April 2017) <<http://www.bbc.co.uk/news/uk-england-london-39492597>> accessed 30 June 2020.

<sup>568</sup> Tom Bingham, *The Rule of Law* (Allen Lane 2010) 76.

such as a disclosure to an employer via an Enhanced Criminal Record Certificate, engages the qualified right under Article 8 of the ECHR<sup>569</sup>.

A decision of the UK Supreme Court in the case of *JR38*, determining that the police sharing of images in order to identify teenage sectarian rioters in Northern Ireland via the local press, can probably be distinguished from the rest of the jurisprudence discussed in this section of this Chapter. In finding that Article 8 ECHR rights were engaged only where there was a 'reasonable expectation of privacy' in the circumstances concerned, a majority of the Supreme Court in *JR38* relied on case law from private law confidentiality/Article 8 horizontality case law concerning 'misuse of private information' actions against media organisations<sup>570</sup>. At the time of writing, this approach (and test) in relation to the question of Article 8 ECHR being engaged could be said to be something of an aberration, or perhaps a new test still bedding in. The adoption of the 'reasonable expectation of privacy test' in the criminal records cases would be questionable because of the specific context in *JR38* of publishing sensitive images via newspapers, and is not the norm in terms of considering a starting point for criminal records disclosures of different kinds. It remains to be seen whether the 'reasonable expectation of privacy' test also becomes a touchstone, in future, for measuring whether Article 8 ECHR is engaged by the police disclosing criminal records.

Case law on Article 8 ECHR from UK courts and from the ECtHR sets out the key considerations that all disclosures of police intelligence must be legitimate, proportionate and necessary<sup>571</sup>. These criteria from the ECHR blend with the purely common law-derived standards, outlined below, of good faith, reasonableness and a 'pressing need' test in determining lawful disclosure; an alignment that is discussed in more detail below.

It can be argued that more modest intrusions into ECHR rights on the basis of police common law powers are more tolerable than more severe intrusions based upon the same, or intrusions based upon statute, from the perspective of coherence with the principle of legality. Laws LJ suggested in *R (Wood) v Commissioner of Police of the Metropolis*

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<sup>569</sup> In discussing Enhanced Criminal Record Certificates (ECRCs) issued to job applicants commonly looking to work with children or vulnerable people, for example, Sumption LJ in *R (P and others) v Home Secretary* [2019] UKSC 3 at 12 observed that: "It is not disputed that article 8 is engaged."

<sup>570</sup> See *In the matter of an application by JR38 for judicial review* [2015] UKSC 42.

<sup>571</sup> See *MM v UK* [2012] ECHR 1906

[2009] EWCA Civ 414, a case concerning police video surveillance of demonstrators at a public meeting, that (at 54) "...the nature of the respondent's interference with the appellant's private life was... no more than modest. In those circumstances the requirement of legality is... satisfied by the general common law power [of the police to use overt surveillance]."

However, in turn, it can be argued that disclosures under the DVDS are more than modest interferences with the right to respect for private and family life under Article 8 of the ECHR. It must be acknowledged that disclosures under the Scheme, when they are made, are serious intrusions into the contemporary private life of an (ex) offender, given that the purported aim of the DVDS, as discussed in Chapter 2, is bringing purportedly risky personal and intimate relationships to an end.

As a result, this thesis argues that the common law basis of the Scheme entails a breach of the particular element of that principle that *prefers* democratic process (and thus statute) for the creation of a legal power resulting in the interference with human and fundamental rights. In addition, given the great potential for severe interferences with rights under the Scheme, because of its purported operational aims, the common law basis of the DVDS creates grounds for the criticism that the criteria for disclosures are not sufficiently 'clear and unambiguous' to satisfy the principle of legality, by way of further analogy.

However, to resolve this issue, we must explore the way in which a right like that contained in Article 8 ECHR may be lawfully interfered with only in a manner that is *legitimate*, in a particular sense, using criteria of *foreseeability*, and as such 'in accordance with the law'; albeit that the law concerned is a series of common law-based tests and structures. It is to the structures by which those common law-based interferences under the DVDS are assessed for their *foreseeability* that we now turn.

#### 8.6 A lack of clarity around criteria for disclosures under the Scheme

Legitimate disclosures that lawfully interfere with Article 8 ECHR must be based upon a foreseeable set of common law tests or standards, as noted above. And as was discussed in Chapter 1, the criteria for disclosure under the DVDS are based upon principles of a 'pressing need' for disclosure; reasonableness; good faith on the part of the police; proportionality, and the balanced duty to seek representations from the subject of a disclosure, where this is practicable. As Baker J observes in *R (AB) v Hampshire*

*Constabulary* [2015] EWHC 1238 (Admin) at para. 49, the European Court of Human Rights has maintained in *MM v UK* [2012] ECHR 1906 at para. 193 that:

"The requirement that any interference must be 'in accordance with the law' under Article 8.2 means that the impugned measure must have some basis in domestic law and be compatible with the rule of law... The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise..."

As a result, we can measure the coherence of the DVDS with these principles of both the rule of law and with Article 8(2), by making a judgment as to whether common law tests for disclosure as reflected in guidance on the operation of the DVDS: i) affords subjects of disclosures 'sufficient precision' in relation to the operation of the DVDS given the common law tests and standards for the disclosure of information about their past in relation to the (alleged) commission of domestic violence offences, and ii) affords subjects of disclosures 'sufficient protection' against arbitrariness in the level of discretion afforded police bodies in relation to the operation of the DVDS.

#### *Testing the current DVDS guidance*

The Home Office guidance from 2016 actually deploys a three-part test, which is broken down and addressed in detail under the headings below, but which in essence draws on the three key components of 'reasonableness', a 'pressing need', and 'proportionality'<sup>572</sup>. We can now examine the manner in which each of these criteria from the Scheme guidance accord with the legal position on criteria for police powers for disclosures of information with the purpose of protecting victims from harm, and with the aim of establishing whether this i) affords subjects of disclosures 'sufficient precision' in relation to the common law tests and standards for the disclosure of information about their past in relation to the (alleged) commission of domestic violence offences, and ii) affords subjects of disclosures 'sufficient protection' against arbitrariness in the level of discretion afforded police bodies in relation to the operation of the DVDS.

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<sup>572</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 18-19.



### A. Reasonableness

According to current DVDS guidance from the Home Office, the following, first-stage strand of the three-part test for disclosure must be satisfied, in order that a disclosure might lawfully take place, namely: *a. it is reasonable to conclude that such disclosure is necessary to protect A from being the victim of a crime*<sup>573</sup>. What can be considered to be a 'reasonable' use of police common law powers to prevent harms in different contexts has been considered by the courts over a considerable period; and context plays a significant part in determining judicial attitudes as to the reasonableness of the use of those common law powers. Alan Davenport has observed that:

"It has long been established that the police have a duty to prevent breaches of the peace and a concomitant power to take reasonable action short of arrest to ensure that the peace is not breached... What constitutes 'reasonable' action is a question of fact to be decided in the light of surrounding circumstances."<sup>574</sup>

Given relevant case law<sup>575</sup> it is clear that immoral behaviour that is not criminal behaviour should not be basis of a disclosure using police common law powers. So we can confidently state that the disclosure of information about a subject's controversial or immoral lifestyle, sexual habits or relationships, to the extent that they are non-criminal behaviours, would not be the basis of a 'reasonable' disclosure. An issue concerned with potential arbitrariness and a lack of legal foreseeability, however, rather than clarity in the guidance, is that the current DVDS guidance allows for the disclosure of items of 'criminality information' of a lower 'provenance' or factual certainty than a conviction. These might relate to the (alleged) commission of domestic-violence related offences in the past; from records of charges and acquittals, to arrests, and even down to only recorded allegations of violence behaviour and abuse<sup>576</sup>. It can be argued that a more

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<sup>573</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 18-19.

<sup>574</sup> Alan Davenport, 'Apprehended breach of the peace: lawfulness and proportionality of preventive action', *J. Crim. L.* (2005) 69(2) 109, 111.

<sup>575</sup> *A v B* [2010] EWHC 2361 (Admin)

<sup>576</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, paras. 10, 13, 52 and Annex A.

foreseeable and less arbitrary version of the Scheme guidance would put greater emphasis than the current guidance does on the issue of the provenance/certainty of the criminality information types that might be disclosed under the DVDS<sup>577</sup>, and would regulate this issue more closely.

A record of an arrest for a domestic violence-related offence, for example, does not have the provenance or certainty, in a legal sense, as a record of a conviction for the same: arrests are made on the basis 'reasonable grounds to suspect' an offence has been committed, while convictions are secured when the evidence puts the matter of guilt 'beyond reasonable doubt'. While Davenport may be academically astute in observing, above, that what is reasonable is 'a question of fact to be decided in the light of surrounding circumstances' of a possible disclosure, where we are clearly dealing with a test of reasonableness that might apply to very different categories of criminality information in terms of their provenance/certainty, this difference should be more overtly made plain in the guidance on the reasonableness of disclosures under the DVDS.

#### *B. A 'pressing need'*

A second-stage strand of the three-part test for disclosure must be satisfied, i.e.: '*b. there is a pressing need for such disclosure*'<sup>578</sup>. The leading case establishing the common law standard of the 'pressing need' required for disclosure is *R v Chief Constable for North Wales ex parte Thorpe* [1998] EWCA Civ 486. In *Thorpe*, Lord Woolf created this standard without reference to any pre-existing case law however, and did not elaborate any further other than to state that: "Disclosure should only be made when there is a pressing need for that disclosure". The 'pressing need' for disclosure test has, however, been

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<sup>577</sup> In the same way, the current DVDS guidance posits a change of stance, compared to the last iteration of the guidance, on 'spent convictions' and the effect of the provisions of S.4 of the Rehabilitation of Offenders Act 1974 on the ambit of disclosures under the Scheme; this is something that is addressed later in this Chapter. While this recent clarification in the Scheme guidance is welcome, the statutory approach of the basis of the Child Sex Offender Disclosure Scheme is clearer and more precise. S.327B of the Criminal Justice Act 2003 makes it plain that the relevant provisions of S.4 of the Rehabilitation of Offenders Act 1974 are not relevant to the operation of the CSODS, and that otherwise 'spent convictions' are included in its ambit.

<sup>578</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 18-19.

cited on a multitude of occasions in the case law<sup>579</sup>. However, such elaborations as there are in this body of case law (often *obiter*) on the 'pressing need' rule from *Thorpe* do not create much elucidation or precision on the nature of what can be said to be a 'pressing need'; there is as much repetition if anything of the point made by Lord Woolf in *Thorpe* that: "Each case must be judged on its own facts."<sup>580</sup>

In trying to find those elements of judicial commentary that do exist in relation to a better attempt to define the 'pressing need' standard for disclosure, we should begin with *R v A local authority in the Midlands and another, ex parte LM* [2000] 1 FLR 612. In this case, Dyson J observed, of the 'pressing need' required for disclosures, that overall "[d]isclosure should be the exception and not the rule." In addition to this, Stuart-Smith J in *R (L) v Chief Constable of Cumbria Constabulary* [2013] EWHC 869 at 89 has observed that the 'pressing need' threshold for a lawful disclosure would not be reached if there were "limited circumstances in which a possible risk of repetition [of the criminality concerned] might arise", or if there were a "relative lack of gravity of the alleged conduct", information about which would form the basis of the disclosure. More broadly however, and from the contrasting public protection perspective, Beatson LJ in *R (A) v Chief Constable of Kent Constabulary* [2013] EWCA Civ 1706 at 94 suggested that a 'pressing need' for disclosure would exist "where [disclosure] is necessary to do so to protect the vulnerable group from the risks to them".

Importantly, when considering the foreseeability requirement in relation to the DVDS and other common law-based DADS, Munby LJ in *H and L v A City Council* [2011] EWCA Civ 403 at para 37 found there was an inherent link between a 'pressing need' test for disclosure and the requirements of Article 8 ECHR for disclosures:

"As the authorities show, each case must be judged on its own facts. The issue is essentially one of proportionality. Information such as that with which we are here concerned is to be disclosed only if there is a "pressing need" for that disclosure. There is no difference in this context between the common law test and the approach mandated by Article 8. The outcome is the same under both."

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<sup>579</sup> Including in *R (AB) v Chief Constable of Hampshire Constabulary* [2013] EWHC 1238 (Admin) at 52; *R (A) v Chief Constable of Kent Constabulary* [2013] EWCA Civ 1706; *R (L) v Chief Constable of Cumbria Constabulary* [2013] EWHC 869 at 89; *R (B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin) at 43; *H and L v A City Council* [2011] EWCA Civ 403 at 37; *A v B* [2010] EWHC 2361 (Admin); *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; *X v Chief Constable of West Midlands Police* [2004] EWHC 61 (Admin); *R (A) v National Probation Service* [2003] EWHC 2910 (Admin); and *R v A local authority in the Midlands and another, ex parte LM* [2000] 1 FLR 612.

<sup>580</sup> *R v Chief Constable for North Wales ex parte Thorpe* [1998] EWCA Civ 486, 15.

As to whether a rule concerning thresholds for disclosures must be statutory in order to be 'in accordance with the law' and so in that way satisfy Article 8 ECHR, however, Lord Sumption explained in *R (Catt and T) v ACPO* [2015] UKSC 9 at 11 that:

"...the rules need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them. Their application, including the manner in which any discretion will be exercised, should be reasonably predictable, if necessary with the assistance of expert advice. But except perhaps in the simplest cases, this does not mean that the law has to codify the answers to every possible issue which may arise. It is enough that it lays down principles which are capable of being predictably applied to any situation."

In terms of laying down those principles, in an interesting case in the context of disclosure of details of criminal history, and in finding no unlawfulness in the disclosure of past allegations of child abuse to a new, different partner with children, Weatherup J, in the case of *In the Matter of an Application by James Martin for Judicial Review* [2002] NIQB 67 at para 33, found that:

"The respondent [public body] had reasonable cause to suspect that the applicant's new partner's children would be likely to suffer significant harm and had grounds to conclude that action was required to safeguard the children's welfare. An assessment was made based on the facts and circumstances of the particular case. A pressing need for disclosure was established. A balance of the considerations affecting the applicant's interests and the public interest was carried out."

A new statutory test for disclosures under the DVDS test could then be phrased as requiring 'reasonable cause to suspect a person would be likely to suffer significant harm and grounds to conclude a disclosure is required to safeguard their welfare'. As another possibility, a fresh statutory basis for the DVDS could look, in an alternative approach, like the language used to address the same sort of operational threshold in relation to the Child Sex Offender Disclosure Scheme, under S.327A of the Criminal Justice Act 2003, as amended. This creates (along the lines of a very proactive 'Right to Know') 'a presumption that the responsible authority should disclose information in its possession about the relevant previous convictions of the offender to the particular member of the public', where a risk threshold is reached, namely:

where the responsible authority for the area has reasonable cause to believe that—  
(a) a child sex offender managed by it poses a risk in that or any other area of causing serious harm to any particular child or children or to children of any particular description, and

(b)the disclosure of information about the relevant previous convictions of the offender to the particular member of the public is necessary for the purpose of protecting the particular child or children, or the children of that description, from serious harm caused by the offender.

So in the statutory CSODS, for example, a democratically-approved and textually-precise clarity is adduced to the threshold of need for disclosure, not only by specifying the requirement for a reasonable cause for belief that a disclosure should be made, but also by way of defining the purpose of the disclosure ('protecting the particular child or children, or the children of that description, from serious harm caused by the offender').

Furthermore, statutory bars could be placed on the disclosure, to rebut the presumption for disclosures, if there were, to return to the words of Stuart-Smith J, "limited circumstances in which a possible risk of repetition [of the criminality concerned] might arise", or if there were a "relative lack of gravity of the alleged conduct".

Furthermore, the exact nature of what can be disclosed under the CSODS is precisely defined in S.327B(5)(a) as 'convictions, findings and cautions' for child sex offences listed under Schedule 34A to the 2003. So information of a lesser 'provenance', possessed by the police body about any child sex offender managed by it, such as records of arrests or 'intelligence' about cases that did not lead to a conviction, finding or caution, cannot be disclosed despite the presumption to disclose 'convictions, findings and cautions'.

Similarly, this situation can be shown to be in parallel with the provisions of Art.50 of the Criminal Justice (Northern Ireland) Order 2008/1216, which requires that guidance be issued by the Secretary of State for Justice in Northern Ireland on what are termed Child Protection Disclosures. As amended, Art.50(2A) of the 2008 Order entails that this guidance must "contain provisions about arrangements for considering the disclosure, to any particular member of the public, of information concerning any relevant previous convictions of a person where it is necessary to protect a particular child or particular children from serious harm caused by that person", and where relevant previous convictions means only convictions and cautions, as well as findings of fact by mental health tribunals, by virtue of Art.49 of the 2008 Order. In this way, information such as records of arrest or the record of charges about a person alleged to have been a risk to children is excluded from the ambit of Child Protection Disclosures in Northern Ireland

just as they are from the ambit of the Child Sex Offenders Disclosure Scheme in the rest of the UK.

An important aside must be made here. It was noted already (above) that, with the creation of a relevant statute, the common law on the use of a police power will ordinarily be either overridden or delineated by the creation of an Act of Parliament. However, under S.327A (10) of the 2003 Act, the creation of the basis for the CSODS in this express statutory provision "is not to be taken as affecting any power of any person to disclose any information about a child sex offender", meaning that the common law power of the police to disclose records of arrests or charges for public protection purposes is unaffected, and the common law criteria for disclosure of reasonableness, good faith, a limited 'need to know' and a 'pressing need' for disclosure are unaffected in relation to these circumstances as they apply to the safeguarding of children, as well as adults. As a result, despite the creation of the CSODS in statute as only encompassing 'convictions, findings and cautions' in its operation, this still then entails a considerable incoherence and inconsistency for the standards of disclosures of information about child sex offenders for public protection purposes (and would be the case in Northern Ireland, where the common law rules on the requirement of a 'pressing need' would apply, as they do too in England, Scotland and Wales).

As such, it is not enough to assume that should the DVDS be placed onto a statutory or other legislative footing then it would automatically become more coherent. In essence, the common law power of the police to disclose different categories of information, in relation to different categories of offender, and according to criteria that satisfy the requirement of Article 8 ECHR for necessity, legitimacy and proportionality, needs to be entirely re-founded in statute, and comprehensively enacted, *along with* its dissolution or abolition as a common law police power to disclose information for public protection purposes.

It is thus possible to see from the lack of judicial exploration and/or standardisation of the 'pressing need' standard that some fresh and future statutory codification of the principle, allowing for elaboration by Parliament on the issue, would be most helpful in enhancing the coherence of the DVDS, and particularly in relation to the 'foreseeability' of the operation of the Scheme. A statutory basis for the DVDS may also help to address the

concerns of police and other public protection professionals who have offered up the view that the 'pressing need' standard is hard to determine.<sup>581</sup>

### *C. Proportionality*

Proportionality, as the third part of the three-stranded test for disclosures as written in the revised Scheme guidance, must be given a nuanced approach; and the Scheme guidance certainly adopts a detailed take on the principle:

"c. interfering with the rights of B, including B's rights under Article 8 of the European Convention of Human Rights, to have information about his/her previous convictions kept confidential is necessary and proportionate for the prevention of crime. This involves balancing the consequences for B if his/her details are disclosed against the nature and extent of the risks that B poses to A. This stage of the test involves considering:

"i. whether B should be asked if he or she wishes to make representations, so as to ensure that the police have all the necessary information at their disposal to conduct the balancing exercise, and

"ii. the extent of the information which needs to be disclosed - e.g. it may not be necessary to tell the applicant the precise details of the offence for the applicant to take steps to protect A."<sup>582</sup>

Of course, the language of Article 8 ECHR ensures that an interference with the qualified right to respect for private and family life, such as a disclosure under the DVDS, must conform to the crucial three principles of necessity, legitimacy *and proportionality*<sup>583</sup>. As Adam Ramshaw has observed, there are a range of different and commonly-encountered types of proportionality-based review. He has highlighted six types, as follows:

1. 'normal' two-stage EU proportionality;
2. 'normal' three-stage EU proportionality;
3. EU manifest disproportionality;

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<sup>581</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS): One Year On - Home Office assessment of national roll-out* (2016) <<https://www.gov.uk/government/publications/domestic-violence-disclosure-scheme-assessment-of-national-roll-out>> accessed 10 April 2017, 5-6; and Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260894/DVDS\\_assessment\\_report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260894/DVDS_assessment_report.pdf)> accessed 10 April 2017, 5 and 18-19.

<sup>582</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 18-19.

<sup>583</sup> See speech by Douwe Korff, 'The standard approach under Articles 8-11 ECHR and Article 2 ECHR', <[http://ec.europa.eu/justice/news/events/conference\\_dp\\_2009/presentations\\_speeches/KORFF\\_Douwe\\_a.pdf](http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf)> accessed 10 April 2017.

4. 'normal' four-stage ECHR proportionality;
5. ECHR manifestly without reasonable foundation proportionality; and
6. proportionality at common law.<sup>584</sup>

A detailed approach to proportionality as a principle in decision-making was not something well-recognised in UK policing circles beyond the last 20 years, or even far more recently<sup>585</sup>. However, to some scholars, proportionality review derived from the common law, not the ECHR, is actually nothing new. As Paul Craig explains:

"The reality is that proportionality-type review existed in the UK from the seventeenth century onwards, and it was most commonly applied in non-rights-based cases. We did not have the classic three-part proportionality inquiry, and indeed if you search the legal database for the word proportionality you will get no hits. This is, however, because a range of different words were used in the context of judicial review actions, direct and collateral, including proportionable, proportionability, disproportion and proportionate. The semantic difference should not, however, conceal the substantive similarity: the courts were concerned to ensure that the regulatory burden placed on an individual was not excessive and that it was fair given the nature of the regulatory schema."<sup>586</sup>

The UK courts have come to adopt a standard four-part proportionality test, for measuring the lawfulness of interferences with Article 8 ECHR, amongst other qualified ECHR rights, and this is based on measuring i) the 'sufficient importance' of that interference; ii) its 'rational connection' to a policy aim; iii) whether it is the most 'minimal interference' possible with the qualified right concerned, and iv) whether a 'fair balance' has been struck between the interference with an individual's right, and the benefit to wider society<sup>587</sup>. As I have argued elsewhere, this four-part test could be re-phrased or adapted for use in situations involving the disclosure of criminality information on the basis of police common law powers, as is the case in terms of the operation of the three UK DADS, since:

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<sup>584</sup> Adam Ramshaw, 'The case for replicable structured full proportionality analysis in all cases concerning fundamental rights', 39 *Legal Studies* (2019) 120, 121.

<sup>585</sup> See Sarah Poolman, Richard Wilshaw, and Jamie Grace, 'Human Rights in Policing: The Past, Present and Future', *The Political Quarterly* 90(3) (2019) 449.

<sup>586</sup> Paul Craig, 'Proportionality and Constitutional Review', *University of Oxford Human Rights Hub Journal* (2020) Vol 3(2) 87-95, p.88

<sup>587</sup> See for example the use of this four-part proportionality test in the judgment of Wilson LJ in *R (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 45.



"Police authorities, in considering a proportionate disclosure under the Scheme, should look to establish: (a) a sufficient importance, in terms of a 'pressing need' (or 'necessity') to justify interfering with the rights of a 'subject' as an (alleged) perpetrator of domestic violence, under the Scheme; and (b) a rational connection between the purpose of the proposed sharing of information with the purpose of the (common law) powers of the police to disclose information; and (c) a minimalised interference with the rights of the subject where practicable; and lastly, (d) evidence of a balancing exercise being conducted, weighing the rights of the 'subject' and the rights of the (potential) victim".<sup>588</sup>

Proportionality in the context of 'criminality information' disclosures entails an emphasis, expounded in the relevant case law, on seeking representations from the subjects of disclosures; as well as disclosing only to those with a reasonable purpose to know.

#### *Seeking representations from the subjects of disclosures*

It is important to consider the extent of the duty on the police to consider consultation with the subject of a proposed disclosure of information that is necessary for public protection purposes, including the prevention of domestic violence through use of the DVDS in England and Wales. Lord Woolf explained in *R v Chief Constable of North Wales Police ex p Thorpe* [1999] Q.B. 396 (at 428) that:

"Disclosure should only be made when there is a pressing need for that disclosure. Before reaching their decision as to whether to disclose the police require as much information as can reasonably practicably be obtained in the circumstances. In the majority of the situations which can be anticipated, it will be obvious that the subject of the possible disclosure will often be in the best position to provide information which will be valuable when assessing the risk." [Emphasis added.]

In *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, Lord Neuberger said (at para 84) that "the imposition of such a duty is a necessary ingredient of the process if it is to be fair and proportionate." According to Lord Munby in *H & L v A City Council* [2011] EWCA Civ 403 at 50, there is a duty to consider consultation with the subject of a proposed disclosure of information for public protection purposes, given "standards of procedural fairness mandated in circumstances such as this both by the common law and by Article 8 [of the ECHR]". In *H & L* at 49, Lord Munby criticised the local authority for the opaque nature of their decision-making: "The local authority took and then implemented its decision behind H's back and without giving either H or L any opportunity to have their say before tardily confronting them with a *fait accompli*."

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<sup>588</sup> Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* 79(1) (2015) 36, 42.

Although Lord Munby saw this duty to consider consultation with disclosure subjects to be part of the common law, he was clear that (at 51) that "Article 8 likewise has an important *procedural* component...":

"Long-established Strasbourg jurisprudence, articulated by the court as long ago as 1988 (see *W v United Kingdom* (1988) 10 EHRR 29, paras [63]–[64]), requires that, where Article 8 is engaged, the local authority's decision-making process must be such as to secure that the views and interests of those who will be adversely affected by its decision are made known to and duly taken into account by the local authority, and such as to enable them to exercise in due time any remedies available to them. The question, according to the court, is whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, those affected have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests."

The European Court of Human Rights has emphasised the procedural components of Article 8 ECHR for some considerable time, and with a considerable degree of rigour. In *Buckley v United Kingdom* (1996) (*Application no. 20348/92*), the Strasbourg Court highlighted (at 76) that:

"Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 (art. 8) contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8"

Furthermore, the Grand Chamber of the Strasbourg Court explained in *Hatton v UK* (2003) (*Application no. 36022/97*) (at 104) that in making a decision on the interference with procedural elements of Article 8 ECHR it must "...consider all the procedural aspects [of a decision], including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available". However, as a matter of domestic law concerning the sharing of criminal histories, the requirement to undertake consultation with a disclosure subject, prior to disclosure, is not absolute. In *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3 at 46, Lord Hope explained that, in relation to Enhanced Criminal Record Certificate disclosures, for example:

"... where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released... But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable." [Emphasis added.]

More recently, the Supreme Court has suggested that where there is considerable clear evidence of the subject's perspective on their alleged criminality, consultation with that subject need not always take place. In *R (AR) v Chief Constable of Greater Manchester* [2018] UKSC 47, there was a finding that a lack of consultation with a disclosure subject prior to an ECRC being created was not unlawful, even though it disclosed an acquittal rather than a conviction for rape. In a unanimous judgment on the issue, Lord Carnwath noted in *AR* (at 66) that:

"It makes no difference whether this is looked at by reference to article 8, or to common law principles of fairness. The complaint [by AR] in essence is of lack of consultation, and was rightly rejected... The officers were fully aware from the evidence at trial of the nature of AR's defence, and his personal circumstances, and they were aware and took account of the potential impact on his employment prospects... there was no indication of any further information [AR] would have wished to advance."

This position from the Supreme Court in *AR* is generous towards the analytical powers of police officers in their decision-making process about a potential disclosure. So how to address the (un)lawfulness of a decision not to consult a potential disclosure subject as part of the decision making process? There is a helpful judicial suggestion in *R (C) v Home Secretary and Chief Constable of Greater Manchester* [2011] EWCA Civ 175. In this case the Court of Appeal decided it was correct for the High Court to quash the decision to share the allegations concerning C, in relation to abuse of a child 15 year previously, and for which he was not convicted. Lord Toulson suggested the following test in *obiter* (at para 12): "Was it obvious that nothing that [the potential disclosure subject] could have said could rationally or sensibly have influenced the mind of the Chief Constable?"

However, and importantly, much of the case law discussed here, on the point about a duty to consider consultation with a potential disclosure subject, such as *L*, *AR* and *C*, concern processes relating to Enhanced Criminal Record Certificates, where the disclosure subject

is the person who has applied for a job in an area that requires an ECRC to be produced - so they, as the subject of the ECRC, understand they have in effect triggered the process. Even in *H & L*, the disclosure was between a local authority and other organisations that might fund the charity operated by H and L. Even if the two claimants did not have any inkling, initially, that a disclosure had or might be made about H's criminal history for public protection purposes, making them aware of a potential disclosure would not create a risk of violence toward any person. So the situation where an applicant makes a Right to Ask request under the DVDS in England and Wales, for example, is distinguishable from these other situations, since the disclosure subject will have no awareness, conceivably, that the applicant is requesting information about them, if it exists. If a potential disclosure subject were to be consulted about this, in situations involving violent partners and former partners, then that would conceivably raise the risk of serious harm to the DVDS applicant who has been in contact with the police. Given the common law duties on the police, and positive obligations under Articles 2, 3 and 8 ECHR towards victims of abuse, to protect them from repeated and/or foreseeable imminent harm, there is little wonder that the 2016 Home Office guidance on the operation of the DVDS is very cautious on the issue of pre-disclosure consultation with the subject. The Home Office guidance is worded to include a balanced consideration of non-consultation with 'B' (the subject of the potential disclosure):

"Consideration must also be given as to whether B should be told that information about him/her may be disclosed to the applicant. Such a decision must be based on an assessment of risk of harm to A, if B were to be informed. Due consideration must be given on whether the disclosure to B would have potential to escalate the risk of harm to A. If this were to be the case, no disclosure must be given to B... In the event that B is to be informed that a disclosure is to be made to the applicant, then B should be informed in person and given information about the Domestic Violence Disclosure Scheme and the implications for B. This also provides agencies with an opportunity to sign-post B to relevant support services to allow B to address his/her offending behaviour."<sup>589</sup>

*A general conclusion on the 'pressing need' test for disclosure*

However, the DVDS is an example of the "... nexus between the police's common law duty to prevent a breach of the peace and the existence of powers short of arrest

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<sup>589</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 3 March 2021 p.19

exercisable to fulfil that duty"<sup>590</sup>. As Davenport goes on to observe, however, the "issue that courts will have to deal with is whether or not those powers have been exercised proportionately in any given situation."<sup>591</sup> Balancing rights, as a matter of using discretion proportionality, is indeed the key problem for police decision-makers considering potential disclosures under the auspices of the DVDS. As the judgment of Lord Reed in *R (T) v Secretary of State for the Home Department* [2014] UKSC 35 at 113 explains, a body of legal rules which "requires the indiscriminate disclosure by the state of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with article 8 rights." The principal problem for the legal coherence of the DVDS is in essence the lack of definition around what can be said to be a standard for disclosure of a 'pressing need'. This causes a distinct issue around the foreseeability of the operation of the Scheme. It must be said that the body of case law that addresses the 'pressing need' standard is not so woefully absent that we can assert that the DVDS is an entirely indiscriminate system of disclosure. But nor is it the best example of a system that affords subjects of disclosures 'sufficient precision' in relation to the common law tests and standards for the disclosure of information about their past in relation to the (alleged) commission of domestic violence offences.

#### 8.7 The rule of law, foreseeability and uncertainties over spent convictions<sup>592</sup>

Legal uncertainties over the degree to which spent convictions and cautions can be included in disclosures through two of the three UK DADS (the DVDS and the DVADS) are something of a risk to the Article 8 ECHR compliance of DADS policy in England and Wales, as well as Northern Ireland. It will be shown in this Chapter section that the regulation, in those jurisdictions, of the disclosure of spent convictions or cautions through such processes is not readily *foreseeable*, in ECHR terms; posing considerable concerns on this discrete issue for the compliance of UK DADS policy with rule of law

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<sup>590</sup> Alan Davenport, 'Apprehended breach of the peace: lawfulness and proportionality of preventive action', *J. Crim. L.* 2005, 69(2), 109-113, p.112-113.

<sup>591</sup> *Ibid.*

<sup>592</sup> My research for this section of this Chapter fed into some of my previous pieces of work on spent convictions under the DVDS. See Marian Duggan & Jamie Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145; and Jamie Grace, 'The nature of spent convictions and the common law basis of the Domestic Violence Disclosure Scheme: Limiting the effectiveness of Clare's Law?', (2015) 21(2) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/401/517>> accessed 16 July 2020.

values. This is because the manner in which spent convictions and cautions can be lawfully disclosed under the DVDS or the DVADS cannot be easily mapped.

In a relatively early case concerned with the effect of a conviction becoming spent on the ability of the police to disclose that conviction, *X v Commissioner of Police of the Metropolis*<sup>593</sup>, Whitford J offhandedly outlined the notion that with regard to Section 4 of the Rehabilitation of Offenders Act 1974 it could be agreed that "there is no positive duty imposed in general terms upon persons not to disclose what are conveniently referred to as 'spent convictions'". This part of this Chapter explores why such a remark upon the lack of a general duty not to disclose spent convictions has bearing and some amount of controversy in an analysis of the legal basis and scope of the Scheme.

The Ministry of Justice publishes guidance on the nature of the relationship between the Rehabilitation of Offenders Act 1974 and the concept of spent convictions, and for the sake of clarity the essence of this guidance is worth repeating here:

“The Rehabilitation of Offenders Act 1974 (“1974 Act”) primarily exists to support the rehabilitation into employment of reformed offenders who have stayed on the right side of the law. Under the 1974 Act, following a specified period of time which varies according to the disposal administered or sentence passed, cautions and convictions (except those resulting in prison sentences of over four years and all public protection sentences) may become spent. As a result the offender is regarded as rehabilitated. For most purposes the 1974 Act treats a rehabilitated person as if he or she had never committed, or been charged with charged or prosecuted for or convicted of or sentenced for the offence and, as such, they are not required to declare their spent caution(s) or conviction(s), for example, when applying for most jobs or insurance, some educational courses and housing applications.”<sup>594</sup>

*Prima facie*, spent convictions might be most readily thought of as giving effect to legal rehabilitation in terms of enhancing and protecting employment rights and the employability of former offenders. Indeed, in some of the relevant case law on occasions judges divine a very clear intention on the part of Parliament to create a legislative scheme, in the form of the Rehabilitation of Offenders Act 1974, which protects offenders from disclosures to their employers about their past, spent convictions and related

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<sup>593</sup> [1985] 1 W.L.R. 420, Whitford J (at 421)

<sup>594</sup> See HM Government, 'Guidance on the Rehabilitation of Offenders Act 1974' <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299916/rehabilitation-of-offenders-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf)> accessed 20 June 2020. The same Ministry of Justice guidance sets out when a conviction can become 'spent' (and when it cannot) (see Fig. 9, below).

information (apart from where there is an exception under statute to that principle, in relation to a certain occupation or role e.g. nursing, social care, and many roles working with vulnerable people or children etc. under what is termed an ‘Exceptions Order’<sup>595</sup>). In *W v Chief Constable of Northumbria* [2009] EWHC 747 (Admin), for example, Nicol J makes it clear that spent convictions should not be disclosed in the employment context/to employers using common law powers: “One of the effects of a conviction becoming spent is that it need not be disclosed to an employer and the failure to disclose it cannot be a proper ground for dismissal or for prejudicing a person in any way in his employment... [given] s.4(3)(b) [of the 1974 Act]” (para. 21). Nicol J further observed that “The Parliamentary policy behind the Rehabilitation of Offenders Act is that those whose convictions are spent are entitled to treat them as past history.” (para. 66) as well as concluding that in the case of W: “Since the conviction was spent, the Claimant had a statutory right to say nothing about it when seeking employment.” (para. 24).

But the operation of the Domestic Violence Disclosure Scheme is not in the employment/public protection nexus, but in the domestic/intimate partnership domain, of course – and so things grow more complex in terms of the exact relationship between the common law basis of the DVDS and the provisions and effects of the 1974 Act. Case law, as discussed below, helps us to see that the non-employment or more domestic context of the operation of the Scheme places it on a potentially different footing in relation to the *prima facie* effects of the 1974 Act. It is of value to explore both the way that the published Scheme guidance has shifted on the question of (non) disclosure of spent convictions, and the more subtle position this reflects given the underpinning case law. As will be recalled, the operation of the Scheme was reviewed by the Home Office in the first half of 2016; and one recommendation in relation to the operation of the Scheme was that new guidance should clarify the common law tests for disclosure<sup>596</sup> - although the report of this review made no mention of a need to change or clarify the position on the applicability or scope of the Scheme in relation to the potential disclosure of spent convictions.

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<sup>595</sup> See HM Government, 'DBS filtering guide' (2013) <https://www.gov.uk/government/publications/dbs-filtering-guidance/dbs-filtering-guide>> accessed 30 June 2020.

<sup>596</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS): One year on - Home Office assessment of national roll-out* (Home Office 2016) 5.

Accordingly, when a new version of the guidance on the DVDS was published in early December 2016<sup>597</sup>, it was no surprise that the common law tests for disclosure were re-stated, drawing directly on the case law that creates and shapes the common law power of the police to disclose information to protect (potential) victims of crime. In essence, disclosures under the Scheme must be made in response to a ‘pressing need’ to protect a (potential) victim of domestic violence, where it is reasonable and proportionate to do so, as was explained in more detail above.

<b>Table 7: MOJ spent convictions guidance</b>	Buffer period for adults (18 and over at the time of conviction or the time the disposal is administered). This applies from the end date of the sentence (including the licence period).	Buffer period for young people (under 18 at the time of conviction or the time the disposal is administered). This applies from the end date of the sentence (including the licence period).
Custodial sentence of over 4 years, or a public protection sentence	Never spent	Never spent
Custodial sentence of over 30 months (2 ½ years) and up to and including 48 months (4 years)	7 years	3½ years
Custodial sentence of over 6 months and up to and including 30 months (2 ½ years)	4 years	2 years
Custodial sentence of 6 months or less	2 years	18 months
Community order or youth rehabilitation order	1 year	6 months

<sup>597</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020.



However, there appears to have been a shift of Home Office policy in relation to the operation of the Scheme vis a vis spent convictions under the most recent published guidance. The first iteration(s) of the Scheme guidance were intractable on the effect of the Rehabilitation of Offenders Act 1974 on the scope of those common law powers<sup>598</sup>. This is because Section 4 of the 1974 Act makes it *prima facie* unlawful to disclose what are termed ‘spent convictions’ (or ‘spent cautions’). Section 4 of the 1974 Act exhorts those that possess information about the spent convictions pertaining to an individual to treat that individual ‘for all purposes in law’ as though they had not received that conviction (or caution). Most case law that in some way mentions these provisions of the 1974 Act relates to criminal records that are exempt from the effect of rehabilitation, that is, they cannot become ‘spent’ under the Act due to Orders specifying that certain fields of employment should be subject to the requirements of Enhanced Criminal Records Certificate processes, administered via the Disclosure and Barring Service. However, in relation specifically to the DVDS as a matter of policy, first iteration(s) of the Scheme guidance were clear that spent convictions and their equivalents could not therefore be disclosed under the Scheme<sup>599</sup>.

However, this did create an unsatisfactory policy stance, it could be argued<sup>600</sup>. Specifically, a record of an arrest, or of a criminal charge, or even of an acquittal, could be disclosed under the Scheme, if the relevant common law-based threshold for disclosure was met, as well as any unspent convictions relating to these pieces of information for the same offence; but when that conviction became spent, in time, all those pieces of information became barred from disclosure according to the previous Scheme guidance. But if a conviction for that offence was never secured, say due to an acquittal at trial, then all those pieces of information (namely a record of an allegation or an arrest, and perhaps a record of a charge itself), on a literal reading of the 1974 Act, could never become spent as they never related to a *conviction*.

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<sup>598</sup> See Home Office, *Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013)* (Home Office 2013).

<sup>599</sup> *Ibid.*

<sup>600</sup> See my initial observations in Jamie Grace, ‘The nature of spent convictions and the common law basis of the Domestic Violence Disclosure Scheme: Limiting the effectiveness of Clare’s Law?’, (2015) 21(2) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/401/517>> accessed 16 July 2020.

This substantive difference in treatment of spent convictions versus mere records of (alleged) ‘bad behaviour’, as purportedly required by this more literal interpretation of section 4 of the 1974 Act, is acknowledged in the recent High Court case of *YA v London Borough of Hammersmith and Fulham* [2016] EWHC 1850. Here a person seeking a place in council-owned social housing was initially barred from access to such housing due to convictions that were later observed to be spent under the terms of the 1974 Act. Finding that this treatment of the applicant had been unlawful, due to the effect of rehabilitation under section 4 of the 1974 Act, the judgment in *YA* does then acknowledge that behaviours relating to non-convictions could readily, by way of contrast, have been used to inform the decision about whether to place him in such housing accommodation.

However, in reviewing the Scheme guidance for re-publication in December 2016, the Home Office appears to have had regard to older case law, which takes a more purposive approach to interpreting the language of section 4 of the 1974 Act.

A starting point is the new Scheme guidance on this point, which states (para. 53) that in addition to the required threshold for disclosure of a ‘pressing need’, allowing the police to use their common law power of disclosure in pursuit of public protection aims, then:

“Where police officers have the power in the course of their duties to disclose spent convictions [or cautions etc.] under the Domestic Violence Disclosure Scheme it is important that disclosure still needs to be **reasonable and proportionate** [emphasis in the original]. The police will work to take into account the age of the spent conviction during the decision-making process. Legal advice should be sought where necessary. Where such disclosure is lawful the Rehabilitation of Offenders Act 1974 provides an exemption under the Act from prosecution for the disclosure.”

The last sentence in the paragraph quoted here is a reference to section 9 of the 1974 Act, which creates an offence for the disclosure of spent convictions other than in the course of official duties for a person with access to such information, here a police officer. This was explored by Whitford J in the High Court case of *X v Commissioner of Police of the Metropolis* [1985] 1 W.L.R. 420 who found that there was no offence committed under section 9 of the 1974 Act when a Metropolitan police officer disclosed the spent convictions of X to Interpol. Interestingly, in *obiter*, and as highlighted above, Whitford J also noted that it could be accepted that section 4 of the 1974 Act creates ‘no positive duty’ for the police to refrain from disclosing spent convictions information in the course of their duties (presumably according to the presence of a suitable ‘pressing need’).

Furthermore, the construction and effect of section 4 of the 1974 Act came into consideration in the case of *N v Governor of HMP Dartmoor* [2001] EWHC Admin 93. This was a case concerned with the proposed disclosure of spent convictions by a prison governor to social services. This related to a prisoner, N, who had spent convictions for indecency with a child, and who was serving a long sentence for unrelated offences. The social services professionals concerned wished to know about these spent convictions in the event that N was either visited in prison by a child, or that when he was released he might go on to live with a partner and their children, etc. In *N* the High Court determined that the treatment of spent convictions ‘for all purposes in law’ should mean the treatment of spent convictions ‘for all legal purposes’, which we might take to mean in the sense of determining rights in legal processes such as criminal trials or civil hearings, or in creating legal (that is, contractual) relationships in the employer-employee setting of work. Thus there was a more purposive, ‘public protection’-type approach in *N*, focusing on the perceived purpose of Parliament in preventing a mischief in the form of *unfairly* stigmatising rehabilitated offenders, and to refrain from following a literal approach to interpreting the language of section 4 of the 1974 to prevent the working of an important feature of the public protection system.

To inform this more purposive approach, specific reference was made by the High Court in *N* to the need to read the language of section 4 of the 1974 Act with an eye to the balance, through the auspices of the Human Rights Act 1998, between the Article 8 ECHR rights of the offender and the positive obligations to uphold the Article 2, 3 and 8 ECHR rights of their potential victim(s). This emphasis on positive obligations under European human rights law to consider disclosures to potential victims of crime in order to protect them from harm or raise their awareness of a risk posed by an individual is the subject of the next part of this Chapter.

As noted above, there is as yet no direct case law arising from the three UK DADS – and the legality of any aspect of the precise operation of the Schemes has never been challenged by way of judicial review – let alone the guidance of the DVDS in relation to the potential disclosures of spent convictions. It is good to think, from a public protection perspective, that the scope of the Scheme is not fixed and rigid with regard to the potential disclosure of spent convictions. However, a question remains as to whether the purposive, public protection-minded approach by the High Court in both *X* and *N* would

find favour in a challenge to an application in practice of this new development in the language of the Scheme guidance. This is not least because the cases of *X* and *N* deal with the interagency sharing of spent convictions information (police officer to Interpol, and prison governor to social services, respectively), and the Scheme is archetypically concerned with disclosures by the police, as a criminal justice agency, to members of the public individually in relation to their personal and private life. Whether or why the Home Office intended a serious policy shift in relation to a new scope for the operation of the Scheme, via the manner in which the new Scheme guidance treats spent convictions, is not easy to discern. As has already been noted in this thesis at several points, S.327B of the Criminal Justice Act 2003 states that the protections of S.4 of the 1974 Act are to be disregarded in relation to the operation of the Child Sex Offender Disclosure Scheme, which exists somewhat in parallel to the Domestic Violence Disclosure Scheme. Palpably, if the DVDS were placed on a statutory footing, the statute concerned could provide similar clarity to the issue of whether and how spent convictions and related information might be disclosed under the DVDS; as well enhance of the foreseeability of UK DADS policy overall, and foster better compliance with rule of law values for DVDS disclosures.

### 8.8 Chapter conclusions

While *prima facie* the Scheme is lawful in relation to wider legal and constitutional norms, some arguments have been made above that show there are ways to boost certainty in this conclusion, and in advance of the courts scrutinising the legal basis of the Scheme in any detail, should the occasion arise. For example, in the above discussion of the common law basis of the 'pressing need' standard, as a main operating principle of the DVDS, and as a requirement for a lawful disclosure, an initial conclusion has been offered up that statutory codification would be needed to make the Scheme more precise and foreseeable (in the public law sense) in its operation. This Chapter has found that this would benefit the DVDS in three ways; in giving it greater internal legal coherence; in better satisfying the element of the principle of legality that calls for the involvement of democratic process in creating legal rules that interfere with fundamental rights; and in ensuring that the Scheme operated more visibly on a legal rather than a discretionary basis, in strict compliance with an element of the rule of law.

Of course, it is entirely possible that the 'margin of appreciation' under the ECHR, afforded to the Member States by the case law of the European Court of Human Rights, might well be enough alone to save the DVDS from strong criticism with regard to any perceived systematic flaw due to its common law basis. The very existence of a system of judicial review in the UK that includes oversight and scrutiny of common law as well as statute might be seen by the judiciary as sufficient coherence for safeguards against the abuse of those common law powers in the context of an entire policy or systematic exercise of discretion. In the words of Lord Reed in *R (T) v Secretary of State for the Home Department* [2014] UKSC 35 at 113:

"...safeguards should ensure that the national authorities have addressed the issue of the necessity for the interference in a manner which is capable of satisfying the requirements of the Convention. In other words, in order for the interference to be "in accordance with the law", there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question."

However, in the end, "the courts are guardians of human rights and ultimately the margin of appreciation runs out..."<sup>601</sup>. Lord Reed makes the key points in *T*, above, that there are factual and doctrinal overlaps between the first two key principles of *necessity* and *legitimacy* in any given case – and notes that we might be able to see that a system of interferences with a qualified right (i.e in this context the existence of the Scheme itself) might *systematically* be both *necessary* and *legitimate*. But Lord Reed concludes that in an individual case involving particular individual disclosure of criminal record histories, and the resulting interference with Article 8 ECHR, there might be issues around the *proportionality* of that *individual* disclosure nonetheless.

Additionally, there is an issue of regulatory theory and its interaction with human rights law that this Chapter has highlighted. This is about the question of when the legal duties to protect victims begin to bite on the conduct of operational policing. That is a problematic question in the context of the DVDS, since it is a very responsive piece of regulation (as the Rights to Ask requires victim approaches to the police to begin with, and the Rights to Ask to Know are both dependent on victims taking steps to protect themselves, arguably, in order to be efficacious). I am uncertain as to whether something

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<sup>601</sup> Sir Philip Sales, 'Legalism in Constitutional Law: Judging in a democracy', P.L. (2018) 687, 697.

that is ultimately aimed at saving lives lost to domestic violence should be allowed to develop and embed itself in police practice, if it is so 'victim blaming' or 'responsibilising', as an aspect of its regulatory 'responsiveness'. The ECHR and Strasbourg jurisprudence though is very clear: if the disclosure of information under the DVDS, just as with an *Osman* warning is a required reasonable step where the state knew that there was a risk to life, under Article 2 ECHR, then that step of disclosure should be taken and the information disclosed. Systematically though, the idea of flaws in police follow-ups after disclosures arising from austerity and pressures on frontline policing will latterly raise questions of whether disclosures under the DVDS are in fact setting pitfalls for the police in England and Wales in terms of the systemic standards of compliance in their practice with Articles 3 and 8 ECHR; should those recipients of information under the Scheme, in essence, who had a 'pressing need' to know the information, chose to stay in a relationship nevertheless, and suffered harm as a result. Again, to draw on the issue of austerity as a limiting politics of public protection for women facing domestic violence, flaws in the systematic operation of the Scheme are only one small potential part of the threat to the freedom from degrading treatment posed by domestic violence to women in the UK.

We might draw the conclusion from this discussion, on a point of law, that a disclosure under the Scheme *alone* is not enough to satisfy the positive obligation on the police to protect, systematically, the ECHR rights of victims of domestic violence in serious cases, regardless of the paucity of support in the wider policy landscape, since the margin of appreciation the police enjoy narrows to compel the police, and other public protection agencies, to take "all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity"<sup>602</sup> under Article 3 ECHR.

It is now appropriate to continue to consider the wider legal frameworks by which we might evaluate the framing of the UK Domestic Abuse Disclosure Schemes and the guidance upon which they are operated. This Chapter has focused already, to an extent, on the *prima facie* legal incoherence the common law basis of the DVDS causes from a combined legal and regulatory point of view. The next Chapter will draw in more detail on international and European Union law; namely EU data protection law and international law instruments, in the form of the Council of Europe's Istanbul Convention

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<sup>602</sup> *Opuz v Turkey* (2009) 33401/02, para. 161-162.

on the elimination of forms of violence against women, and the UN Convention on the Rights of Children (UNCRC).

## **9. Issues with the regulation of UK DADS by wider legal frameworks**

### 9.1 Chapter Introduction

This chapter considers the supranational legal frameworks that either apply, or arguably should apply, to the wider regulation of the Domestic Abuse Disclosure Schemes (DADS) in the UK. The guidance on each of the UK DADS (the DVDS, the DSDAS, and the DVADS) will surely be updated in time and this chapter explores some of the wider legal issues that come from those frameworks, and which I believe should inform the changes and reforms to the operation of the DADS in the UK. In doing so, this Chapter has two main purposes. The first is to acknowledge the recent crucial shifts in supranational information privacy law that apply to the UK DADS. In doing this, this Chapter reviews the applicability of European Union data protection law to the DADS, given the coming into force in May 2018 of the EU 'Law Enforcement Directive' (now applied in the UK in the form of Part 3 of the Data Protection Act 2018).

The second main purpose of this Chapter is to explore three different supranational human rights frameworks in the particular way that they apply to the regulation of the three UK DADS. The first of these is the European Convention on Human Rights. Chapter 8 of this thesis explored the manner in which Article 8 of the ECHR applies to the operations of the DVDS and the other UK DADS, but this was from the perspective of the right to respect for private life as it formed a part of the controls and checks on possible disclosures under the Schemes. This chapter explores the way, instead, that the ECHR places positive obligations to protect victims on the police agencies who operate the UK DADS and indeed, deploy other types of interventions to prevent harms arising to victims of domestic violence. The DVDS guidance does not, as was explained in Chapter 4, explicitly address the existence of these positive obligations to protect victims under the ECHR, while the guidance on the DSDAS and DVADS do however both acknowledge their existence. This chapter looks at these duties in detail, and considers the latest developments on case law concerning these positive obligations. The second supranational human rights framework considered in this chapter is the Istanbul Convention (the *Council of Europe Convention on preventing and combating violence against women and domestic violence*) (2011) while the third is the UN Convention on the Rights of the Child. Both of these latter supranational legal texts are only arguably applicable in part to the direct operation of the UK DADS, but there is a case to be made



that elements of these frameworks are now, or soon will be, binding on the governments, agencies and police forces that between them operate the UK DADS.

### 9.2 Part 3 of the DPA 2018 and its effects on the operation of the UK DADS

Part 3 of the new Data Protection Act 2018 is concerned with the processing of personal data for law enforcement purposes by UK criminal justices agencies and other relevant bodies. Part 3 is the element of the 2018 Act that transposes the requirements of the EU Law Enforcement Directive on data protection<sup>603</sup> into UK law. The EU (Withdrawal) Act 2018 has created a new constitutional category of 'retained EU law', which includes the Law Enforcement Directive. However, at the time of writing, none of the guidance documents that govern the operation of the three UK DADS make reference to the Data Protection Act 2018 and the details of the statutory framework it creates for the management and disclosures of criminal histories information, which are discussed below. Suffice to say that the three guidance documents should all be updated in due course with regard to this need for revision; and this is, of course, a recommendation of this thesis. The practical changes to the operation of the three UK DADS that the relevant provisions of the DPA 2018 may require, and which would need to be reflected in those revisions to the guidance documents, are reflected below.

Disclosures of personal data of subjects of the Domestic Abuse Disclosure Schemes undertaken by police forces in the UK are done for 'law enforcement purposes'. These are defined by Section 31 of the DPA 2018 as "the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security." Disclosures under the UK DADS are of course considered and then made with the aim of preventing criminal offences connected with possible domestic abuse in the future. Section 35 of the DPA 2018 requires that processing for a law enforcement process is 'lawful and fair', in the context of the operation of the UK DADS, if it is 'based on law' (S.35(2)), which would include the common law bases of the UK DADS, and 'necessary' for the purpose of preventing criminal offences (S.35(2)(b)); or, where the disclosure involves sharing sensitive personal data concerning, for example, the ethnicity or health data of an individual, then the disclosure must be 'strictly necessary' for the purpose of

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<sup>603</sup> EU Data Protection Directive 2016/680 (the Law Enforcement Directive')

preventing criminal offences where a person is at risk of harm, and on the basis of any published Scheme guidance as an 'appropriate policy document in place' (S.35(5)(a)(b)(c) and Schedule 8).

Section 37 of the DPA 2018 requires that "personal data processed for any of the law enforcement purposes must be adequate, relevant and not excessive in relation to the purpose for which it is processed". These principles of 'adequacy', relevance and non-excessiveness (or a certain interpretation of 'proportionality', therefore, it could be suggested) would require that disclosures under the UK DADS must be carefully balanced between the need to impress upon a recipient that the disclosure is in response to the pressing need required for the disclosure, from a risk assessment-perspective, and the need to make only the most limited disclosure to achieve that intended effect. This summons up the prospect of tough decisions around determining the best timing or extent of a disclosure on the part of police forces, with the knowledge that the subjects of disclosures would have recourse to certain rights afforded to them, not only under Article 8 ECHR jurisprudence, as discussed in the last Chapter of this thesis, but newly-codified rights under the DPA 2018 and outlined here, below.

The provisions of Section 38 of the DPA 2018 would be important in the context of a possible challenge from a subject of a UK DADS disclosure, so they are reproduced in full here before being discussed in more detail below:

- (1) ...
  - (a) personal data processed for any of the law enforcement purposes must be accurate and, where necessary, kept up to date, and
  - (b) every reasonable step must be taken to ensure that personal data that is inaccurate, having regard to the law enforcement purpose for which it is processed, is erased or rectified without delay.
- (2) In processing personal data for any of the law enforcement purposes, personal data based on facts must, so far as possible, be distinguished from personal data based on personal assessments.
- (3) In processing personal data for any of the law enforcement purposes, a clear distinction must, where relevant and as far as possible, be made between personal data relating to different categories of data subject, such as—
  - (a) persons suspected of having committed or being about to commit a criminal offence;
  - (b) persons convicted of a criminal offence;

- (c) persons who are or may be victims of a criminal offence;
  - (d) witnesses or other persons with information about offences.
- (4) All reasonable steps must be taken to ensure that personal data which is inaccurate, incomplete or no longer up to date is not transmitted or made available for any of the law enforcement purposes.
- (5) For that purpose—
- (a) the quality of personal data must be verified before it is transmitted or made available,
  - (b) in all transmissions of personal data, the necessary information enabling the recipient to assess the degree of accuracy, completeness and reliability of the data and the extent to which it is up to date must be included, and
  - (c) if, after personal data has been transmitted, it emerges that the data was incorrect or that the transmission was unlawful, the recipient must be notified without delay.

Section 38(2) of the 2018 Act entails that disclosures under the UK DADS must be made in such a way that the factual information being disclosed (say the details of arrests, or convictions, of a subject) must be conveyed in such a way as to make it plain that it is different in quality from the finding of any risk assessment; that is, the subjective determination that an applicant or recipient of a disclosure is in 'pressing need' of a disclosure to protect them from the subject concerned. The latter is of course a 'personal assessment' of the police decision-making panel or forum concerned. In terms of how this might affect victims' vulnerability, it could be argued that any perceived disparity in the convictions information relayed, for example, and the risk assessment scoring, might cloud any feeling the victim had in their own mind as to the dangerousness of the disclosure subject; with potentially dangerous consequences indeed. Section 38(3) also entails that if the police only have information of an arrest of a subject ("persons arrested"), they may not be able to most clearly label him, despite their own suspicions, as a domestic violence perpetrator, if there are no convictions on the criminal record of a subject for such offences ("persons convicted"). Police labelling of a risky subject would need to be couched in terms of whether a subject was a convicted abuser, or a suspected abuser only.

Some provisions of Part 3 of the 2018 Act focus on the procedural protections to be afforded to the subjects of disclosures. Taken together, the provisions in section 38(4) and (5) would seem to suggest that if it were reasonable in the circumstances, a subject should

be approached to clarify the vaguer details in a police intelligence report that might be disclosed under the DADS in question, absent any 'hard' evidence of the perpetration of domestic abuse on the part of a subject, such as a conviction. Some would argue that this raises concerns over victim vulnerability. In a less significant re-codification of the previous law on retaining criminal records, and in relation to Section 39 of the 2018 Act:

"(1) ... personal data processed for any of the law enforcement purposes must be kept for no longer than is necessary for the purpose for which it is processed.

"(2) Appropriate time limits must be established for the periodic review of the need for the continued storage of personal data for any of the law enforcement purposes."

This does not especially advance the common law position on the retention of police intelligence and records about domestic violence perpetrators, or the previous statutory regime in the Data Protection Act 1998, however. Again, under the provisions of Section 46 of the 2018 Act, there is a recodification of the common law position on the ability of an individual to have their criminal record accurately represented in its retention and disclosure:

"(1) The controller must, if so requested by a data subject, rectify without undue delay inaccurate personal data relating to the data subject.

(2) Where personal data is inaccurate because it is incomplete, the controller must, if so requested by a data subject, complete it.

(3) The duty under subsection (2) may, in appropriate cases, be fulfilled by the provision of a supplementary statement.

(4) Where the controller would be required to rectify personal data under this section but the personal data must be maintained for the purposes of evidence, the controller must (instead of rectifying the personal data) restrict its processing."

Lady Hale set out the rationale behind the presumption in common law that the criminal records and police intelligence of perpetrators of domestic violence would be, as a matter of public policy, required to be maintained, perhaps rectified or clarified, but not deleted. Hale LJ wrote in *Catt* (at para. 54) that:

"It is well known that, for a variety of reasons, complaints of domestic violence are often not followed through to prosecution and conviction. But it is vital for the police, when responding to any new complaint, to know whether there have been similar complaints in the past. Domestic violence often escalates in seriousness with each new incident, and the police have to be aware of this when considering how to respond. It is not too dramatic to say that lives have been saved as a result."

However, the provisions of Section 37 (3) and (4) are also vital to consider:

"(3) Where a data subject contests the accuracy of personal data (whether in making a request under this section or section 46 or in any other way), but it is not possible to ascertain whether it is accurate or not, the controller must restrict its processing.

(4) A data subject may request the controller to erase personal data or to restrict its processing (but the duties of the controller under this section apply whether or not such a request is made). (Emphasis added.)"

The wording of the provisions in Section 37 (4), above, would suggest that the police are now under a statutory duty to *proactively* consider whether criminal records information is accurate and complete before they disclose it - again perhaps strengthening the argument that an individual should be consulted, as a potential subject of a disclosure, and before a disclosure is made - again, this would raise concerns about the vulnerability of victims of domestic violence as applicants and recipients of information under the UK DADS. Section 33(6) of the Data Protection Act 2018 now explains that "'Restriction of processing' means the marking of stored personal data with the aim of limiting its processing for the future". So if a force felt that it could not render information accurate because of doubt over the event it recorded (where we are talking about 'intelligence' on an offence, rather than a record of an arrest, for example), it may be internally barred from disclosure as a result.

A recent study of the internal disclosure rules around the DVDS, as used by several police forces in England and Wales, uncovered a great deal of inconsistency in the manner of operation of the Scheme from force to force, in terms of the management and degree of supply of data to victims or people at risk of domestic abuse. This research used interviews with police officers, and an analysis of FOI-obtained internal policy documents from 12 different forces, and found that forces "diverge on

whether they disclose spent convictions, convictions, charges, or other information indicating risk, such as reported crimes that resulted in ‘no further action’”. Forces “also diverge on whether they make disclosures only to victims assessed as high-risk or also to those assessed as medium or standard risk...”, while the “level of detail included in a disclosure also varies greatly between forces, with some merely copying and pasting court records and others providing detailed descriptions of the ways in which perpetrators have harmed and attacked ex-partners.”<sup>604</sup> If future revised guidance on any of the UK DADS does not address the implications of the provisions of Part 3 of the Data Protection Act 2018, these disparities will continue to proliferate. These sorts of micro-level regulatory problems have been addressed in Chapter 7, above, but there is a statutory framework in the relevant provisions of the 2018 Act which, if not addressed carefully, will perpetuate this regulatory problem in policy as a legal issue too.

### 9.3 Human rights standards in protecting the rights of victims of domestic violence

As discussed earlier in this thesis, there is a public common law duty to prevent domestic violence placed upon the police<sup>605</sup>: “There is no doubt that the police owe a positive duty in public law to protect members of the public from harm caused by third parties”, as said by Hale LJ in *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 at 195<sup>606</sup>. But this duty is arguably vague, and so this section of this Chapter focuses on the human rights standards and duties that apply more concretely in the context of the police protecting (potential) victims of domestic violence in the UK.

Human rights duties to prevent domestic violence are also applied to the police, and other actors, via Section 6 of the Human Rights Act 1998. As a starting point, it is the case that “...violence against women and the deficient state response are violations of the human

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<sup>604</sup> K. Hadjimatheou & J. Grace, ‘No black and white answer about how far we can go’: police decision making under the domestic violence disclosure scheme, *Policing and Society* (2020) DOI: 10.1080/10439463.2020.1795169 at p.6

<sup>605</sup> This public law *duty* may or may not require the police to disclose information under the DVDS, where applicable, using their common law *power* to do so, on the basis of the criteria explored in the last Chapter.

<sup>606</sup> In the *Michael* case, the Supreme Court balked at imposing a private law duty of care in negligence on the police in relation to victims of domestic violence, noting public policy arguments about the financial burden that would arise on the police, and with little practical effect on reducing domestic violence, in all likelihood.

rights of women."<sup>607</sup> But as a matter of UK law, and in practice, only the latter of the two (i.e. a 'deficient state response' to domestic violence in a particular case, or systematically) can be said to be a breach of the European Convention on Human Rights (1950) and thus the 'vertical' legal duty applicable to police bodies, for example, under S.6 HRA 1998. But what is a sufficiently grave deficiency in the state response to domestic violence to produce a finding in the courts that ECHR rights have been violated? And in England and Wales, to what extent does the operation of the DVDS contribute to a sufficient standard of protection for the state here to comply with the ECHR rights and uphold the rights, therefore, of victims of domestic violence?

The substance, procedure and degree of a particular state response to a pattern or individual instance of risk of domestic violence is a matter for careful judgement; according to the standards required by, in the UK context, particular Articles of the ECHR. These are requisite standards as interpreted not just by the UK courts but also, of course, by the Strasbourg court. This Strasbourg case law must however be filtered through what that very Court has developed as a doctrine of a 'margin of appreciation' (domestically, a 'margin of discretion', discussed below) in its application to particular claims for judicial review. The Articles of the ECHR considered in turn here, and in some detail, are Article 2 and the right to life; Article 3 and the right to freedom from torture/inhuman or degrading treatment, and Article 8 - in the sense of it encompassing the right to respect for private and family life<sup>608</sup>.

#### 9.4 Article 2 ECHR and the right to life

Article 2 ECHR describes the right to life. It has both a substantive and a procedural strand; to prevent the loss of life, and to investigate the loss of life, respectively. The DVDS may well be a piece of public policy that contributes toward evidencing the commitment of the Home Office and police forces to meeting their duty in relation to potential victims of domestic violence under the substantive strand of Article 2 of preserving life. Assuming that the DVDS does indeed prove effective, in an individual

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<sup>607</sup> C. Crowther-Dowey and M. Silvestri, 'The gendering of violent crime: towards a human rights approach', *British Journal of Community Justice* 14(3) (2017), 3.

<sup>608</sup> Article 14 ECHR, and its prohibition any discrimination in the enjoyment of these rights that is without a 'manifestly reasonable foundation', is of course 'parasitical' in nature, and as a result will be discussed where relevant in relation to other rights in this section of this Chapter, and in the conclusion to this Chapter, below.

case, and the assumption that a disclosure might lead to the end of a potentially lethal relationship is correct in an individual case, then we can readily say that a disclosure under the Scheme is a way of meeting the duty under Article 2 ECHR that the HRA 1998 places upon the police in this context.

However, is a disclosure that does not lead to the end of an abusive relationship sufficient to meet the duty to preserve life under Article 2, namely where the subject of the disclosure goes on to kill the recipient who had drawn upon their Right to Ask? And, for that matter, is a non-disclosure in an instance where the violent partner then does go on to kill the applicant concerned also a decision that meets the duty to preserve life under Article 2? This would depend upon the precise circumstances of the facts of the case, in essence, and whether the substantive duty to preserve life in that case was engaged, and whether a disclosure of information about a subject under the Scheme guidance was sufficient to meet that duty. Of course, to best meet the requirements of Article 2 ECHR post-disclosure, the police would need to have kept an individual case of risk of domestic violence under review. However the Scheme guidance makes it plain that the police have a *discretion* as to what advice should accompany a disclosure, including signposting recipients to local support services<sup>609</sup>; while the guidance also recommends the consideration of whether a disclosure subject needs to be referred to a local Multi-Agency Public Protection Arrangements (MAPPA) panel, or the local Integrated Offender Management (IOM) programme<sup>610</sup>. The Scheme guidance does *not* make this increase in rigour, in terms of offender management, a mandatory outcome from a decision to disclose.

But the legal position of a police force as to whether it has met its Article 2 ECHR duty to preserve life is very much dictated by the standards laid down in the touchstone case of *Osman v UK* (1998). Stemming from this case, to paraphrase, there are duties on the police in the UK, under the positive obligation to protect life under Art. 2 ECHR, to take sufficient steps to intervene where there is a known, real and immediate risk to life. As the Strasbourg Court noted in the case of *Osman* itself:

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<sup>609</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, para 72.

<sup>610</sup> *Ibid.* paras 74-75.



"...where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their [duty] to prevent and suppress offences against the person... it must be established... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."<sup>611</sup>

One way of achieving compliance with this duty is for the police to issue '*Osman* warnings' to those individuals facing credible threats to their lives, on the assessment of police intelligence<sup>612</sup>. The DVDS fits into a fairly similar mould, it could be argued. A disclosure under the Scheme could be said to be 'sufficient' as a response to a known, real and immediate risk to life; and surely more confidently so, in the eyes of the courts, if it were part of a package of interventions against a subject of that disclosure, such as arrest, charge and bail with conditions, and/or the use of a Domestic Violence Protection Notice or Order (DVPN or DVPO).

#### 9.5 Article 3 ECHR and Article 8 ECHR

Articles 3 and 8 of the ECHR are set out in the following way:

##### Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

...

##### Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Under Article 3 ECHR, if the harm complained of is sufficiently serious, then "...the [Strasbourg] Court must next determine whether the national authorities have taken all

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<sup>611</sup> *Osman v UK* (1998) (87/1997/871/1083), 116.

<sup>612</sup> BBC News, 'Police letters warn 1,900 people of 'threat to life'' (BBC News, 28<sup>th</sup> October 2015) <<http://www.bbc.co.uk/news/uk-34651682>> accessed 30 June 2020.

reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity."<sup>613</sup> Under Article 8 ECHR, however, "States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an *adequate legal framework affording protection against acts of violence by private individuals...*" [Emphasis added].<sup>614</sup>

The recent stance from the High Court in the UK has been to put these two Articles of the ECHR on a kind of continuum, or 'sliding scale', in the context of the human rights protections afforded to (potential) victims of domestic violence, and the extent to which public bodies or 'state agents', such as the police, are required to both systematically and in individual cases expend resources on combatting that risk of harm arising from (possible or future) domestic violence. In essence, whether or not Article 3, and/or Article 8 ECHR is engaged, creating that corresponding duty placed upon the police and other agencies to protect victims, is a matter of the gravity of the risk of harm. The attentions of the police should be focused on combatting the most serious risks to victims from domestic violence perpetrators, as explored here, below.

In *D v Commissioner of Police for the Metropolis* [2016] QB 16, Laws LJ at paragraph 45 of his judgment considered that:

"There is perhaps a sliding scale: from deliberate torture by state officials to the consequences of negligence by non-state agents. The energy required of the state to combat or redress these ills is no doubt variable, but the same protective principle is always at the root of it. The margin of appreciation enjoyed by the state as to the means of compliance with article 3 widens at the bottom of the scale but narrows at the top. At what may, without belittling the victim, be called the lower end of the scale where injury happens through the negligence of non-state agents, the state's provision of a judicial system of civil remedies will often suffice: the individual state's legal traditions will govern the means of compliance in the particular case. Serious violent crime by non-state agents is of a different order: higher up the scale. ..."

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<sup>613</sup> *Opuz v Turkey* (2009) 33401/02, 161-162.

<sup>614</sup> *A v Croatia* (2010) 55164/08, 60.

Hypothetically, Article 8 ECHR is part of this continuum of the engagement of rights and interventions required by that engagement. In *R (MLIA and another) v Chief Constable of Hampshire Constabulary* [2017] EWHC 292 (QB) at 189, Lavender J noted that counsel for the claimants had "accepted that a case which fell within the scope of Article 8 could also be seen as part of the same sliding scale, and that a case which fell within the scope of Article 8 but not Article 3 would fall further down the scale than a case which fell within the scope of Article 3". However, Lavender J also noted, in paragraph 185 of *MLIA*, that the "English courts have yet to consider the circumstances in which such a duty might arise under Article 8 on a case which does not also fall within the scope of Article 3". Furthermore, it is worth highlighting on this point the words of Gross LJ in *Allen v. Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967 at para. 57, where he noted that "it would be necessary to think long and hard before acceding to any claim raising the prospect of some generalised positive obligation on the State to intervene under Art. 8, without the closest scrutiny of the limits of any such postulated obligation". Gross LJ concluded in *Allen* on this point (again at 57) that the "ramifications otherwise could be most unfortunate — not least, the unhappy prospect of widening the scope of Art. 8 still further".

There is some evidence for the weakness of Article 8 ECHR in imposing a duty to prevent domestic violence occurring in the form of the judgment of the Strasbourg Court in *Wilson v UK* (10601/09), from 2012. This case shows that where there is an 'adequate' system of protections for (potential) victims of domestic violence provided by a state, there will be no systemic breach of Article 8 ECHR; and in her individual case, there was not an inability on Wilson's part to draw upon civil and criminal legal frameworks to seek assistance and protection from the state. Wilson's argument that a failure to prosecute her violent husband for a more serious offence out of two possible charges under the Offences Against the Person Act 1861 was unsuccessful; this did not entail that her Art. 8 ECHR rights were engaged. The Fourth Section of the Strasbourg Court, in ruling the complaint by Wilson inadmissible, outlined the 'relevant principles which guide that assessment' of whether or not the positive obligations on a state criminal justice system are engaged with respect to assisting a potential victim of domestic violence (at para 37). These were in part that:

"While the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by public authorities, there may in addition be

positive obligations inherent in effective “respect” for private and family life and these obligations may involve the adoption of measures in the sphere of the relations between individuals. Children and other vulnerable individuals, in particular, are entitled to effective protection.”

Furthermore:

“The concept of private life includes a person’s physical and psychological integrity. Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.”

However:

“The Court’s task is not to substitute itself for the competent domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.”

So the Domestic Violence Disclosure Scheme could be seen as part of the fulfilment of the requirement to adopt 'measures in the sphere of the relations between individuals', as part of an adequate legal framework affording protection against acts of violence by private individuals'. However, particular decisions to disclose information (or not) under the Scheme, and whether these are complemented by any other preventative measures, are clearly subject to the discretion afforded by the margin of appreciation, and which works in favour of the state agents or public bodies concerned, under Article 8 ECHR.

An example is given in *Wilson v UK* as to how the European Court of Human Rights saw this arms-length-only approach (familiar to students of English administrative law and judicial review) actually working in favour of a complainant and victim. In the case of *A v. Croatia* (2011), no. 55164/08:

“Various measures had been taken by the authorities, including, in the context of criminal proceedings, pre-trial detention as well as other protective measures such as restraining orders, which prohibited B from approaching the applicant. However, there had been other measures (including detention, psychiatric treatment and fines), which had been recommended or ordered but which had not been implemented. Although it was not for the Court to take the place of the national authorities in determining the most appropriate methods of protecting individuals from attacks on their personal integrity, the Court found that the Croatian authorities had failed to implement the measures which had been considered adequate and necessary by the Croatian courts in order to address the

violence directed against the applicant. They had thus failed to satisfy their positive obligations to her under Article 8."<sup>615</sup>

Furthermore, on the issue of a margin of appreciation, and as for the difficulties of a claimant victim in basing a claim on Article 3 ECHR, these are further compounded by the view that was expressed in the UK courts. For some time, that Article 3 compliance is first and foremost about *systemic* compliance, rather than meeting a duty applied from purely the facts of a particular operational scenario or in an individual case. As Laws LJ observed in *D v Commissioner of Police of the Metropolis* [2016] QB 16 at paragraph 68:

"...the inquiry into compliance with the article 3 duty is first and foremost concerned, not with the effect on the claimant, but with the overall nature of the investigative steps to be taken by the state. This circumstance, moreover, is consonant with the fact that Strasbourg accords a margin of appreciation to the state as to the means of compliance with article 3. As I have said, the margin widens at the bottom of the scale but narrows at the top. While the doctrine of the margin of appreciation has its origin in the international character of the court, which inevitably stands at some distance from the differing exigencies of the individual states parties, I have no doubt that we should accord a like margin (more often described on the domestic front as a margin of discretion) in the adjudication of claims under the 1998 Act."

Cases with a context of systemic protections for victims' rights, but involving a failure to uphold those rights through those failures in an individual, particular case, can be seen to be found to be a breach of the ECHR by the Strasbourg Court. This occurred in the recent case of *Talpis v Italy* (2017)<sup>616</sup>, where the police in Italy had been too slow, in the view of the Court, to act upon signs that the victim or one of her children (as it sadly transpired) could be the subject of a fatal attack by her husband. In *Talpis*, there was a history of violence that the police should have taken into account and acted upon; meaning this is a case, in setting out the human rights standard protecting victims, which should be looked at here in some detail.

In *Talpis v Italy* (2017) (41237/14), a woman (Talpis) was stabbed, and her son stabbed to death, by her husband (AT). AT had a criminal record for domestic violence against Talpis, and was already facing a long overdue prosecution for domestic violence reported by Talpis, at the time of the murder and attempted murder. Police officers had been

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<sup>615</sup> As observed in *Wilson v UK*, para. 42.

<sup>616</sup> Discussed in English by Emily Rayner, from the original French of the official text, in Emily Rayner, 'Articles 2, 3 and 14: failing to take prompt action on a complaint of domestic violence', I.F.L. 2 (2017) 156-157.

separately called out to Talpis home earlier on the night of the fatal attack, where there was evidence of domestic abuse (criminal damage), and to a report of AT drunk and disorderly in a public place. No action was taken against AT earlier that night, and no link was made between his history, and the earlier call-out to the Talpis home. It was possible for police officers to have looked up details of the pending prosecution of AT, and to have made a connection with reports of criminal damage at the Talpis home earlier that evening, and the drunken and aggressive state of AT. But this connection was not determined by police officers present when AT was stopped.

In their decision in *Talpis*, a majority of the ECtHR found a violation of Articles 2, 3 and 14 ECHR. On the importance of protecting the rights of potential victims over perpetrators, the ECtHR highlighted (at para. 123) that: "... in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and psychological integrity... Furthermore, the State has a positive obligation to take preventive operational measures to protect an individual whose life is at risk."

On the delay in prosecuting AT for an earlier violent offence, that ECtHR observed ( at paras. 128 and 129), that:

"... the mere passing of time can work to the detriment of the investigation, and even fatally jeopardise its chances of success... the passing of time will inevitably erode the amount and quality of the evidence available and that the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the complainants...",

The ECtHR also observed that:

"...by underestimating, through their complacency, the seriousness of the violent acts in question, the Italian authorities in effect condoned them. The applicant was therefore a victim of discrimination, as a woman, in breach of Article 14..."

Human rights compliance for DADS in the UK then turns on the extent to which the police do, or do not use the process of a disclosure scheme as the only support for a likely victim of domestic violence, or whether such a disclosure is augmented by one of their preventive powers, such as DVPNs and DVPOs, which have been made available by government (and prior to the newer proposed powers outlined in the Domestic Abuse Bill (2020), in the form of Domestic Abuse Protection Notices (DAPNs) or Orders (DAPOs).

However, it is important to note that the Centre for Women's Justice produced a report in March 2019, on which they grounded a police 'super-complaint', which identified that police forces were routinely under-using DVPNs and DVPOs, as well as not sufficiently pursuing offenders for breaches of non-molestation orders, failing to apply pre-charge bail conditions on suspected domestic abuse perpetrators, and failing to apply for restraining orders when an investigation has been completed.<sup>617</sup> Additionally, it should also be remembered that the DVDS guidance as currently published by the Home Office for England and Wales, and unlike the guidance on the DSDAS for Scotland and the DVADS for Northern Ireland, does not explicitly refer to positive obligations to protect the human rights of potential victims of domestic violence as one of the criteria for determining whether a disclosure should be made/another intervention undertaken.

Interestingly, Green J, in *R (DSD) v Metropolitan Police* [2014] 436 (QB), and in setting down guidance as to how the courts might discern a breach of Article 3 in the police response or intervention (or paucity of response or intervention) in a particular case, and according to whether "all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity"<sup>618</sup> were taken, noted that (in *obiter* at para. 218):

"... whether a breach has occurred is measured by viewing the conduct of the police over a relevant time frame. Ordinarily, this will be measured by the time span from the assault on the Claimant to the last point in the criminal process (which might be a case closure or a conviction in a criminal court...)... There is, however, no reason why it cannot span the police investigation from the first point in time that evidence comes to police attention of a person's offending until the last point in the process. This will be particularly relevant in the case of a serial offender whose violent criminality might long pre-date the point in time that a particular victim is attacked."

This point made by Green J in *DSD*, in relation to the 'particular relevance' that an offender's history might be in establishing whether police failures in a particular case amounted to a breach of the ECHR, gives support to the idea that the operation of the DVDS, in forming a policy measure objectively designed to warn potential victims of the

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<sup>617</sup> See Centre for Women's Justice, *Centre for Women's Justice Supercomplaint: Police failure to use protective measures in cases involving violence against women and girls* (19<sup>th</sup> March 2019) <<https://www.centreforwomensjustice.org.uk/news/2019/3/20/cwj-launch-super-complaint-police-failure-to-use-protective-measures-in-cases-involving-violence-against-women-and-girls>> accessed 20 June 2020.

<sup>618</sup> *Opuz v Turkey* (2009) 33401/02, 161-162.

risks of being in a relationship with a 'serial offender' and perpetrator of domestic violence, might be a contribution to the UK as a state actually better meeting its requirements under positive obligations through the ECHR. These are to adopt 'measures in the sphere of the relations between individuals' and 'to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals' under Article 8 ECHR<sup>619</sup>; and in those most serious cases engaging Article 3 ECHR, as to whether "the national authorities have taken all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity."<sup>620</sup>

The UK Supreme Court decision in *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11 means that 'conspicuous or substantial' or 'egregious and significant errors' in police decision-making around investigations or the handling of complaints by victims will lead to an operational breach of Article 3 ECHR. *DSD* is a decision that extends the 'reasonable measures' test to a more granular consideration not just of the entire legal framework that exists to protect the victims of sexual and/or domestic violence in a contracting state, but of the precise way an individual victim of domestic abuse was handled by police in the UK. This liability under the ECHR for 'egregious and significant errors' in the investigation and handling of any individual case is a novel domestic law standard that would apply in many scenarios where a victim would approach the police under a 'Right to Ask' element of a DADS, or when referred to the decision-making process of a DADS under its 'Right to Know' strand<sup>621</sup>.

The test of whether police (mis)handling of a reported crime or possible future offence constituted any "egregious and significant errors" sufficient to engage Article 3 ECHR

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<sup>619</sup> As per *Irene Wilson v UK* (10601/09), 37.

<sup>620</sup> *Opuz v Turkey* (2009) 33401/02, 161-162.

<sup>621</sup> The Independent Office for Police Conduct reported in June 2020 that a member of Wiltshire police staff had been investigated and disciplined for misconduct after it transpired that they had badly handled a 'Right to Ask' request. The officer checked the date of birth of a man whose partner enquired about him under the DVDS, using the date of birth as she had supplied it to Wiltshire police. This date of birth was incorrect, and the man had in fact a considerable history of perpetrating domestic abuse against previous partners. The woman was then seriously assaulted by the partner she had enquired about. The IOPC review of the matter determined that all 'Right to Ask' applicants should be met with in person in order that further questions can be asked about the potential subject of a disclosure. See: Independent Office for Police Conduct, 'Response to request for a domestic violence disclosure check - Wiltshire Police, April 2019' (3<sup>rd</sup> June 2020) <https://policeconduct.gov.uk/recommendations/response-request-domestic-violence-disclosure-check-wiltshire-police-april-2019>> accessed 30 June 2020.



was applied in *R (LXD) v Chief Constable of Merseyside Police* [2019] EHC 1685 (Admin); the High Court judge, Dingemans J, found that the mis-recording of the risk of harm (as 'standard' as opposed to 'medium' as required under force policy) relating to threats to kill against a woman and her children was not sufficient to engage Article 3 or 8 ECHR. Dingemans J (at 100) concluded there had been no breach of the ECHR since it was "apparent that the Defendant did take the proper steps which should have been taken in relation to the Claimants and that the failure to assess the threat as medium did not make any practical difference to the way in which the Claimants were treated." This would suggest that a police force which could feasibly have made a disclosure in response to a Right to Ask or Right to Know, and did not, could meet their positive obligation under Article 3 ECHR to undertake a handling of a public protection matter by way of their other steps to support a potential victim.

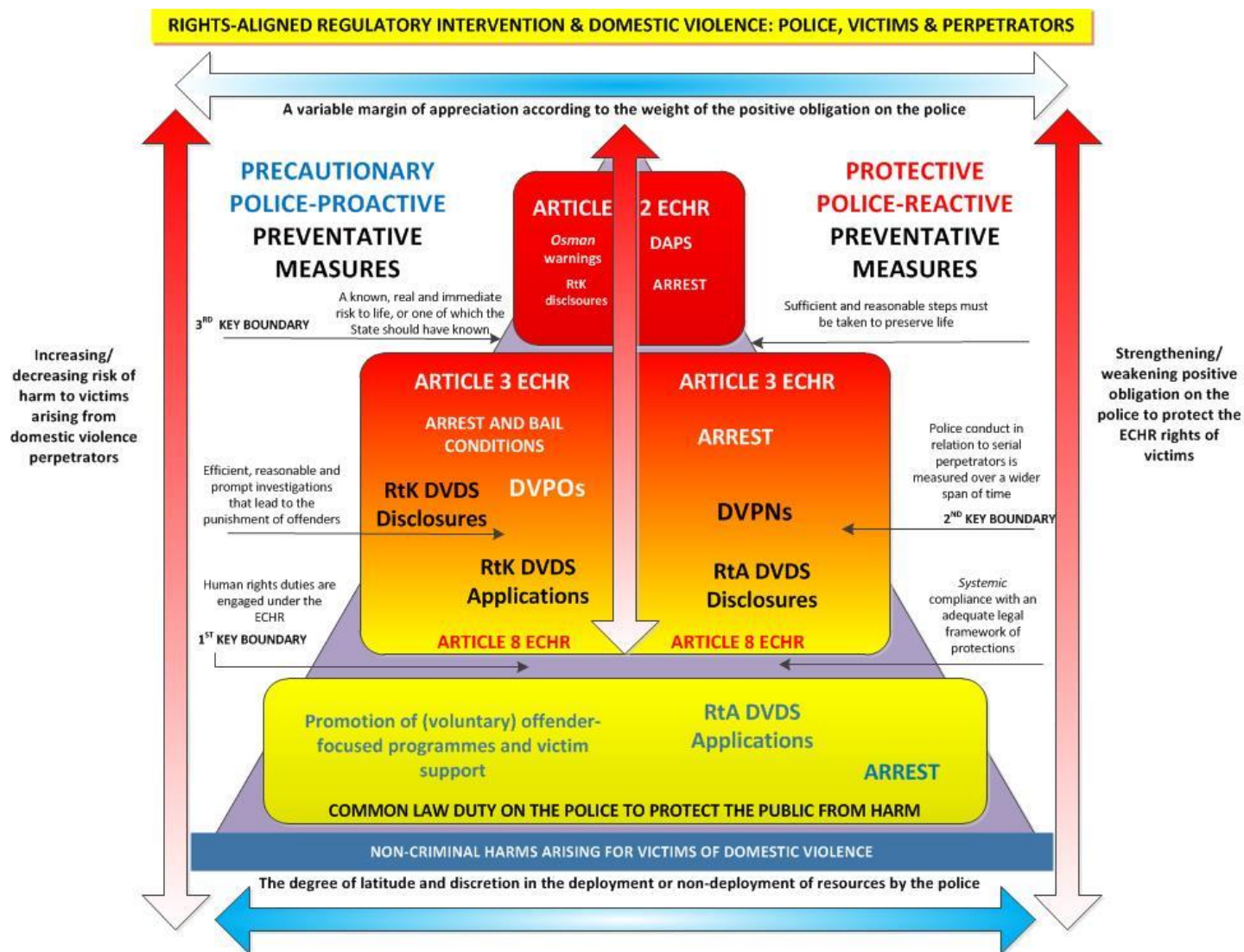
The diagram on the page below is an attempt to capture the overall picture of the 'sliding scale' of serious across the positive obligations under Articles 2, 3 and 8 ECHR, as well as the related (and narrower-to-broader<sup>622</sup>) range of police discretion in decision-making and interventions concerning risks toward domestic violence victims that the courts, and now the relevant case law, will tolerate. In presenting this representation of the positive obligations concerned in this way, the diagram below makes assumptions about the manner that Right to Know disclosures, because of their inherently more proactive context in being triggered often by interagency intelligence sharing, would be more likely to be an appropriate response to at least consider on the part of the police, when Article 2 or Article 3 is deemed to be engaged, and in using a risks assessment process. This is also, however, a position that happens to be supported by Marian Duggan's empirical finding; that in the operation of the DVDS by one force, the RtK disclosure recipients receive a higher spot in a hierarchy of treatment compared to RtA recipients<sup>623</sup>. This is presumably, but of course need not always be, that the offenders whose probation officers pass information to the police under the Right to Know might be known to pose a (higher) risk; or that social work teams are flagging the arrival of a seemingly 'risky' new partner in the life of a family with vulnerabilities or a history of victimisation already.

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<sup>622</sup> As noted above, Laws LJ observed in *D v Commissioner of Police of the Metropolis* [2016] QB 16 at 68, the applicable discretionary "margin widens at the bottom of the scale but narrows at the top" - entailing a pyramid outline for the figure below.

<sup>623</sup> See Marian Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' (2018) 24(2) 199.

Fig. 4: Human rights, domestic violence and the discretionary use of police powers on the context of the ECHR



## 9.6 International legal standards and victims of domestic violence and their children

Within international law is a body of rules purporting to protect the interests of women and children and seeking to protect them from domestic violence. However, international law is not necessarily law that is binding in the UK. Whether or not it is binding depends on whether the doctrinal standard concerned, for example, is part of 'customary international law' (that takes effect through the principle of *opinio juris*; the subjective assessment of whether the courts in a jurisdiction treat the international law as binding); or whether instead it is treaty law (perhaps that is agreed between a group of states), and which must be ratified by those states (and in the UK 'dualist' constitution, furthermore, brought into effect domestically through an 'enabling Act' or other legislation). This section of this Chapter examines in brief two different international law instruments and considers their ramifications for the UK legal system in the context of the DVDS in particular.

### *The Istanbul Convention*

The *Council of Europe Convention on preventing and combating violence against women and domestic violence* (2011) is often known as the Istanbul Convention, for ease of reference. It was noted in Chapter 1 that as a doctrinal test standard, the Istanbul Convention is more an 'aspiration' for the criminal justice system of England Wales to adhere to in protecting the rights of victims of domestic violence. It is not currently in force, although this may change, since there are current government plans to bring the Istanbul Convention into increasing legal effect in the UK through ratification and some further legislative provision as part of the Domestic Abuse Bill (2020)<sup>624</sup>. This is a move which would automatically purport to give effect to its standards through an array of legislative and policy standards in the UK dualist constitution.

Lisa Grans gives a valuable overview of the Istanbul Convention, in terms of its broad scope as to what constitutes preventative measures aimed at reducing levels of domestic violence and other harms aimed at women - and the need for there to be specificity and granularity in the way that the Istanbul Convention is interpreted to apply in the UK in a binding manner. Grans concluded that the Istanbul Convention represented a positive step in terms of building pressure on European states to commit resources to preventive measure combatting domestic

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<sup>624</sup> At the time of writing, as the Domestic Abuse Bill (2020) faces its second reading in the House of Lords, Clauses 66 and 67, and parts of Schedule 2 to the draft Bill, would allow for the ratification of the Istanbul Convention by giving extraterritorial jurisdiction for certain criminal offences to the course in different parts of the UK.

violence. Under the ECHR, "the choice of methods to prevent violence has mainly been left to the discretion of the State, although the ECtHR has provided some clarification as to minimum standards. The preventive obligations in the Istanbul Convention are more detailed, but...their content also needs to be spelled out."<sup>625</sup>

Under the Istanbul Convention itself, then, and following this evaluation of the Convention by Grans, there are layered duties which cumulatively would make measures including the DVDS more of a necessity, it could be argued, in relation to the regulation of domestic violence prevention, should the Convention become binding in the UK. Article 5(2) of the Istanbul Convention ('State obligations and due diligence') states that: "Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors." This is tantamount to the systemic standard laid down by Articles 3 and 8 ECHR that requires states, as noted above, to adopt 'measures in the sphere of the relations between individuals' and 'to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals' under Article 8 ECHR<sup>626</sup>; and under Article 3 ECHR, to take "all reasonable measures to prevent the recurrence of violent attacks" against individuals<sup>627</sup>.

In addition to this, under Article 7 of the Istanbul Convention (concerned with 'Comprehensive and co-ordinated policies'), we see that requirements for coherent regulation of measures and interventions designed to prevent domestic violence are stipulated in some detail, as follows:

- 1 Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women.
- 2 Parties shall ensure that policies referred to in paragraph 1 place the rights of the victim at the centre of all measures and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations.

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<sup>625</sup> Lisa Grans, 'The Istanbul Convention and the Positive Obligation to Prevent Violence', *Human Rights Law Review* (18)1 (2018) 133, 154.

<sup>626</sup> As per *Irene Wilson v UK* (10601/09), 37.

<sup>627</sup> *Opuz v Turkey* (2009) 33401/02, 161-162.

*Prima facie* then, the three DADS in operation would help the UK adhere to these standards as set by the Istanbul Convention. However, the current lack of a body of satisfactory evidence that the DVDS, for one, actually works to prevent domestic violence, as opposed to displacing it (as discussed in previous Chapters) would suggest that DADS are not necessarily measures yet mandatory under the requirements for 'effective, comprehensive and co-ordinated policies' demanded in Article 7(2). Indeed, any evidence that DADS might heighten the vulnerability for some victims could put the operation of a particular DADS policy in breach of Article 7(2). This thesis has found an ongoing risk of abuse by disclosure subjects, post-disclosure, for at least 45% of recipients, for example (see Chapter 6).

In Chapter III of the Istanbul Convention (concerned with 'Prevention'), we see that Article 12(2) requires that Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person", while Article 12(3) demands that "Any measures taken pursuant to this chapter shall take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre." In addition to this, Article 18(1) creates a general duty: "Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence." Much more specifically, the multi-agency decision to consider a disclosure under the Scheme, or the possibility of a more interventionist or offender-oriented measure separate to the potential disclosure under the Scheme, would be regulated by Article 51(1) of the Istanbul, which states that:

Parties shall take the necessary legislative or other measures to ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support.

The DVDS guidance, in its current version, would at least partly ensure compliance with this multi-agency standard; as in the Scheme guidance it is after all emphasised that:

"Once the police have determined whether the initial trigger can be categorised as a "concern" or "no concern", the final decision to disclose must be referred to the local multi-agency forum for consideration at their next meeting. **While it will be for the police to make the final decision on whether the trigger is a "concern" or "no concern" and, consequently, whether a disclosure should be made, this should be done with the input of the multi-agency forum.**"<sup>628</sup> [Emphasis in the original.]

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<sup>628</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 57.

An issue would be that from the evidence in the public domain today, the three UK DADS, operated in a multi-agency fashion, are stronger at measuring the risk posed to a potential recipient of a disclosure, compared to providing 'co-ordinated safety and support'. That later, equally vital work would be more onerous and interventionist, one would imagine. To keep pressure on policymakers in HM Government in that regard, the Home Affairs Select Committee of the UK Parliament recommended in October 2018, in relation to the need for forthcoming government-sponsored legislation to be cognisant of international law standards such as these in the Istanbul Convention, that "the Government [should publish] a Violence Against Women and Girls and Domestic Abuse Bill [sic] which would facilitate a more effective, joined-up and cross-Government strategy to tackle both domestic abuse and VAWG and would better demonstrate the UK's commitment to comply with international VAWG conventions."<sup>629</sup> The Domestic Abuse Bill (2020) aims achieve these improvements.

Reform of the operation of DADS in the UK, including putting them on a statutory basis, would hardly be the only thing the Committee would have envisaged, then, to safeguard women and girls in the UK from the harms of domestic abuse and other crimes or behaviours.

In addition, the Istanbul Convention is not the only international law standard which sets a possibly or soon-to-be binding doctrinal standard on the prevention of domestic violence in the UK. Whereas the Istanbul Convention may be ratified and brought into effect in time in the UK by way of statute, however, the United Nations Convention on the Rights of the Child might come into effect in the UK through judicial deliberation alone. This is an important consideration for this thesis, as the Home Affairs Select Committee observed in October 2018 that the Home Office consultation on a Domestic Abuse Bill at the time showed that:

"... the Government's proposed strategy makes no explicit additional provision for children who have experienced domestic abuse, as abuse within a family can cause children and young people to suffer a range of long-term negative consequences as a result of their experiences"<sup>630</sup>

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<sup>629</sup> House of Commons Home Affairs Committee, *Domestic Abuse - Ninth Report of Session 2017-19*, HC 1015, 3.

<sup>630</sup> *Ibid*, 4.

## 9.7 The United Nations Convention on the Rights of the Child (UNCRC) 1989

The UNCRC addresses the notion of the interests of children in legal processes, and the DVDS guidance from the Home Office for England and Wales is, surprisingly, largely silent on the operation of the Scheme in the parent-child/family sphere. Current Scheme guidance simply suggests that the police, in making a disclosure, should put the onus on an individual receiving a disclosure to use that information to help them keep their child(ren) safe<sup>631</sup>; and that the police should carry out checks to see if support has been sought by an individual in order to keep their child(ren) safe<sup>632</sup>. The current guidance does not, however, put the 'best interests' of children into the mix in terms of consideration and decision-making as to whether a disclosure should be made *at all*.

### *The 'best interests of the child'*

Domestic violence victims receiving disclosures under any of the three UK DADS may well be parents or carers for children. Westmarland has noted that mothers may have a difficulty in acting on information supplied to them under the DVDS<sup>633</sup>. For parent-victims and for child victims of domestic abuse in general, and aside from the operation of just the DVDS, the United Nations Convention on the Rights of the Child (UNCRC) is a relevant international law set of standards that arguably apply in this context - although there is some judicial disagreement as to the extent to which the UNCRC is actually in effect in the UK dualist constitution<sup>634</sup>. There is no doubt though that if provisions of the UNCRC did apply directly in the UK then there would be an effect on the procedural operation of the DVDS where children were concerned.

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<sup>631</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 50.

<sup>632</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf)> accessed 16 June 2020, 51-52.

<sup>633</sup> Nicole Westmarland, *Violence against Women: Criminological perspectives on men's violences* (Routledge 2015) 27.

<sup>634</sup> Detailed discussion as to how or indeed even whether the UNCRC operates with direct effect in the UK can be found in *R (DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), and see throughout in *R (DA and others) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504.

The UNCRC contains as a 'headline' duty the principle, in Article 3(1) UNCRC, that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." If this applied directly to UK police forces, and thus to the operation of the Scheme, then this would mean that the needs of children affected by (potential) domestic violence in a relationship would need to be taken into account, according to the 'best interests' of the children concerned. Hypothetically this could give weight to an argument in favour of withholding information from a potential victim under the Scheme as well as giving weight to the argument to provide information to them, depending on the exact circumstances of the known risks, the actual family and the exact nature of the information concerned. It certainly might be a persuasive factor in relation to the police, when faced with using their discretion to issue a Domestic Violence Protection Notice where this might remove, albeit temporarily, an allegedly abusive adult from a home where vulnerable children reside.

Does the UNCRC actually apply directly to the work of UK police forces today, however? The 'best interests of the child' as a principle of 'primary consideration' likely applies only in terms of interpreting the extent and application of Articles of the ECHR in a possible disclosure scenario under one of the three UK DADS. Lord Reed in *R (SG and others) v. SSWP* [2015] 1 WLR 1449 at 82 asserted (as the writer of the leading judgment in that case) that what mattered was the status of the UNCRC as an *unincorporated* international treaty (albeit one to one taken into account through interpreting the way that Article 8 ECHR applied to other legislation and policy in the light of the relevant impact on children (at 83)). On the other hand, Lady Hale's view in *SG* was that the UNCRC did apply more directly, and was supported by at least one other<sup>635</sup> of the five Supreme Court Justices hearing the case (Lord Kerr). This is since, in Hale LJ's view (in *SG* at 218), that:

"our international obligations under the UNCRC... have the potential to illuminate our approach to both discrimination and justification. Whatever the width of the

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<sup>635</sup> Collins J in the case of *R (DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) might well have written in error that a majority of three of the five SCJs felt that the UNCRC applied in *SG*. A close reading of the text of the UKSC judgment in *SG* shows that Lord Hughes (at 140) felt he was unable ('like Lord Reed and Lord Carnwath') to accept the arguments of Lord Kerr and Lady Hale that the UNCRC applied directly and enforceably in the case. This would create a majority of 3 to 2 in favour of the UNCRC not being directly applicable; but instead only as a guide to the interpretation of ECHR rights where matters were being considered in the best interests of a child.



margin of appreciation in relation to the subject matter of a measure, the Strasbourg court would look with particular care at the justification put forward for any measure which places the United Kingdom in breach of its international obligations under another human rights treaty to which we are party."

Lord Kerr went a concrete step further than the reasoning of Lady Hale, as he argued in *SG* that the UNCRC was binding in domestic law on UK public bodies, and created a standalone duty to comply with its requirements, for example, that decisions must be taken in policy matters in accordance with the best interests of a child or children affected, and as amongst other standards. Lord Kerr wrote in *SG* (at 256) that:

"Standards expressed in international treaties or conventions dealing with human rights to which the UK has subscribed must be presumed to be the product of extensive and enlightened consideration. There is no logical reason to deny to UK citizens domestic law's vindication of the rights that those conventions proclaim. If the government commits itself to a standard of human rights protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard. This is particularly so in the case of UNCRC."

However, when the decision by Collins J in *R (DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) was reversed by the Court of Appeal in March 2018, the judgment of the appellate court, perhaps unhelpfully in its language, was considering the notion of whether Article 3 UNCRC was 'engaged' (thus suggesting in their language that it *might* be a standalone ground of review), though the majority of the Court of Appeal panel concluded it was not in that case. The deliberations of the Court of Appeal did, however, always make it plain that if Article 3 UNCRC was not 'engaged' on the facts of a case it could be used in an interpretive fashion in relation to ECHR grounds themselves<sup>636</sup>, even if it did not or could not apply directly as a 'standalone' ground of review or applicable human rights standard.

#### 9.8 Parliamentary debate of Clause 65 of the Domestic Abuse Bill (2020)

Clause 64 of the Domestic Abuse Bill (2020) (as it was introduced to the House of Commons) sought to put the DVDS for England and Wales on a statutory footing by having the relevant police forces put under a duty to have regard to Home Office guidance, in essence. This was a more limited possible form for a statutory footing for the DVDS, and from a regulatory perspective was clearly a missed opportunity, given the regulatory

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<sup>636</sup> See throughout in *R (DA and others) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504.

conclusions. The Home Office impact assessment on the 2020 Bill had mooted the following policy options on possible reform to the basis for the DVDS in England and Wales:

"a) Option 1: Do Nothing. This will maintain the current situation where the scheme is not consistently applied across forces. This likely results in missed opportunities for the scheme to be used and potentially reduces the sharing of information with potential victims of domestic abuse. b) Option 2: Place the guidance underpinning Domestic Violence Disclosure Scheme on a statutory footing: This will require the police to have regard to the guidance and so improve consistency in the application of the scheme... Option 2 is the Government's preferred option because it will raise awareness of the DVDS and drive better consistency in its application..."<sup>637</sup>

There was no consideration of placing the exact workings of the DVDS on a statutory basis in detail, however. The Home Office Impact Assessment also noted that, based on estimates averaged over the costs for disclosures for 6 Anglo-Welsh forces, police costs for disclosures were or are: "£1,006 for each disclosure from the 'right to ask' (where the police disclose information via a request from a member of the public) [and] £789 for each disclosure from the 'right to know' (where a proactive decision is made to consider disclosing information in order to protect a potential victim)..."<sup>638</sup>. This would mean a total cost of the operation of the DVDS in England and Wales, alone, of more than £5.75m in the year to March 2019: equivalent to the annual salaries of 178 therapeutic support workers assisting victims of domestic violence and their families<sup>639</sup>.

But what also of the social cost of 'displacement' from one victim to another, if an offender is not rehabilitated, potentially resulting in even more violence? And what of the increased risk and harm to a victim themselves in leaving a relationship? More use of the Scheme would result, logically in more of these sorts of wider 'costs'. The Home Office impact assessment explained "it is assumed that the policy leads to an increase in volumes [of disclosures] between 5 and 10 per cent"<sup>640</sup>. But the use of the DVDS has been increasing at much greater rate than this for the last six years, while the wider social costs of the DVDS in terms of

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<sup>637</sup> HM Government, 'Domestic Abuse Bill 2020 - Impact Assessment' (February 2020) <<https://publications.parliament.uk/pa/bills/cbill/58-01/0096/IAFEB2020.pdf>> accessed 30 June 2020, 11.

<sup>638</sup> *Ibid*, 32.

<sup>639</sup> This comparison is based on a benchmark annual salary for a therapeutic victim-support professional of £32,181. See Women's Aid (2019) *Funding Specialist Support for Domestic Abuse Survivors*, Bristol: Women's Aid, 28.

<sup>640</sup> HM Government, 'Domestic Abuse Bill 2020 - Impact Assessment' (February 2020) <<https://publications.parliament.uk/pa/bills/cbill/58-01/0096/IAFEB2020.pdf>> accessed 30 June 2020, 33.

actual harms to victims receiving disclosures, or otherwise, have not been mapped, as we know.

The human rights impact assessment published concerning the 2020 Bill noted that: "Clause 64 puts the guidance issued by the Secretary of State supporting the domestic violence disclosure scheme on a statutory footing. This is with a view to encouraging greater, consistent and transparent use of the scheme by police chief officers."<sup>641</sup> But transparency surely requires a duty to evaluate and review the use of the Scheme by each force and/or the Home Office, and to be publically accountable for this. Key issues for police forces to be re-regulated over the DVDS would be the issue of children and their 'best interests' in terms how they would be affected by possible disclosures, due to the effect of Article 3 UNCRC; as well as a more concrete basis and series of tests for disclosures to satisfy the foreseeability requirements of positive obligations to offenders under a qualified right like Article 8 ECHR, and a statutory duty to consider victim safety-planning in the event of a disclosure, in order to satisfy the requirements of Article 3 ECHR to take reasonable steps to prevent repeated victimisation at the hands of an offender. As well as these substantive elements of disclosure decision-making, the provisions of this clause in the Bill could have put procedural duties on chief constables and the Home Secretary to review the true effectiveness and impact of the operation of the DVDS<sup>642</sup>.

The Explanatory Notes to the Domestic Abuse Bill put before Parliament in early March 2020 did commit the government to some greater scrutiny and a degree of reform as to the

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<sup>641</sup> HM Government, 'Domestic Abuse Bill - European Convention on Human Rights Memorandum' (2020) <<https://publications.parliament.uk/pa/bills/cbill/58-01/0096/ECHR%20memo%20Domestic%20Abuse%20Bill%20Commons%20introduction%20March%202020.pdf>> accessed 30 June 2020, 23-24.

<sup>642</sup> While the Domestic Abuse Bill (2020) was at Committee Stage in the House of Commons, I wrote to the Parliamentary office of Labour MP Jess Phillips, with a summary of the conclusions of this thesis on the DVDS, and some suggested amendments. Jess Phillips MP then (unsuccessfully) moved and argued for the text of the amendments I had suggested to her, using the following proposed amendments to Clause 64 of the Bill, as it was then:

“(1A) Before issuing guidance under this section, the Secretary of State must undertake a comprehensive assessment of the contribution of the disclosure of police information to the prevention of domestic abuse, drawing on disclosures made by chief officers of police prior to this section coming into force. (1B) Disclosures of police information for the purposes of the prevention of domestic abuse may only be made— (a) where reasonable, necessary, and proportionate, (b) with regard to the best interests of children likely to be affected by the disclosure, and (c) after ensuring there is an operational plan to support the recipients of such disclosures... (2B) Each chief officer of police of a police force must annually review— (a) the compliance of their own force with any guidance issued under this section, and (b) the overall contribution of the disclosures under that guidance to the prevention of domestic abuse in their force area.” See Domestic Abuse Bill (2020) Public Bill Committee Proceedings, 17 June 2020 > [https://publications.parliament.uk/pa/bills/cbill/58-01/0096/amend/domestic\\_rp\\_pbc\\_0617.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0096/amend/domestic_rp_pbc_0617.pdf)> accessed 18 July 2020, 15.

operation of the DVDS, explaining that the guidance on the DVDS produced by the Home Office, a new statutory basis, would cover:

"Recommended minimum levels of knowledge and experience required by practitioners to discharge their functions under the DVDS effectively... Suggested step-by-step processes and timescales for the two disclosure routes under the scheme (the "right to ask" and the "right to know"), including example scenarios for each route... Minimum standards of information to be obtained from the applicant... [and] Minimum standards of intelligence checks to be completed..."<sup>643</sup>

This list of areas of re-focus promised by the explanatory notes to the Bill, as outlined by HM Government as the Bill was discussed by Parliament, did look to satisfy some of the concerns that this thesis has raised about the operation and regulation of the DVDS, particularly in relation to the need for clearer guidance, as follows:

"...Guidance on robust risk assessment and safety planning in order to safeguard the individual or individuals potentially at risk of domestic abuse... Suggested types of information which may be disclosed under the scheme, such as details of allegations, charges, prosecutions and convictions for relevant offences... [and] Guidance on what constitutes a "reasonable and proportionate" disclosure in line with relevant human rights and data protection legislation and the [Rehabilitation of Offenders Act 1974]..."<sup>644</sup>

When pressed on some of these issues by Jess Phillips MP, who at the relevant Public Bill Committee argued for an amendment to the provisions of the Bill concerning a statutory basis for the DVDS, Victoria Atkins MP, government minister for safeguarding, responded to the moved amendment, explaining that the government

"...understand the need to review and are reviewing the guidance. I welcome the thoughtful idea of looking at the pressing need test, which is set out in the explanatory notes accompanying the amendments. We have not had that suggestion made to us by the police as part of our work to review it. We can see that there may be complications in terms of the importance of risk assessment and so on, but we undertake to explore that point with the police... We will also of course share the new guidance fully with sector partners and the domestic abuse commissioner, among others, before it is published. It is anticipated that Clare's law guidance arising out of clause 64 will be published after Royal Assent next year... Even if we were to identify changes to the pressing need test—at this stage, we are very much still pondering that—we have to be alert to whether it is appropriate to place the test in legislation. Doing so may have unintended legal consequences for the well-established legal obligations on police considering making a disclosure. Statutory guidance has the advantage of flexibility and is more readily updated to reflect

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<sup>643</sup> HM Government, 'Explanatory Notes to the Domestic Abuse Bill' (March 2020) <<https://publications.parliament.uk/pa/bills/cbill/58-01/0096/en/20096en.pdf>> accessed 30 June 2020, 46.

<sup>644</sup> *Op cit.* 47.

developing good practice. The police will be required to have regard to the statutory guidance and may face challenge in the courts if they fail to comply with the guidance without good reason... I absolutely agree wholeheartedly with the principles that the hon. Lady has raised—namely, that we want to bolster the scheme and make sure that more people are aware of it and that we have consistency of application across forces. We very much intend to achieve that through the guidance set out... Members have been very concerned about how we are looking after children throughout our discussions on the Bill. I very much welcome the suggestion of a specific focus on ensuring that the best interests of any children are taken into account. I agree that that is crucial to the safe operation of the scheme. We will look at how that principle can be included in the statutory guidance... On amendment 53, we share the ambition that local forces should be aware of how they are operating Clare's law, including whether that is in accordance with the published statutory guidance and with a full understanding of the impact and outcomes of the scheme on victims. Again, I maintain that that is a matter for the new statutory guidance, but our discussions on that will be taken forward as part of our review. I hope the hon. Lady will be content with those representations."<sup>645</sup>

Jess Phillips MP then withdrew the relevant amendment; so it remains to be seen how much work HM Government will do in 2021 on these reforms to DVDS guidance for police forces in England and Wales. It is of note that the government minister reported the police had not been explaining the 'pressing need' text required clarification when the Home Office had consulted them. One expects this is either for lack of interest; or because the police officers consulted by the Home Office prefer the operational flexibility that comes from the emphasis in current Home Office DVDS guidance on the common law standard of the 'pressing need' test. Regardless, at the time of the completion of this thesis, therefore, there is doubt over how the operation of the DVDS can be better demonstrated, procedurally or substantively, to comply with Article 3 UNCRC, Article 3 ECHR and Article 8 ECHR.

### 9.9 Chapter conclusions

As things stand the most useful thing about the provisions of Article 3(1) UNCRC becoming directly effective, guiding police officers in applying Article 3 ECHR or Article 8 ECHR to a disclosure decision-making process, would be to put the 'best interests' of children explicitly into the consideration as part of the process for deciding on a disclosure according to a 'pressing need'. The 'best interest of children' test should be as much at the heart of decision-making under the Scheme as the securing of safety from harm for potential adult victims of

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<sup>645</sup> Hansard, *Domestic Abuse Bill (2020)*, Public Bill Committee, minutes of the Eighth Sitting, columns 284-285 <[https://hansard.parliament.uk/commons/2020-06-11/debates/2b88e3cc-6f84-42a0-a440-136bbc9fbe0b/DomesticAbuseBill\(EighthSitting\)](https://hansard.parliament.uk/commons/2020-06-11/debates/2b88e3cc-6f84-42a0-a440-136bbc9fbe0b/DomesticAbuseBill(EighthSitting))> (accessed 18 July 2020)

domestic violence (although these will often be common issues). The guidance on disclosure processes for the UK DADS should be updated accordingly.

But as noted above, how would a directly applicable procedural duty to consider the 'best interests' of a child in deciding whether to make a DVDS disclosure, or in the manner in which such a disclosure is made, actually work in practice? Of course, this issue would need considerable research in the field, or consultation with child protection experts, before a definitive answer could be given, but it could not, *prima facie*, be a negative thing to have a more holistic set of factors in DVDS decision-making processes, especially concerning the issue of the interests of children in a disclosure being made/not made.

In terms of needing to update the UK DADS guidance documents (and chiefly the Home Office DVDS guidance) to reflect the requirements of Article 3 UNCRC, the same is equally true in terms of factoring in new standards from the Data Protection Act 2018, as explored above, and in time, the Istanbul Convention too. It may well be that in future the operation of parts of both the Istanbul Convention and the UNCRC will be written into the DVDS guidance in a fourth or later iteration; and an update with regard to the language, tests and benchmarks of Part 3 of the 2018 Act has now been rendered a necessity for the good governance of all three of the UK DADS. But for the UNCRC and Istanbul Convention principles explored here, above, this might make binding a requirement of bringing more perspectives from non-police agencies to bear on DVDS decision-making, and would arguably make decision-making around disclosures more oriented toward the 'best interests' of children, according to developing doctrinal standards in international law. In terms of the Home Office DVDS guidance specifically, greater emphasis on protecting vulnerable children and making disclosure decisions with due regard to their needs and best interests is one strand of the recommendations included in the next, and final chapter of this thesis.

## 10. Conclusions and recommendations

### 10.1 Chapter Introduction

This thesis has sought to address three key research questions:

1. To what extent do Domestic Abuse Disclosure Schemes show a lack of regulatory responsibility for preventing domestic violence?
2. To what extent do the Domestic Abuse Disclosure Schemes adequately address issues of victim vulnerability?
3. To what extent do the Domestic Abuse Disclosure Schemes pose issues of coherence in terms of their legality, and in relation to the context of disclosures?

#### *Regulatory responsibility*

To give a short summary of the work done in this thesis to address the first question on regulatory responsibility: This thesis has shown that elements of strong regulation have been missing from the governance of Domestic Abuse Disclosure Schemes. This is true particularly in England and Wales, where there is less of an excuse for this shortfall in the degree of regulatory responsibility shown, since there has been more time for the DVDS to have been thoroughly reviewed and reformed as to its effectiveness, and the consistency of its operation. The general trend for the last several years has been for greater volumes of applications to both the Right to Ask and Right to Know strands; and more significantly, greater rates of disclosures from those applications<sup>646</sup>. There will be new, statutory guidance on the operation of the DVDS once the Domestic Abuse Bill, in its current form, is passed by Parliament. However, this will only update the current DVDS guidance (and not those for the other two UK DADS), and will simply put a duty on chief officers to 'have regard' to it; although as reprised below in this Chapter, there might be some issues where the current DVDS guidance is not entirely fit for purpose. But a main concern about the operation of the DVDS in England and Wales is the great variation in disclosures rates geographically i.e. between police forces<sup>647</sup>. Very high disclosure rates (100% for Right to Ask applications in

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<sup>646</sup> For a brief overview of known disclosure rate variations, please see: Jamie Grace, 'Whatever Happened to 'Clare's Law'? Reviewing the Evidence', (August 7, 2018; Revised 3<sup>rd</sup> December 2019) SSRN <<http://dx.doi.org/10.2139/ssrn.3227956>>

<sup>647</sup> Office for National Statistics, *Domestic abuse in England and Wales, year ending March 2018* (ONS, 22<sup>nd</sup> November 2018) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017>> accessed 30 June 2020.

Wiltshire up to March 2018, and 100% for Right to Know disclosures in Kent in the same period for example<sup>648</sup>), if these are correct and not subject to statistical massaging, suggest that the privacy rights of past offenders are not being taken seriously. By turn, very low disclosure rates when it comes to Right to Know applications (for example at a rate of just 9.6% for Thames Valley police in relation to that period<sup>649</sup>) would suggest that the positive obligations to protect victims in human rights law terms might not be being given enough weight. If these are not the real issues in these forces, then police data recording needs to be standardised in how they report applications and disclosures, and basic reasons for refusals of applications. At the moment, not only do we not know why there are these great differences in disclosure rates between police force areas, we do not know if they are truly to be believed.

### *Victim vulnerability*

In terms of the research question explored in this thesis concerning victims' vulnerability: A key concern is the ongoing doubt over the efficacy of actual disclosures under the Scheme. This is the core concern in this thesis around issues of DADS failing to tackle, and to take into account, victims' vulnerability. At least 45% of recipients of disclosures in a period in 2014/15 went on to be the victims of abuse by the very subject of that disclosure by mid-2018, as shown by police force responses to FOI requests, received from 26 forces over the summer of 2018. Furthermore, the details of the Domestic Homicide Review report in relation to the tragic death of Kerri McAuley shows that the risk of 'displacement' of offending (where a perpetrator of abuse moves on to a another and potentially more vulnerable victim following a disclosure to an initial partner) is very real<sup>650</sup>.

### *Coherent legality*

As for the third research question addressed by this thesis, on the issue of a coherent legality, and as between the UK DADS: There is a need to update and to standardise elements of the DVDS guidance for England and Wales to match the best-practice features of the guidance

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<sup>648</sup> Office for National Statistics, *Domestic abuse in England and Wales, year ending March 2018* (ONS, 22<sup>nd</sup> November 2018)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017>> accessed 30 June 2020.

<sup>649</sup> *Ibid.*

<sup>650</sup> See Jamie Grace, 'Whatever Happened to 'Clare's Law'? Reviewing the Evidence', (SSRN, August 7, 2018; Revised 3<sup>rd</sup> December 2019) <<http://dx.doi.org/10.2139/ssrn.3227956>> accessed 18 July 2020.



on both the Domestic Violence and Abuse Disclosure Scheme (DVADS) in Northern Ireland and the Disclosure Scheme for Domestic Abuse (Scotland) (the DSDAS). At the time of writing the final elements of this thesis, Parliament was deliberating a new part-statutory basis which could have been used to make substantial changes to the operation, regulation and oversight of the DVDS in England and Wales; through a new statutory Code of Practice, and quite possibly the other UK DADS if legislative consent had been pursued with regard to the Scottish and Northern Irish governments<sup>651</sup>. These ongoing issues in terms of legal (in)consistencies, both doctrinal and constitutional, and in ways that mean the UK DADS will all operate differently, mean that an opportunity for a statutory basis for more coherent legality across the UK DADS could be about to be lost.

### 10.2 A summary of regulatory problems contributing to the 'policy spiral' of DADS

There is an innate tension in the nature and operation of the Domestic Abuse Disclosure Schemes which this thesis has surveyed; namely that their policy formulation and implementation has more of an underlying trade-off; that is, between values of offender rehabilitation as a strand of respect for the private life of individuals, and values of public protection as a strand of the positive obligation to prevent degrading treatment of the vulnerable and of victims of domestic violence. However, this tension between public protection and rehabilitation, and the complexities of 'forgetting' criminal histories due to concerns over 'safeguarding' is to an extent also true of the practices surrounding 'criminality information' management in other arenas - not least with regard to employment vetting and safeguarding in a range of institutional and commercial settings, across bodies and organisations in both the public and private sector, and in terms of recruitment practices. The Domestic Abuse Disclosure Schemes under consideration in this thesis extend this regulatory complexity, and policy balancing act, to the domestic domain of intimate relationships.

In a connected issue, there is ready criticism to be found, and rightly so, when it comes to the notion that Domestic Abuse Disclosure Schemes are victim-responsibilising regulatory tools: though this thesis is hardly the first piece of academic work to lay this particular charge at the door of a policing policy tool such as the Domestic Violence Disclosure Scheme.

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<sup>651</sup> Cl. 78 of the Domestic Abuse Bill, as it passed to the Lords for debate in July 2020, establishes that provisions concerning a basic statutory basis for a domestic abuse disclosure scheme apply only to England and Wales.

This thesis is again not the first piece of scholarship to reach the conclusion, offered in the chapters above, that the spread of Domestic Abuse Disclosure Schemes has been hurried, and too uncritical on the part of policymakers in relevant government units and on the part of decision-makers and leaders in police organisations and inspectorates. Albeit, this is the first piece of academic research to engage with those self-same DADS as potential 'policy spirals'; indeed, at this juncture, with the findings laid out in the chapters above, we can confidently conclude that Clive Walker's definition of 'policy spirals'<sup>652</sup> would apply to DADS, as Walker found it would to UK counter-terrorism policy in recent years. The rapid spread of DADS in a common-law global 'policy spiral' is in spite of some considerable regulatory problems, which this thesis does work to gather together and present holistically for the first time. To briefly reprise these regulatory problems here:

#### *Regulatory problems at the micro-level of the DADS*

1. Julia Black's 'fragmentation of knowledge': the police can potentially arrive at non-disclosures as 'false negatives' that put victims at risk from perpetrators of violence who are unknown to the police; and the latter cannot know as much of the potential violence in a relationship as they might in theory, due to this 'fragmentation of knowledge'
2. The 'postcode lottery': We have seen that there are great variations between forces' disclosure rates in different force areas in England and Wales
3. Inconsistent resources, processes and timelines at force-level for the operation of the DVDS, and presumably the DSDAS and DVADS by way of comparison

#### *Regulatory problems at the meso-level of the DADS*

1. There can be seen to be a lack of coherent national DADS-related offender/victim policy in an era of austerity

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<sup>652</sup> As a reminder, Clive Walker observed that: "A "policy spiral" describes a policy which lacks clear initial purpose or subsequent direction, progression, control and reflection. A policy spiral is therefore susceptible to unresolved contradictions or gaps, dramatic direction changes, and uncertain outcomes. As a result, policy spirals arise from inexact and contested meanings, objectives, and mechanisms...". Clive Walker, 'Counter-terrorism and counter-extremism: the UK policy spirals', P.L. (201) 725, 726.

2. While procedural reviews of the operation of the DVDS in England and Wales have been conducted by the Home Office, no rigorous (published) review of effectiveness has been conducted by any policy actor in the field.
3. There has been a lack of transparency in the roll-out from the DVDS to the DSDAS to the DVADS, allowing for discrepancies to emerge in terms of policy/decision-making emphases in differing guidance for the three Schemes across the UK

*Regulatory problems at the macro-level of the DADS*

1. There are (principally due to a broader context of devolution) differing legal bases for each of the three UK DADS: the DVDS; the DSDAS; and the DVADS - albeit with the relatively vague (and common law) 'pressing need' test a problem in all three to a varying extent
2. There is scope for a great breadth and inconsistency of the disclosure of non-conviction 'intelligence' due to the lack of firm policy barriers on the disclosure of non-conviction information; as well as some inconsistencies in the (non)inclusion of spent convictions and cautions
3. Across the three DADS in operation in the UK today, their guidance shares a lack of emphasis on emerging international law standards e.g. the UNCRC test as to the welfare of children, and up-to-date data protection law requirements.

10.3 Original contributions to knowledge about Domestic Abuse Disclosure Schemes

This thesis is the single largest and most comprehensive study of the policy origins, known effects and legal processes of the Domestic Violence Disclosure Scheme, and the other two Domestic Abuse Disclosure Schemes in operation in the UK at the time of writing (the Disclosure Scheme for Domestic Abuse (Scotland) and the Domestic Violence and Abuse Disclosure Scheme in Northern Ireland). This thesis is the first piece of scholarship to offer the following four original contributions in the conclusions arrayed across its Chapters:

Firstly, this thesis is the first piece of detailed scholarship to examine the complex multi-level governance arrangements in place for adopting and (supposedly) monitoring the operation of DADS in the UK and other common law jurisdictions (i.e. parts of Australia, parts of Canada and New Zealand). The complexity of this 'regulatory space' of different common law jurisdictions is part of the explanation as to why the operation of these DADS has been so

unchecked and uncritical as a 'policy spiral', globally-speaking. As mentioned above, nine crucial regulatory problems have been identified in this thesis with regard to the development of the UK DADS.

Secondly, this thesis represents the most detailed study undertaken to date of the complex overlapping doctrinal frameworks that regulate the current crop of Domestic Abuse Disclosure Schemes; tiered as they are over the common law (administrative law), European and UK human rights law, European and UK data protection law in the law enforcement context, and international law standards relating to combating gendered violence and protecting the rights and interests of children. Graca's point that women from ethnic and cultural minorities are also likely to find it harder to utilise DADS<sup>653</sup>, even if the Schemes are effective policy, also needs reflecting more upon by HM Government; and so the relevant guidance, when it is amended for any or all of the three UK DADS now in operation, to highlight the duties the police have to have 'due regard' to the need to prevent the victimisation of minority ethnic and nationality communities in their operational approaches<sup>654</sup>.

The third original contribution to knowledge contained in the analysis of DADS in this thesis is concerning some of findings obtained using the freedom-of-information approach taken to gathering material for the thesis. Not only is the Domestic Violence Disclosure Scheme being operated in a 'postcode lottery' fashion with regard to how applications and disclosures come about at different rates in relation to different forces in England and Wales, but according to responses to my freedom-of-information requests to police forces in England and Wales (see Appendix 1) it may not be as effective as the rapid spread of similar Schemes across a number of other jurisdiction would imply. I found that 45% or more of disclosure recipients are still harmed by those offenders they are warned about via the operation of the DVDS.

Fourthly, and finally, the creation of this thesis has also led to the finding, obtained using a freedom-of-information approach, that solely one police force in England and Wales (Cleveland Police) had decided by 2017 to engage with evaluating the effectiveness of the Domestic Violence Disclosure Scheme; suggesting that there are a number of valid regulatory

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<sup>653</sup> See Sofia Graca, 'Domestic violence policy and legislation in the UK: A discussion of immigrant women's vulnerabilities', *EJoCLI* 22(1) (2017) online < <http://webjcli.org/article/view/531> > accessed 16 July 2020.

<sup>654</sup> This 'due regard' duty, as part of the Public Sector Equality Duty, is created by the language of Section 149 Equality Act 2010.

concerns present in the operation and governance of UK Domestic Abuse Disclosure Schemes. Admittedly, 2019 saw police forces in Nottinghamshire and the West Midlands begin to evaluate the operation of the DVDS in their own ways given the findings of HMICFRS reports of force-level inspections,<sup>655</sup> but the national picture on self-management of performance with regard to DADS is overall consistently failed by the police service, on the basis of their widespread failure to self-evaluate - or national regulators, like HMICFRS or the Home Office, to direct them to do so. A considerable downside to this finding is the obvious implication for this research that while there might be a doctrinal/legal research case for the statutory codification and merger of the three current Domestic Abuse Disclosure Schemes operated in the UK, for example, and from a more rarefied constitutional perspective; there is the obvious connotation of a lack of urgency and support for reform of Domestic Abuse Disclosure Schemes, for example, from police forces in England and Wales in relation to the Domestic Violence Disclosure Scheme. After all, why reform something when you are not truly interested in its efficacy? And if there were to emerge, as has occurred through the creation of this thesis, a statistical indication, however crude, that a policy is only partly successful in its efficacy at best - why restrict its use (prior to reform) if it is such an easy sell to the media and to those who pressure the police to take action over the prevention of domestic violence? The truth is that the status quo with respect to the DVDS, if not all three UK DADS, is very likely to be allowed to continue to meander along the path of steadily increasing the use of Right to Know disclosures, in particular, without really investing in a programme to explore their effectiveness.

#### 10.4 A summary of the case for reforming DADS in the UK

There is a considerable need, as identified at different points throughout this thesis, to update the guidance documents underpinning each of the three UK DADS, and perhaps even to consolidate them, the difficulties of statutory codification notwithstanding. One chief aim of this would be to decide upon the correct ordering and emphases to be placed upon the rights and duties of different actors and interested parties in the DADS disclosure decision-making

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<sup>655</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Nottinghamshire Police* (2019) <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-nottinghamshire.pdf>> accessed 16 June 2020, 18; and HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of West Midlands Police* (2019) <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-west-midlands.pdf>> accessed 16 June 2020, 15.

process. DADS guidance also needs updating in relation to the new Data Protection Act 2018 and its requirements, as described in Chapter 9, above.

The DVDS and other DADS will always entail, from a legal perspective, the balancing and ordering of competing and contrasting rights claims between the rights to privacy, due process and rehabilitation of (former or potential) perpetrators of domestic violence on the one hand, and the right to safety and freedom from harm and to personal autonomy for (potential and possible) victims of their violence. Of particular importance, as a result, will be the (re)ordering of duties in revised DADS guidance across the UK when it comes to factoring the positive obligation to protect victims of domestic violence, and their children, from harms. Revisions to DADS guidance by the UK government in a centralised and standardising exercise is no more than compliance with doctrinal standards of human rights law requires of our criminal justice policy makers and democratic decision-makers. As John Braithwaite has written, "[t]he good society, in short, is both strong on duties and strong on rights, and especially strong on duties that protect rights."<sup>656</sup>

There can be no doubt that an emphasis on policing policy evaluation and evolution rooted in respect for, and prioritisation of the human rights of victims of crime would be of great societal value. The same was true, on a much wider scale, when Peter Neyroud and Alan Beckley assessed the early impact of the Human Rights Act 1998 as a potentially transformative tool for the police service as a whole<sup>657</sup>. Indeed, although the impact of the HRA presented a policy management 'challenge' for the police service as a whole, the development of a more niche policy concern such as the opportunity to operate DADS still offers a policy management 'challenge' connected to human rights<sup>658</sup> that, if realised in an effective way, could bring about greater benefits.

In evaluating the draft Domestic Abuse Bill, and the intention through the Bill to put DVDS guidance on a statutory footing, the Parliamentary joint committee that gave pre-legislative scrutiny of the Home Office proposals concerned gave an endorsement of the move to put the DVDS guidance on a statutory footing. The joint committee noted that putting DVDS guidance on a statutory footing might raise more awareness of the Scheme, and noted

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<sup>656</sup> John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) 185.

<sup>657</sup> See Peter Neyroud and Alan Beckley, *Policing, Ethics and Human Rights* (Willan 2001).

<sup>658</sup> Peter Neyroud and Alan Beckley, *Policing, Ethics and Human Rights* (Willan 2001) 211.

criticisms from some quarters of the *under-use* of the Right to Know, currently, judging that use of the Right to Know "would increase with improved multi-agency working and we recommend further work is done in this area".<sup>659</sup> The effectiveness of doing so is unclear.

In the Domestic Abuse Bill (2020) when it was first published, in Clause 64(1), the statutory basis for DVDS guidance had as its scope 'the purposes of preventing domestic abuse', specifically through the means of 'disclosure of police information'. All police forces would be under a statutory duty to have regard to this duty. It is interesting to ponder how broad this scope for the Scheme in statute might actually be. Subject to the requirements of proportionality in human rights law, and the strictures of data protection law, the 'pressing need' test for disclosure under the DVDS might be used in the guidance to apply not just to partners or any particular category of persons, and not to any particular category of information i.e. not necessarily only domestic violence-related information about the past offending of a perpetrator, and not necessarily only convictions or charges, and so forth - subject to the normal constitutional strictures on a minister not to issue statutory guidance *ultra vires*. There is proposed a duty to consult on the new statutory guidance with a new Domestic Abuse Commissioner, the NPCC and such other persons that might be appropriate to the Home Secretary when the guidance is to be refreshed, unless the changes to it are only 'insubstantial' (as per cl. 70(4) and (5) in the Bill as it was introduced to the House of Lords for debate in July 2020).

Away from the considerations here of DADS in the UK, and on the issue of preventing and reducing domestic violence in society through other or any means, it is interesting to note that the new Domestic Abuse Bill seeks to place an emphasis on the importance of MARAC processes, MAPPA supervision, and in a new policy move, mandatory notification requirements as part of the coming Domestic Abuse Protection Order (DAPO) regime - though there is no current government intention to create a new MAPPA monitoring system of all convicted domestic abusers<sup>660</sup>. However, at the time of writing, the Domestic Abuse

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<sup>659</sup> Joint Committee on the Draft Domestic Abuse Bill, *Draft Domestic Abuse Bill, First Report of Session 2017-19*, 38.

<sup>660</sup> In early April 2020, the London Assembly produced a report on domestic abuse in the UK capital which explained that: "The London Assembly is campaigning for legislation to introduce a Domestic Abusers Register. It has asked that this is included as part of the Domestic Abuse Bill that has recently been reintroduced to Parliament. The Assembly has suggested, for example, that a register "alongside a requirement for those on the list to inform the police of the commencement of a new relationship", would provide information that could be used by officers to make a greater number of proactive disclosures under the 'Right to Know' element of Clare's

Bill had passed from the House of Commons to the House of Lords, and the requirement for notification looks to be a future, strict requirement on recipients of DAPOs<sup>661</sup>; whether these are DAPOs handed down post-conviction in the criminal courts, or upon application in the magistrates' or family courts. These DAPOs could also feature compulsion to engage with rehabilitation programmes, since breach of a DAPO will be a criminal offence, and will include scope for electronic monitoring of domestic abuse perpetrators. However, regardless of these newer and potentially more influential policy moves, there are a number of recommendations I would make to improve the text of the (soon to be statutory) guidance on the DVDS for England and Wales, based on the findings of this thesis. This Chapter therefore makes some recommendations about how the statutory guidance that will be forthcoming about the DVDS in 2021 could be shaped.

### 10.5 Recommendations for re-drafting a statutory version of the DVDS guidance

The new statutory guidance for the DVDS should take additional steps to put new emphases in the duties on police forces in England and Wales in operating the Scheme, as follows:

1. Put a duty on police forces to undertake internal reviews of the effectiveness of DVDS disclosures by way of auditing the extent of victimisation for recipients after an appropriate length of time (one or two years) following each disclosure. (From HMICFRS reports of force-level inspections, West Midlands Police<sup>662</sup> and Nottinghamshire Constabulary<sup>663</sup> are already doing this of their own volition.)

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Law..." See London Assembly Police and Crime Committee, *Domestic Abuse* (April 2020) <[https://www.london.gov.uk/sites/default/files/pcc\\_domestic\\_abuse\\_report\\_april\\_2020.pdf](https://www.london.gov.uk/sites/default/files/pcc_domestic_abuse_report_april_2020.pdf)> accessed 30 June, 23.

<sup>661</sup> This change in policy followed debate in the House of Commons at Committee and Report stages for the Domestic Abuse Bill (2020), and is now to be found in cl.39 and cl.40 in the Bill as it was introduced to the House of Lords. See *Domestic Abuse Bill (2020)* <<https://publications.parliament.uk/pa/bills/lbill/58-01/124/5801124.pdf>> accessed 18 July 2020.

<sup>662</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of West Midlands Police* (2019) <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-west-midlands.pdf>> accessed 16 June 2020, 15.

<sup>663</sup> HMICFRS, *PEEL: Police effectiveness, efficiency and legitimacy 2018-19 - An inspection of Nottinghamshire Police* (2019) <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-assessment-2018-19-nottinghamshire.pdf>> accessed 16 June 2020, 18.



2. Put a responsibility on police forces to identify commonalities in cases where the recipients of disclosures in that force both do and do not go on to become victims of the subject of the disclosure, and take steps to address/reinforce practices in the light of these reviews.
3. Put a duty on police forces to consider using a Domestic Abuse Protection Notice, and then applying for a Domestic Abuse Protection Order with offender notification/registration requirements (however these are eventually enacted) when a DVDS disclosure is made, according to the relevant statute (or statutory guidance) in place, and where the risk level to the victim makes this practicable and appropriate. Regular police contact with an offender resulting from this notification/registration requirement might be one way of mitigating the risks of 'displacement' of abuse onto even more vulnerable victims.
4. Re-draft the DVDS guidance to make sure it explains, in relation to the decision-making around a disclosure, the positive obligations in human rights law to prevent victimisation, under Articles 2, 3 and 8 ECHR (where each is relevant), and in balancing these with the Article 8 ECHR rights on the part of a subject of a potential disclosure. Currently, both the DSDAS and DVADS guidance do this more clearly than in the DVDS guidance.
5. Re-draft the DVDS guidance to put more emphasis on the rights of children to be protected from harm in the context of a possible disclosure. Again, the DVDS guidance is shorter on detail in relation to this consideration in disclosure decision-making, when compared to the guidance on similar Schemes elsewhere in the UK.
6. Ensure that the reporting of statistical data on the operation of the DVDS to the Home Office and the ONS, undertaken annually by the range of police forces in England and Wales, is standardised to a much higher degree; and made to include basic categories of reasons as to why a disclosure is made or refused following either a Right to Ask application or a Right to Know application.

These six recommendations for the soon-to-be statutory guidance would *augment* the list of issues that HM Government have listed, in the most recent Explanatory Notes to the

Domestic Abuse Bill, as the features of the DVDS that policymakers plan to be addressed in forthcoming statutory guidance<sup>664</sup>.

### 10.6 Concluding comments

The Domestic Homicide Review of the failings of agencies in Norfolk concerning the January 2017 murder of Kerri McAuley made the recommendation that "...a national evaluation of Clare's Law [should be] commissioned to assess its use and effectiveness in protecting victims"<sup>665</sup>. This thesis has shown that estimating the overall efficacy of the DVDS and other DADS is possible using the records the police themselves hold about outcomes for disclosure recipients. But without impetus for further research coming from government (the Home Office) or a range of national police organisations (chief amongst them HMICFRS), we may never see the UK Domestic Abuse Disclosure Schemes evaluated as to their effectiveness in detail. In the absence of policymakers asking tough questions about the effectiveness of the UK DADS, such disclosure schemes may remain questionably or misleadingly part of the public protection and domestic violence prevention agenda or strategy in the UK. It is vital that policymakers and police professionals gain a better understanding of the circumstances in which a disclosure under a DADS will truly help a potential victim; and not instead increase or fail to reduce the risk posed to them by an abusive partner or former partner.

Jo Miles has written that "...it is essential to understand the dynamics of abuse and the diverse help-seeking behaviours of victims...Getting it wrong in any legal context, whether concerning access to housing, access to justice or otherwise, potentially threatens the lives of vulnerable adults and children."<sup>666</sup> The continued *unmeasured* use of disclosures to the

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<sup>664</sup> "Recommended minimum levels of knowledge and experience required by practitioners to discharge their functions under the DVDS effectively... Suggested step-by-step processes and timescales for the two disclosure routes under the scheme (the "right to ask" and the "right to know"), including example scenarios for each route... Minimum standards of information to be obtained from the applicant... [and] Minimum standards of intelligence checks to be completed... Guidance on robust risk assessment and safety planning in order to safeguard the individual or individuals potentially at risk of domestic abuse... Suggested types of information which may be disclosed under the scheme, such as details of allegations, charges, prosecutions and convictions for relevant offences... [and] Guidance on what constitutes a "reasonable and proportionate" disclosure in line with relevant human rights and data protection legislation and the [Rehabilitation of Offenders Act 1974]..." See HM Government, 'Explanatory Notes to the Domestic Abuse Bill' (March 2020) <<https://publications.parliament.uk/pa/bills/cbill/58-01/0096/en/20096en.pdf>> accessed 30 June 2020, 46-47.

<sup>665</sup> Christine Graham for the Norfolk County Community Safety Partnership, *Domestic Homicide Review Report: Review into the death of April in January 2017* (2018) 68.

<sup>666</sup> Jo Miles, 'Defining 'domestic violence': housing law and beyond', C.L.J. (2011) 70(3) 511, 513.

vulnerable partner in a violent relationship may well, too, be 'getting it wrong'. It is important that the ongoing, unmeasured use of disclosures to vulnerable partners in violent relationships does not continue immoral victim responsabilisation. It is also important that the (in)effectiveness of disclosure schemes is explored, and separately but more importantly, that the necessary political momentum is reached for the prioritisation and the proper funding of two equally important problems: a shortfall in domestic violence refuge spaces for victims and their children, and more intensive policing and *rehabilitation* of serial domestic abusers.

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- Council of Europe Convention on preventing and combating violence against women and domestic violence (2011) ('the Istanbul Convention')
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- European Convention on Human Rights (1950)
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- EU GDPR: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
- United Nations Convention on the Rights of the Child (1989)

### UK primary legislation

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- Police Act 1997

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**Appendix 1 - Freedom of information data on first-20-recipients' victimisation, 8<sup>th</sup> March 2014 onwards, from 26 forces in England and Wales**

<b>Force in England and Wales</b>	<b>Number of 20 recipients recorded as harmed by a disclosure subject, post-disclosure</b>	<b>Number of 20 recipients recorded as harmed by an offender other than a disclosure subject, post-disclosure</b>
Kent	9	7
North Wales	6	3
Staffordshire	3	0
Northumbria	13	5
Norfolk	11	1
Bedfordshire	9	6
West Midlands	9	7
Merseyside	10	4
Dorset	12	7
Thames Valley	11	4
Cheshire	8	7
Cambridgeshire	8	4
Hampshire	8	3
Leicestershire	8	2
Cleveland	13	10
Gloucestershire	13	4
Gwent	4	10
Humberside	10	6
West Yorkshire	10	9
Hertfordshire	7	7
Essex	13	10
Suffolk	7	Not supplied
Warwickshire	7	3
West Mercia	10	4
Lancashire	3	4
Northamptonshire	9	8
<b>Total reports</b>	<b>234</b>	<b>139</b>
Total sample	520	500
<b>Percentage victimisation by May 2018</b>	45.00%	27.80%