

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's response to the Home Office
consultation on the Domestic Violence
Disclosure Scheme**

January 2012

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Background: The consultation proposals

1. This consultation¹ stems directly from a campaign launched following the murder of Clare Wood, who was found dead at her home in Salford on 6th February 2009. She had been killed by her ex-husband George Appleton, who she had met on an internet dating site. Appleton had several previous convictions, including for harassment and assault against previous partners. Having broken up with Appleton in October 2008, Clare had regular contact with Greater Manchester Police throughout the last few months of her life complaining of the harassment, threats to kill, sexual assault and criminal damage that she suffered at the hands of Appleton. Although Greater Manchester Police took some steps to help Clare, tragically, numerous police failings meant that she was not given the protection that she was entitled to and so badly needed.²

2. The subsequent report of the Independent Police Complaints Commissioner (IPCC) into Clare's death made clear that the systemic failings which contributed to her death were not caused by inadequate powers, but by inadequate training and a failure to properly follow processes that were already in place. The most worrying police failings included: (i) ignoring Crown Prosecution Service (CPS) advice to issue a harassment warning, (ii) failing to follow the protocol for domestic violence cases which would have enabled police officers and the Domestic Violence Unit to properly assess the risks, (iii) a four month delay in submitting Clare's allegations to the CPS and, (iv) even then, failing to mention the alleged sexual assault and breaches of bail.³ The IPCC found that the officer dealing with Clare's case demonstrated a "*clear lack of understanding of the situation and a failure to recognise a pattern of behaviour*", which led to the severe underestimation of the threat posed by Appleton.⁴

3. Other IPCC reports into the deaths of other victims of domestic violence have made similar findings, identifying systemic failures rather than holes in the system. A

¹ Home Office *Domestic Violence Disclosure Scheme: A consultation* (October 2011), available at <http://www.homeoffice.gov.uk/publications/about-us/consultations/domestic-violence-disclosure/domestic-violence-disclo-cons?view=Binary>.

² For details of the circumstances surrounding the death of Clare see the Report of the Independent Police Complaints Commissioner into Greater Manchester Police Contact with Clare Wood prior to her death (February 2010), available at http://www.ipcc.gov.uk/en/Pages/inv_reports_north_region.aspx.

³ See the IPCC Report, *ibid*.

⁴ *Ibid*, at page 11.

more recent IPCC report detailing an investigation into Nottinghamshire Police's treatment of Casey Brittle before she was murdered by her ex-boyfriend has again identified serious flaws in the approach of the force to cases of domestic violence.⁵ Before her death in October 2010 Casey had been in contact with police eleven times relating to incidents of violence perpetrated by her boyfriend and father of her child. Numerous reports were also made by Casey's family and friends. In its review the IPCC identified a number of significant failures, both on the part of individual officers and systemic failings by the force, which lead to Casey's death. These included (i) failure to pursue lines of enquiry, evidencing a complete lack of understanding about the nature of this crime; (ii) lack of training and knowledge about how to respond to domestic incidents, which lead to, among other things, not passing on details of successive violent incidents involving Casey and her ex-boyfriend to the force's Domestic Abuse Support Unit; and (iii) lack of proactive steps by the Support Unit to identify and risk assess domestic incidents in the area.⁶ The failings were compounded by the fact that Nottinghamshire Police had previously been warned of many of the same issues following an IPCC investigation two years prior into the death of Gail Hdili, who had also suffered serious abuse by her former partner.⁷ At the time of Casey's death the force's policies were still outdated and in urgent need of review.⁸

The proposals: a new scheme of disclosure

4. Surprisingly the present consultation does not address any of the failures identified in these IPCC reports. Instead the consultation proposes three possible options. The first option is to retain the existing systems and powers (which we outline in further detail below). The second and third options suggested would introduce a new statutory disclosure scheme. The second option would give individuals the "right to ask" if another person had previous convictions for certain offences. The third option would give individuals a "right to know", requiring proactive disclosure by the police. In determining the scope of information to be

⁵ Report of the Independent Police Complaints Commissioner Investigation into the police management of reports of domestic abuse made by/in relation to Casey Brittle (September 2011), available at http://www.ipcc.gov.uk/news/Pages/pr_181011_brittle.aspx?auto=True&l1link=pages%2Fnews.aspx&l1title=News%20and%20press&l2link=news%2FPages%2Fdefault.aspx&l2title=Press%20Releases.

⁶ Ibid, at pages 13 to 17.

⁷ Ibid, at pages 17 to 21.

⁸ Ibid, at page 17.

disclosed, information held on the Police National Database will be categorised as either “concerns” or “no concerns”. It is suggested that “concerns” will include a wide variety of information including convictions for assault and harassment; convictions for other sexual or violent offences; allegations or intelligence about previous domestic violence incidents; and intelligence about previous civil injunctions.⁹

5. Under the proposed new scheme, any interested party who asked for disclosure, or was to be pro-actively disclosed to, would first have to meet face-to-face with police to confirm the nature of their relationship with the person in question: disclosure could only be made to a person with whom the suspected offender has entered into an “intimate” relationship”. No suggestion is made of how “intimate” will be established or how it will be defined. It is proposed that the person who has the “right to ask” could extend beyond someone who is immediately involved with the suspect individual.¹⁰ A multi-agency body would make the final decision on whether a report and risk assessment should be disclosed to the interested party; finally the police would then make the disclosure. An Independent Domestic Violence Advisor¹¹ would be present with the police when any disclosure was made in order to offer advice and support.

6. Neither option 2 or 3 substantively adds anything to the powers police already have. The proposed scheme conceivably could be created under existing legal powers if police were to retain the discretion to disclose. However, if police are to be obliged to disclose once ordered to do so by the multi-agency body as proposed, legislation would be required.

Current obligations of the police and other public authorities

7. Before the creation of new duties and systems it is worth considering the numerous systems and measures already in place. There are already a number of obligations imposed on the police to disclose recorded information where it would help to protect a potential victim. There are also a range of additional powers available to the police and other bodies specifically intended to address protecting victims and prosecuting perpetrators of domestic violence. The shared police, CPS

⁹ Consultation Paper, *ibid* at page 10.

¹⁰ Consultation Paper, *ibid*, at page 11.

¹¹ Independent Domestic Violence Advisers “*are trained specialists who provide a service to victims who are high risk of harm*”: Consultation Paper, *ibid*, at footnote 9 on page 9.

and Government definition of domestic violence is “any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality.”¹² Although there is no specific criminal offence of ‘domestic violence’, there are a range of applicable offences, including harassment, assault, false imprisonment, other offences against the person, rape, criminal damage, and attempted murder.¹³

Duties to disclose

8. As the consultation paper acknowledges,¹⁴ the police already have a common law power to disclose information about previous convictions or charges where there is a pressing need for disclosure in order to prevent further crime.¹⁵ The existence of police discretion ensures that the system can be kept sufficiently flexible to deal with the individual circumstances of a case. Any member of the public (including a new partner or his or her friends or family) can request or pro-actively be given information about an individual’s past convictions in the interests of preventing further crime.

9. Generally, public protection is ensured and assured by human rights legislation which shores up these common law obligations. Public authorities, including the police and the CPS, are obliged to take steps to protect the rights of individuals in certain circumstances under the *Human Rights Act 1998 (HRA)*. In particular, the right to life¹⁶ and the prohibition on torture and inhuman and degrading treatment¹⁷ require the police to do all that can reasonably be expected of them to avoid a real and immediate risk to life of which they ought to have been aware, especially where the risk arises from the criminal acts of another individual.¹⁸ A

¹² See the CPS Prosecution Policy and Guidance for Domestic Violence, available at http://www.cps.gov.uk/publications/prosecution/domestic/domv_guide_for_victims_and_witnesses_faqs.html.

¹³ A Home Office consultation on the definition of domestic violence, proposing to potentially widen it to include coercive control and extend the age parameters, is ongoing. Available at <http://www.homeoffice.gov.uk/publications/about-us/consultations/definition-domestic-violence/>.

¹⁴ See the Consultation Paper, *ibid*, at page 6.

¹⁵ See for example, *R v Chief Constable of the North Wales Police and others, ex parte AB and another* [1998] 3 All ER 310.

¹⁶ The right to life is protected by Article 2 of the *European Convention on Human Rights*, incorporated into UK law by the *Human Rights Act 1998*.

¹⁷ The prohibition on torture, inhuman and degrading treatment is contained in Article 3 of the *European Convention on Human Rights*, incorporated into UK law by the *Human Rights Act 1998*.

¹⁸ See *Osman v United Kingdom*, (1998) 29 E.H.R.R. 245.

similar positive obligation arises under the right to respect for physical integrity.¹⁹ 'Immediate' in this context does not necessarily mean 'in the very near future', but includes situations where harm may be caused whenever the perpetrator next finds an opportunity.²⁰ There is also a corresponding duty to prosecute where appropriate. These are powerful obligations upon the police to ensure that information is proactively disclosed where appropriate and that any additional necessary action is taken.

10. Additionally, there are existing disclosure duties imposed on public authorities under Multi-Agency Public Protection Arrangements (**MAPPA**). MAPPA are arrangements under which responsible authorities, including the probation, prison and police services, work together to manage violent offenders, sexual offenders, and offenders who otherwise pose a serious risk of harm to the public. MAPPA Guidance requires that the risk assessment of all such offenders identifies who may be at risk of serious harm from the offender, and considers how to manage those risks.²¹ There is an obligation to consider in every case whether information about an offender should be disclosed to others in order to protect potential victims. Cases are categorised according to three levels of severity. The most dangerous cases (Level 3) are reviewed every four to six weeks, middle layer cases (Level 2) are reviewed every 8 to 12 weeks and the less serious cases (Level 1) are reviewed every four months. At every Level 2 and 3 review and at most Level 1 reviews there is an obligation to consider disclosing information held on the offender to third parties if it will protect potential victims.²²

Organisational structures and inter-agency systems of protection

11. There are also organisational structures dedicated to addressing the incidence of domestic violence. All police forces have specialist domestic violence officers who are trained to provide support and protection to people experiencing domestic violence. Following any incident of domestic violence, police officers have discretion to intervene, arrest, caution or charge as appropriate. If someone is arrested, the police can also impose pre or post-charge bail conditions including a

¹⁹ The right to respect for private and family life is contained in Article 8 of the *European Convention on Human Rights*, incorporated into UK law by the *Human Rights Act 1998*.

²⁰ R. (F)v Chief Constable of Norfolk Police [2002] EWHC Admin 1738

²¹ See the Ministry of Justice's *MAPPA Guidance 2009*, available at http://www.justice.gov.uk/downloads/guidance/prison-probation-and-rehabilitation/public%20protection%20manual/10004894MAPPAGuidance_2009_Version3.pdf.

²² *MAPPA Guidance 2009*, *ibid*, at Chapter 6.

prohibition on going within a specified distance of the victim or their home. This adds an additional layer of protection to victims of domestic violence because perpetrators can be arrested if they break their bail conditions.

12. In addition to investigation and prosecutorial powers and obligations, the police can refer high-risk cases to meetings between representatives from a range of statutory and voluntary bodies, called Multi-agency Risk Assessment Conferences (**MARACs**). MARACs are supposed to manage cases in order to produce a co-ordinated approach across the bodies to best protect the victim's safety. The police are key participators in these meetings, but Independent Domestic Violence Advisers (**IDVAs**), probation officers and representatives from health and housing organisations will also attend. IDVAs are specialists trained in supporting victims of domestic abuse who represent victims at MARACs and work to ensure that appropriate action is taken to protect the victim. They can also help victims secure sanctions and remedies in the criminal and civil courts.²³ There are approximately 250 multi-agency risk assessment conferences in operation across England and Wales to ensure that high-risk victims do not slip through the net.²⁴

Specific criminal offences and civil orders

13. In addition to offences available in the normal criminal law, there are a number of criminal and civil remedies that are intended to address behaviour which falls within the definition of domestic violence. The *Protection from Harassment Act 1997* makes it a criminal offence to pursue a course of conduct (i.e. at least two incidents of abuse) which causes alarm or distress, or otherwise amounts to harassment of another person.²⁵ A court may issue a restraining order against someone found guilty of such an offence, prohibiting the defendant from doing anything described in the order. Breach of the order amounts to a criminal offence, carrying a maximum sentence of five years. As well as the criminal offence, the Act also creates a tort of harassment, enabling the plaintiff to obtain a civil court injunction and to claim damages.

²³ See Home Office guidance on the departmental website:

<http://www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/idva/>.

²⁴ Home Office Research Report 55, "Supporting high-risk victims of domestic violence: a review of MARACs", Nerissa Steel, Laura Blakeborough and Sian Nicholas. Available at <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/horr55/horr55-report?view=Binary>.

²⁵ Sections 1 and 7(2) *Protection from Harassment Act 1997*.

14. Victims of domestic violence can also seek redress under civil law by applying under Part 4 of the *Family Law Act 1996* for either a non-molestation order or an occupation order. A non-molestation order is a court order prohibiting the perpetrator from using, or threatening to use, violence against the victim or a child, or from intimidating or otherwise harassing the victim. Non-molestation orders automatically include the power of arrest. Breach of a non-molestation order is a criminal offence, punishable by a fine or custodial sentence of up to five years.²⁶ An occupation order establishes who may live in the family home and can exclude the perpetrator from the home and the surrounding area. These orders can be granted for a fixed period or indefinite period. The court can attach a 'power of arrest' to the order which means the perpetrator can be immediately arrested if he or she breaks the order.²⁷

15. Finally, the Government is currently piloting Domestic Violence Protection Notices (**DVPNs**) and Orders (**DVPOs**) in three police forces.²⁸ A senior police officer may issue a DVPN to protect a suspected victim of domestic violence from future violence or a threat of violence.²⁹ Police can then apply to a Magistrates Court for a DVPO within 48 hours of serving the DVPN. If it is granted the alleged offender can be prevented from contacting the victim or returning to the victim's address for a minimum of 14 days and maximum of 28 days. These provisions aim to give victims immediate breathing space in the aftermath of domestic violence so they can seek support should they choose to do so and make decisions about longer term protection. There is no requirement that the victim consents to either the issuing of a DVPN or DVPO. There is a power of arrest without warrant for breaches of DVPNs and DVPOs.³⁰

16. Domestic violence cases will be heard in a Specialist Domestic Violence Court (**SDVC**) wherever possible. These specialist courts provide independent advisers for victims and dedicated prosecutors, as well as specialist magistrates and police officers, and separate areas to make sure victims do not encounter their attackers. In recognition of the fact that many victims of domestic abuse are

²⁶ Section 42A *Family Law Act 1996*.

²⁷ Section 47 *Family Law Act 1996*.

²⁸ See information about the pilot on the Home Office website, at: <http://www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/dv-protection-orders/>

²⁹ Section 24 *Crime and Security Act 2010*.

³⁰ Sections 25(1)(b) and 28(9) *Crime and Security Act 2010*.

particularly vulnerable and may not be in a position to support a prosecution, both the police and CPS have power to proceed with criminal prosecution without the consent of the victim.

Liberty's concerns about the disclosure scheme

17. The circumstances that led to the tragic deaths of Clare Wood and Casey Brittle, among others, indicate that despite the range of powers, offences, and institutional mechanisms available to police, there are significant problems with implementation. In these cases, police failures to properly investigate and act on the crimes reported and protect the victims from further harm arguably put them in breach of their obligations under the HRA. But confusingly, instead of addressing the failures identified by the IPCC in both cases, the present consultation proposes something entirely different. Liberty does not see how a new statutory disclosure scheme will effectively address the problems which successive IPCC investigations have identified nor effectively protect individuals from potentially violent partners. Worse still, we think that such a scheme could lead to unintended consequences both for potential victims and those against whom disclosures may be made.

Effective

18. In opposing a statutory disclosure scheme we don't take the view that current systems could not be improved. Given evidence of continuing catastrophic responses to situations of domestic violence it is clear that there is already a huge disconnect between black letter law and policy and its practical implementation. Research indicates that the multiple avenues via which domestic abuse can already be addressed and hopefully remedied are severely underused. A recent review conducted by the Association of Chief Police Officers for the Home Secretary found that existing law and policy needs to be used more effectively to address the problem of domestic violence.³¹ The same review specifically warned that "*new laws may not always have the beneficial outcomes envisaged, particularly if they distract focus and resources away from what is known to work*".³² Against this backdrop, it is difficult to see how creating additional administrative obligations for police – which will likely involve considering applications for countless unnecessary disclosures – will improve

³¹ "Tackling Perpetrators of Violence against Women and Girls", ACPO Review for the Home Secretary, September 2009, available at

<http://www.acpo.police.uk/documents/crime/2009/200909CRIVAW01.pdf>.

³² Ibid.

their current unsatisfactory record on discharging their obligations for this form of crime.

19. Further, the consultation paper recognises that the most severe cases of domestic violence resulting in death or serious injury tend to be the wretched end to patterns of escalating violent behaviour.³³ However there is an assumption which the consultation paper does not back up with evidence that if individuals have knowledge of previous offending that they will choose to end a relationship and that the concerned individual will no longer pose a risk to them. Liberty believes that resources would be far better dedicated to police training to assist officers to deal more effectively with complaints of domestic violence and to properly deploy one of the number of orders or measures available to them. Additionally, funding could of course always be directed towards service providers which specialise in supporting victims of domestic violence with the expertise and practical experience necessary to best assist women, men and children to move away from dangerous or potentially dangerous domestic situations.

Unintended consequences

20. Equally of concern are the potential unintended consequences of reform of this kind. These extend to the impact on individuals about whom sensitive information (including unsubstantiated allegations) is disclosed without adequate safeguards; and the potential impact on individuals to whom disclosure is made who may then unduly rely on a 'clean record' and not act on their own more accurate instincts about an individual's propensity for violence. Indeed the proposed scheme badly risks lulling people into a false sense of security that they can know everything about another persons past actions and their future behaviour.

21. It is proposed that information will be disclosed to those in an "intimate relationship" with the person about whom there is concern, but this term remains undefined by the consultation paper. Defining a category of persons who will be able to make an application for disclosure is fraught with difficulty. Defining it too widely risks the liberal release of information to those who may not respect its sensitivity, and once information is in the public domain all control over it is lost. We need only look to the recent examples of similar disclosure both here and internationally to see the undesired consequences stemming from similar disclosure schemes. Untold

³³ Ibid, at page 6.

problems were caused by a 'name and shame' campaign launched in 2000 by the now defunct News of the World, mirroring similar schemes in America. Rather than promoting safety, the irresponsible and uncontrolled release of information had the opposite effect. Publication of photographs and names of paedophiles by the News of the World paper and the Sun lead to vigilante action, targeting of innocent people following misidentification,³⁴ detrimental interference with ongoing police investigations and sending dangerous paedophiles underground.³⁵ The type of scheme proposed in this consultation has similar hallmarks of disaster attached to it.

Balancing safety and an individuals' privacy

22. Liberty believes the current police powers effectively accommodate their obligations under the HRA and the *Data Protection Act 1998 (DPA)*, and draw the appropriate line between protecting victims of domestic violence and protecting the privacy of the subjects of any disclosure. The right to privacy protected by the HRA permits disclosure of information on the police record only where it is necessary, proportionate and is made for the purpose of preventing further crime. The police must also comply with their obligations under the DPA and statutory Code of Conduct to only disclose confidential information properly, appropriately and in the proper course of their police duties. These safeguards are incredibly important. Although it may be tempting to mandatorily require disclosure in as many cases as possible, it must be remembered that there may be no substance to suspicions that a particular person poses a risk of committing domestic violence. It is also extremely difficult to determine whether certain instances or allegations of violence in the past suggest that a person may commit domestic abuse in the future. Information held by the police on the PND can include uncorroborated – and potentially malicious – allegations of which the alleged perpetrator is not even aware. Even where a person has been involved in violent crime in the past, it could be for something very minor which occurred many years previously. Given the severe impact such disclosure could have on the subject's ability to form social relationships and seek employment, and generally rehabilitate after punishment, it is essential that information released is in the most extreme case where the prospect of violence is not speculative but a real and foreseeable threat. A cautious and careful analysis is required, and sensitivity is

³⁴ <http://www.guardian.co.uk/media/2003/mar/31/pressandpublishing.sun>.

³⁵ See journalistic analysis and reporting of the consequence of the campaigns, for example, at <http://news.bbc.co.uk/1/hi/uk/848759.stm>; <http://news.bbc.co.uk/1/hi/uk/864676.stm>, <http://news.bbc.co.uk/1/hi/england/1672252.stm> and <http://www.guardian.co.uk/commentisfree/2011/jul/11/news-of-the-world-sarahs-law>.

paramount. The broad disclosure schemes as proposed in this consultation do not give due weight to these concerns.

Conclusion

23. Common law powers and obligations under the HRA currently require the police to exercise their professional discretion to disclose information about previous convictions or charges where there is a pressing need for disclosure in order to prevent further crime. However, the fact that the police have a discretion, rather than a duty, is an important safeguard against inappropriate disclosure and against an excessive administrative burden that could undermine police effectiveness.

24. Liberty urges the Government to think again before heading down the route proposed in this consultation. The aim of minimising the risks and incidence of domestic violence is certainly laudable and we commend the Government for seeking to act. However initiatives to protect vulnerable victims of domestic violence and prevent further crime must be effective. Newly proposed powers should also not reinvent the wheel. We urge the Government to think more broadly about effective responses to domestic violence. Addressing failures in policing culture and officer training, as identified by numerous IPCC reports, is surely the place to start.

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