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## How Can a Growing Use of Clare's Law Help Us Meet Human Rights Obligations to Victims of Domestic Abuse?

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### Abstract

The Domestic Violence Disclosure Scheme (the DVDS, or 'Clare's Law') sees police forces warn members of the public, as 'applicants', about their possibly abusive partners. There were more than 25,000 more applications under 'Clare's Law', overall, in the year to March 2023 than in the year to March 2020 for England and Wales (namely, 45,344 applications compared to 20,147 – more than doubling the use of the Scheme in just three years). Disclosures also jumped from 8,715 in the year to March 2020, to 17,438 in the year to March 2021 (again a doubling of the use of disclosures). These statistics aside, the task of trying to establish how effective the DVDS is at protecting victims is still unfinished. This article seeks to establish whether, and if so, how the DVDS contributes to compliance with developing human rights law standards – drawing on a body of European and domestic case law and policy. From a feminist legal perspective, however, there remains a key issue that, however many more DVDS applications and disclosures are made in England and Wales year-on-year, and aside from the unknown efficacy of those disclosures in preventing domestic abuse, there has been a disturbing trend toward serious failures to protect victims from violence against women and girls, seen in decreasing prosecutions for domestic abuse, and specifically domestic abuse-related rape, in the same time frame.

### 1. Introduction

The Domestic Violence Disclosure Scheme (DVDS) operated by police forces in England and Wales is better known as 'Clare's Law' – named for Clare Wood, killed by her partner in Salford in 2009. In national operation in England and Wales since March 2014, this newly-statutory<sup>1</sup> public protection policy is based upon the premise that warning potential victims about their partners' history of perpetrating domestic abuse will enable, or at least spur on, the recipients of such information to take steps to safeguard themselves (and potentially their own families). There were more than 25,000 more applications under 'Clare's Law', overall, in the year to March 2023 than in the year to March 2020 for England and Wales (namely, 45,344

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<sup>1</sup> The DVDS in England and Wales is now operated under statutory guidance, under Section 77 of the Domestic Abuse Act 2021.

applications compared to 20,147 – more than doubling the use of the Scheme in just three years). Disclosures also jumped from 8,715 in the year to March 2021, to 17,438 in the year to March 2020 (again a doubling of the use of disclosures). These statistics aside, the task of trying to establish how effective the DVDS is at protecting victims is still unfinished. As His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) highlighted in September 2021 in an inspection report on the police response to violence against women in England and Wales: "We haven't previously considered the operation of this important scheme in detail, and we are concerned about what we found in this fieldwork."<sup>2</sup> This article contributes to the complex task of assessing the effectiveness of the DVDS by trying to establish whether, and if so, how the DVDS contributes to compliance with developing human rights law standards. It does so by drawing on a body of European and domestic case law and policy. From a feminist legal perspective, however, there remains a key issue that however many more DVDS applications and disclosures are made in England and Wales year-on-year, and aside from the unknown efficacy of those disclosures in preventing domestic abuse, there has been a disturbing trend toward serious failures to protect victims of violence against women and girls, seen in decreasing prosecutions for domestic abuse, and specifically domestic abuse-related rape, in the same time frame.

The rise in DVDS applications and disclosures up to the year to end of March 2023 was a very large increase, as noted above, and is shown in context in Figure 1, below. The causes for this considerable recent increase in both disclosures and applications are likely to be diverse. As well as a *Coronation Street* storyline involving the DVDS,<sup>3</sup> which might have raised more of a popular consciousness about 'Clare's Law', there was, of course, the international COVID-19 crisis, involving 'lockdowns' in the United Kingdom, which impacted the ability of the police to work in routine ways, and may have led to the greater promotion of the DVDS as an 'arms-length' domestic abuse policing tool.<sup>4</sup> In fact, around the common law world, there have been policy developments to increase the use of Domestic Abuse Disclosure Schemes (DADS) throughout the pandemic period.<sup>5</sup> However, there is a strong feeling amongst commentators who have researched DADS policies that such disclosures cannot be comfortably relied upon to protect the rights of vulnerable victims of domestic abuse in its wide range of forms.<sup>6</sup>

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<sup>2</sup> HMICFRS, *Police response to violence against women and girls: Final inspection report*, 17 September 2021.

<sup>3</sup> See: <https://www.tyla.com/entertaining/tv-and-film-clares-law-coronation-street-yasmeen-nazir-geoff-metcalfe-storyline-20200317>

<sup>4</sup> See: <https://www.theguardian.com/society/2021/aug/25/domestic-abusers-weaponised-covid-england-wales-study-finds>

<sup>5</sup> In Jersey, see: <https://jerseyeveningpost.com/news/2021/10/12/law-aims-to-tackle-domestic-violence/>. In Canada, see: <https://edmontonjournal.com/news/local-news/alberta-clares-law-applications-privacy>. In South Australia, see: <https://www.premier.sa.gov.au/news/media-releases/news/dv-disclosure-scheme-records-milestone>.

<sup>6</sup> My 2021 book on Domestic Abuse Disclosure Schemes globally reviews the evidence for and against the policy adoption of such Schemes. See Jamie Grace, *Domestic abuse disclosure schemes: Problems with policy, regulation and legality*, Springer Nature, 2021.

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Traces of this are beginning to emerge in the form of accounts in domestic homicide reviews,<sup>7</sup> investigations from the Independent Office for Police Conduct (IOPC),<sup>8</sup> and even in reported cases, on occasion, from the courts. For example, in *WU v BU* [2021] EWCOP 54, a DVDS disclosure was made to a woman (BU) of nearly 70 with vascular dementia, in respect of a man (NC) seventeen years her junior and who appeared to be manipulating BU into handing over control of her substantial financial assets.

We do not know from the judgment of Roberts J in *WU* what the exact nature of this DVDS disclosure was, but we know that NC had a significant criminal record of theft, deception offences, and blackmail, as well as two alleged rapes and an alleged sexual assault on file with the police, and a long history of well-documented abusive and financially-manipulative behaviour with numerous former partners. However, Roberts J noted that upon the DVDS disclosure being made to her by the police, BU "refused to believe that NC could have committed the offences described...[she was] insistent that she wished him to remain living in her home".<sup>9</sup> Nonetheless, given the vulnerability of BU to abusive, controlling, and fraudulent behaviour from NC, Roberts J put in place an injunction prohibiting NC from contacting BU, leaving NC facing the risk of contempt of court and in that case likely imprisonment, as well as a forced marriage protection order (FMPO). It is telling that Roberts J wrote of BU that: "She is blind to future risk as she has been to past risk."<sup>10</sup> *WU* is a clear example of the need for the DVDS to be part, and not the whole, of the public protection approach in a situation involving a victim of (potential) domestic abuse.

Recent legislative processes have begun to build a better scaffolding policy framework for the DVDS to be used within. This has come about through the development by the Home Office of a new (statutory) code for the operation of the DVDS. The impetus for the shift has been the (admittedly drawn-out) creation of the Domestic Abuse Act 2021. While the Domestic Abuse Bill (as it then was) moved through Parliamentary processes before enactment, Jess Phillips MP moved an amendment that would have created a multi-stranded statutory duty with regard to the operation of the DVDS in England and Wales.<sup>11</sup> These proposed provisions would have clarified some elements of the operation of the DVDS, and attempted to add greater rigour in the manner of its deployment as part of public protection practices. If this amendment had been incorporated into the Bill: a) the legal disclosure test(s) would have been clarified whilst giving the basis of the Scheme the clearest statutory authority, b) there would have been a statutory duty to consider wider/ 'follow-up' action to protect victims and

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<sup>7</sup> *Ibid* at 142.

<sup>8</sup> *Ibid* at 168.

<sup>9</sup> *WU v BU* [2021] EWCOP 54 at [29].

<sup>10</sup> *Ibid* at [90].

<sup>11</sup> See: [https://hansard.parliament.uk/Commons/2020-06-11/debates/2b88e3cc-6f84-42a0-a440-136bbc9fbc0b/DomesticAbuseBill\(EighthSitting\)?highlight=disclosure%20proportionate#contribution-46A3759F-2A9B-4F56-990E-9F75CBABBE58](https://hansard.parliament.uk/Commons/2020-06-11/debates/2b88e3cc-6f84-42a0-a440-136bbc9fbc0b/DomesticAbuseBill(EighthSitting)?highlight=disclosure%20proportionate#contribution-46A3759F-2A9B-4F56-990E-9F75CBABBE58)

augment disclosures with other public protection measures, c) police forces would have needed to consider the impact disclosure/non-disclosure would have with regard to children who might be affected by the decision in some way, and d) the police service would need to undertake a review, at a regional force-level, as to how the DVDS is being operated. While Phillips' amendment was not adopted in the Parliamentary process, and so there is no statutory duty on regional police forces to undertake their own review of the DVDS in England and Wales, Government ministers did give assurances that the eventual DVDS statutory code of practice (the Code) would cover particular issues.

Questions as to whether the DVDS can be demonstrated to be efficacious are beyond the scope of this article, but have been considered in published work, including in a key chapter of the author's book.<sup>12</sup> It is vital, however, to consider the bigger picture in terms of how the DVDS can contribute to the human rights law compliance required of the criminal justice system in England and Wales, especially given shifting case law standards in that area of the law. It is to those relevant European and domestic human rights law standards, and more recent developments, including the shortfall in public protection enforcement in terms of domestic abuse-related prosecutions, that this article now turns.

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<sup>12</sup> Grace (n 6), Chapter 5.

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Figure 1 – Statistics on the Domestic Violence Disclosure Scheme (DVDS) for England and Wales<sup>13</sup>

Year to	Right to Ask Applications	Right to Ask Disclosures	Right to Ask Disclosure Rate	Right to Know Applications	Right to Know Disclosures	Right to Know Disclosure Rate	Total Applications	Total Disclosures	Overall Disclosure Rate
March 2017	3045	972	31.9%	5445	2438	44.8%	8490	3410	40.2%
March 2018	4655	2055	44.1%	6313	3594	56.9%	10968	5649	51.5%
March 2019	6496	2575	39.6%	7252	4008	55.3%	13748	6583	47.9%
March 2020	11,556	4236	36.7%	8591	4479	52.1%	20147	8715	43.3%
March 2021	17,916	7037	39.3%	12,192	6,405	52.5%	30,108	13,442	44.6%
March 2022	22,435	8383	37.4%	16,011	7283	45.5%	38,446	15,666	40.7%
March 2023	27,419	9829	35.8%	17,925	7609	42.5%	45,344	17,438	38.5%

<sup>13</sup> Sources: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseandthecriminaljusticesystemappendixtables>

## 2. A human rights law context

As Helena Kennedy QC has explained: "Modern rights discourse recognises that persecution and abuse is carried out not only by the state but by relatives and neighbours, and that the failure of the state to prevent inhumane behaviour becomes a tacit acceptance of it."<sup>14</sup> These words bear particular meaning in relation to the jurisdiction of England and Wales at the moment. As Figure 2, below, shows, there is currently a shortfall in public protection in terms of a plummeting rate of prosecution of domestic abusers, and rapist domestic abusers. While the criminal justice system is currently struggling to bring to justice a cohort of dangerous (mainly) men,<sup>15</sup> who pose a great risk of human rights abuses in terms of violence and sexual violence inflicted on women and girls, it can be seen that relatively unproven approaches, such as the use of restrictive orders and the disclosure of risk information to victims, have been on a steady rise, unlike rates of prosecution for domestic abuse offence types. However, as Chamberlain J explained in *Her Majesty's Attorney General for England & Wales v British Broadcasting Corporation*,<sup>16</sup> the use of the Domestic Violence Disclosure Scheme, as well as Domestic Violence Protection Notices and Orders, Stalking Protection Orders, Sexual Risk Orders and sex offender registration requirements, are "part of the means by which the UK discharges its general positive obligations under Article 2 and 3 ECHR to have in place a system to protect its citizens (and in particular women) from violence and sexual violence".<sup>17</sup>

There is a risk, however, of systemic non-compliance in relation to standards under Article 3 ECHR, in particular, arising from the lack of prosecution of domestic abuse and/or sexual violence by the police service of England and Wales, and partner criminal justice agencies. As some of the columns in Figure 2, below, demonstrate, there has been a drastic fall in the number of prosecutions annually in relation to some of the worst domestic abuse-related offences, including partner rapes. Meanwhile, the Home Office released a *Tackling Violence Against Women and Girls Strategy (VAWG)* in July 2021,<sup>18</sup> and then a further *Tackling Domestic Abuse Plan* in March 2022.<sup>19</sup> This paper reviews the human rights standards that these strategies must systemically, and now (arguably) operationally, strive to meet, in the context of shifting doctrinal standards under the ECHR, and as specifically developed by the UK judiciary.

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<sup>14</sup> Helena Kennedy QC, *Eve was shamed: How British justice is failing women*, Penguin: London, 2018 at 87.

<sup>15</sup> For a wider context on the criminal courts backlog, see: <https://www.theguardian.com/law/2022/jun/18/thousands-victims-violent-sexual-crime-stuck-england-wales-courts-backlog>

<sup>16</sup> [2022] EWHC 826 (QB)

<sup>17</sup> *Ibid* at [57]

<sup>18</sup> See: <https://www.gov.uk/government/publications/tackling-violence-against-women-and-girls-strategy>

<sup>19</sup> See: <https://www.gov.uk/government/publications/tackling-domestic-abuse-plan>

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Figure 2: A shortfall in public protection?<sup>20</sup>

Year to 31 <sup>st</sup> March	Domestic abuse arrests	% change year on year	Domestic violence protection notices issued	% change year on year	All CPS domestic abuse prosecutions E&W	% change year on year	Domestic abuse-flagged rape prosecutions E&W	% change year on year	DVDS disclosures, RtK and RtA E&W	% change year on year
2017	217, 607	n/a	3029	n/a	97,497	n/a	959	n/a	3410	n/a
2018	225, 714	+ 3.73	4219	+ 39.29	91,129	- 6.53	908	- 5.32	5649	+ 65.66
2019	214, 965	- 4.76	4349	+ 3.08	81,035	- 11.08	542	- 40.31	6583	+ 16.53
2020	226, 385	+ 5.31	4468	+ 2.74	61,169	- 24.52	335	- 38.19	8715	+ 32.39
2021	253, 546	+ 12.00	10,046	+ 124.84	54, 515	- 10.88	267	- 20.30	13,439	+ 54.20

<sup>20</sup> Sources:

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2021> and <https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2020-2021> and <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/police-response-to-violence-against-women-and-girls-final-inspection-report.pdf>

### 3. Positive obligations under the ECHR: Relevant case law of the Strasbourg Court

Our starting point for a consideration of the human rights duties placed on the police service, and the criminal justice system of England and Wales, when it comes to protecting victims of domestic abuse and/or violence against women and girls, is the definitions given to a core set of 'positive obligations'. These are duties applying to the actions and decisions, or the policy stances, of state bodies under the European Convention on Human Rights (the ECHR). In England and Wales, the judiciary are required to take into account the case law of the European Court of Human Rights (the Strasbourg Court) in applying these positive obligations in the domestic legal context, by virtue of Section 2 of the Human Rights Act 1998 (the HRA). The relevant Articles of the ECHR in the context of this paper are Article 2, the right to life; Article 3, the right not to be subject to inhuman or degrading treatment; and Article 8, the right to respect for private and family life – the latter including an element of a duty to protect the bodily and psychological integrity of individuals.

The European Court of Human Rights, in outlining a substantive duty on state bodies to act to preserve life, stated in *Osman v UK*<sup>21</sup> that:

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>22</sup>

This duty requires the police, and wider criminal justice system in England and Wales to prioritise the protection of possible victims who have been determined to face such a "real and immediate" risk to life – which might readily mean protection from domestic abuse, for example.

In terms of the nature of risk assessment that is required, for example, by police handling the risk presented to a possible homicide victim, the European Court of Human Rights has highlighted in *Kurt v Austria*,<sup>23</sup> that:

in order to be in a position to know whether there is a real and immediate risk to the life of a victim of domestic violence [relevant to the *Osman* duty]... the authorities are

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<sup>21</sup> (1998) Case No 87/1997/871/1083.

<sup>22</sup> *Ibid* at [116].

<sup>23</sup> (2021) Case No 62903/15.

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under a duty to carry out a lethality risk assessment which is autonomous [i.e. objective], proactive and comprehensive.<sup>24</sup>

In January 2022 the College of Policing rejected the need for any substantial revisions and standardisations to the most commonly-used checklist of risk factors used by police forces in England and Wales to screen victims for different degrees of personal risks – finding “no research or evaluation to support the adoption of any one particular risk assessment tool over another”.<sup>25</sup> This policy position – very much not an effort to develop a brand-new risk assessment model – is therefore a minimalist response to a recommendation on the reform of police risk assessment practices as made by HMICFRS.<sup>26</sup>

Meanwhile, under Article 3 ECHR, if the risk of harm in a relationship is sufficiently serious, albeit to a non-lethal extent, then according to *Opuz v Turkey*,<sup>27</sup> domestic courts “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”.<sup>28</sup> Furthermore, under Article 8 ECHR, and in the lower tier of this layered approach of duties under the ECHR, the Strasbourg Court observed in *A v Croatia*<sup>29</sup> that “[u]nder Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons... [and] they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”.<sup>30</sup> This language of the prevention of the recurrence of violent attacks against victims, in a system that should be maintained and applied in practice, raises the issue of non-compliance with the ECHR, given the drastic fall in domestic abuse-flagged prosecutions in England and Wales in the last 4-5 years. Given the uncertainty as to whether DVDS disclosure are efficacious, no explosion in terms of numbers of DVDS applications (or disclosures) will likely satisfy the State’s duties in public protection terms.

An example of the layered approach by the Strasbourg Court in setting these standards for positive obligations under the ECHR can be seen in *Talpis v Italy*.<sup>31</sup> A woman (Talpis) was stabbed, and her son stabbed to death, by her husband (AT). At the time of the murder and attempted murder AT already had a criminal record for domestic violence against Talpis, including a long overdue prosecution for domestic violence reported by her. Police officers had been separately called out to Talpis's home earlier on the night of the fatal attack, where there was evidence of domestic abuse (criminal damage), and to a report of AT being drunk

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<sup>24</sup> *Ibid* at [168].

<sup>25</sup> See College of Policing, *Understanding risk and vulnerability in the context of domestic abuse: Authorised Professional Practice* (2022).

<sup>26</sup> See HMICFRS, *Everyone’s business: Improving the police response to domestic abuse* (2014), Recommendation 6.

<sup>27</sup> (2009) Case No 33401/02.

<sup>28</sup> *Ibid* at [161]-[162].

<sup>29</sup> (2010) Case No 55164/08.

<sup>30</sup> *Ibid* at [60].

<sup>31</sup> (2017) Case No 41237/14.

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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 the police officers present. And so, in *Talpis*, a majority of the ECtHR found a violation of Articles 2, 3 and 14 ECHR (the latter being the right to non-discrimination – violated given the institutional misogyny that resulted in AT not being prosecuted or dealt with sufficiently quickly).

On the importance of protecting the rights of potential victims over the corresponding rights of domestic abuse perpetrators, the Strasbourg Court noted in *Talpis* that: "in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and psychological integrity... [f]urthermore, the State has a positive obligation to take preventive operational measures to protect an individual whose life is at risk".<sup>32</sup> There had been a failure to take those kinds of 'preventive operational measures' in the *Talpis* case. Furthermore, in a way highly relevant to the context of a plummeting rate of domestic abuse prosecution in recent years in England and Wales (see Figure 2, above), but specifically on the delay in prosecuting AT as an abuser in relation to an earlier serious violent offence against Talpis, the Strasbourg Court highlighted that in terms of intensifying a potential breach of Article 3 ECHR:

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.<sup>33</sup>

In addition, in finding sex discrimination and a breach of Article 14 ECHR (as noted above), the Court said that "by underestimating, through their complacency, the seriousness of the violent acts in question, the Italian authorities in effect condoned them".<sup>34</sup>

The UK courts have likewise dealt with how the ECHR might operate to protect victims of abuse through the creation of certain positive obligations on agencies in the justice system. In *R (MLIA and another) v Chief Constable of Hampshire Constabulary*,<sup>35</sup> 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 [a] sliding scale, and that a case which fell within the scope of Article 8 but not

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<sup>32</sup> *Ibid* at [123].

<sup>33</sup> *Ibid* at [128]-[129].

<sup>34</sup> *Ibid* at [145]/

<sup>35</sup> [2017] EWHC 292 (QB).

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Article 3 would fall further down the scale than a case which fell within the scope of Article 3.<sup>36</sup>

Greater discretion will be afforded by the courts to police officers, for example, facing Article 8-engaging risks of harm, than for those cases relating to Article 3-engaging risks of harm. The relevant margin of appreciation, now a doctrine to be found in a reformed recital to the ECHR,<sup>37</sup> gives a degree of latitude to domestic police services in their handling of domestic abuse cases. As Laws LJ observed in *D v Commissioner of Police of the Metropolis*:<sup>38</sup>

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. ... 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.<sup>39</sup>

Rogers has given an excellent summation of the way that these differing layered duties under the ECHR have emerged over time:

Over the years, the Strasbourg Court has found a variety of positive obligations to support citizens who are threatened with or already victimised by certain criminal activity. Most urgently, state agents have a duty to prevent crimes of such gravity, when they should reasonably be aware of a real and immediate risk of their occurrence... But there are also less direct obligations, e.g. to have effective criminal law provisions which offer some deterrence to would-be offenders of the most serious crimes... There may also be duties to have a system of enforcement which may entail pro-active policing and even, at least in the case of human trafficking, co-operation with other countries... It will be noted that the list above mixes operational as well as systemic duties, with no particular regard for the distinction.<sup>40</sup>

With regard to the range of police discretion, a claimant victim may face difficulties in basing a claim on Article 3 when a court might see it as engaging Article 8 only, and these doctrinal difficulties are further compounded by the view expressed in the UK courts (until recently) that Article 3 compliance is more about *systemic* compliance than meeting a duty constructed from purely the facts of a particular scenario or in an individual case. But this began to shift

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<sup>36</sup> *Ibid* at [189].

<sup>37</sup> Introduced by ECHR Protocol 15, in force from 1 August 2021.

<sup>38</sup> [2016] QB 16.

<sup>39</sup> *Ibid* at [68].

<sup>40</sup> Jonathan Rogers, 'Liability for egregiously bad police investigations' (2018) 6 *Arch. Rev.* 6 at 7.

with the exposition given by Green J in *R (DSD) v Metropolitan Police*.<sup>41</sup> In relation to discerning a breach of Article 3 at the operational level, i.e. in relation to a particular case handled by a particular force, Green J gave the following useful overview:

- "where a credible allegation of a grave or serious crime is made, the police must investigate in an efficient and reasonable manner, which is capable of leading to the identification and punishment of the perpetrator(s)"<sup>42</sup>
- "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."<sup>43</sup>
- "the assessment of the efficiency and reasonableness of an investigation takes account of its promptitude."<sup>44</sup>
- "the assessment of the efficiency, and, reasonableness of an investigation also takes into account whether the offender was adequately prosecuted. In this respect, a successful prosecution within a reasonable period of time will render prior operational failures irrelevant (non-justiciable). However, a prosecution that is brought after an unreasonable point of time does not in and of itself expunge the legal effect of prior operational failures".<sup>45</sup>

This framework of factors was distilled by Lord Kerr in the Supreme Court to a principle that police should avoid making 'egregious errors' in investigations and case handling.

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<sup>41</sup> [2014] 436 (QB). The *DSD* case was brought by two victims of John Worboys, a serial sex offender known as the Black Cab Rapist and thought to be responsible for the drugging and sexual assault of over 100 women. Both NBV and DSD reported their assaults to the police, and in NBV's case Worboys was quickly arrested as a suspect but released without charge. In DSD's case, he was never identified. Worboys was eventually charged with 23 offences relating to 14 victims and convicted of 19 counts, including the assault on NBV. The women brought damages proceedings against the police, alleging failure to carry out effective investigations into their complaints that amounted to breaches of Article 3 of the ECHR.

<sup>42</sup> *Ibid* at [216].

<sup>43</sup> *Ibid* at [218].

<sup>44</sup> *Ibid* at [219].

<sup>45</sup> *Ibid* at [220].

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#### 4. DSD in the UK Supreme Court

In *Commissioner of Police of the Metropolis v DSD and another*,<sup>46</sup> Lord Kerr expressed the view that there had been failures that were not systemic, but which pertained to the shortcomings of the policing approach taken by the Met in dealing with particular reported sexual offences, that is to say, reported crimes on an individual basis, and relating to the victims of John Worboys:

- (i) Reception staff failed to record relevant names, addresses and vehicle registration details. If these had been recorded, it was “perfectly feasible to believe”, the judge found, that Worboys might have been apprehended earlier or might even have been deterred from further offending;
- (ii) Failure to interview promptly a witness known as Kevin. He could have identified Worboys and could have given evidence that might have led to his arrest;
- (iii) Failure to collect CCTV evidence. Worboys had driven his taxi to a police station. The timing of his arrival at and departure from the police station was known. If police officers had checked the CCTV footage, they could have identified the registration number and this would have led them to Worboys;
- (iv) Between 2003 and 2008 many complaints were made to police which should have been sufficient to trigger the arrest of Worboys. The failure to make the link between these complaints was due not only to a lack of training but also to a failure to adhere to procedures;
- (v) Failure to conduct searches.

The UK Supreme Court judgment in *DSD* now creates a rule in UK law that conspicuous and substantial, or egregious and significant errors in the police handling of a case will lead to an operational breach of Article 3 ECHR, notwithstanding structural compliance.<sup>47</sup> This goes beyond Strasbourg jurisprudence, and is a result of a majority of the Supreme Court in the case (Lord Kerr, Lady Hale, and Lord Neuberger) determining that there is a duty under Section 6 of the HRA to uphold Convention rights as they must apply in the UK context – not merely in accordance with supra-national guidance.<sup>48</sup> Lord Kerr explained that:

simple errors or isolated omissions will not give rise to a violation of Article 3 at the supra-national and the national levels. That is why, as I point out below, only conspicuous or substantial errors in investigation would qualify. The Strasbourg court disavowed any close examination of the errors in investigation because it was a supra-

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<sup>46</sup> [2018] UKSC 11 at [51].

<sup>47</sup> *Ibid* at [20]: “What is not in the least uncertain, however, is that, if the relevant circumstances are present, there is a duty on the part of state authorities to investigate where non-state agents are responsible for the infliction of the harm. That cannot be characterised as other than an operational duty. The debate must focus, therefore, not on the existence of such a duty but on the circumstances in which it is animated.”

<sup>48</sup> See *ibid* at [78].

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national court. It left that to national courts... errors in investigation, to give rise to a breach of Article 3, must be egregious and significant.<sup>49</sup>

Striking the right degree of rigour about the review of decision-making concerning the best allocation of resources in police investigations is always going to be difficult, and we might frankly always wish for more resources for policing in England and Wales, and indeed the justice system more broadly. Levy's chief critique of the UKSC decision in *DSD* was based on a concern with regard to resources:

Police work, by its nature, requires decisions to be made, often in high pressure situations and without a clear course of action to take. The Convention correctly imposes a duty for effective structures, the absence of which would mean policing decisions could not be effective to begin with. However, the majority's extension of the duty can only divert resources and impinge, rather than improve, police operations.<sup>50</sup>

Lord Kerr, however, specifically dismissed the concerns around 'opening the floodgates' to HRA-based claims against the police via judicial review of investigative approaches of officers working on a case. In his words:

The prospect of every complaint of burglary, car theft or fraud becoming the subject of an action under the Human Rights Act has been raised. I do not believe that this is a serious possibility. All of the cases in this area involve conspicuous and substantial shortcomings in the conduct of the police and prosecutorial investigation. And, as this case illustrates, frequently, operational failures will be accompanied by systemic defects. The recognition that really serious operational failures by police in the investigation of offences can give rise to a breach of Article 3 cannot realistically be said to herald an avalanche of claims for every retrospectively detected error in police investigations of minor crime.<sup>51</sup>

In previous research,<sup>52</sup> I collated perspectives on perceived shortcomings of domestic abuse disclosure scheme policies in different common law jurisdictions, but I also gathered what evidence I could as to situations where the operation of these schemes has been operationally ineffective. It is difficult to establish, empirically, whether any such scheme operating today is not hit-and-miss with regard to making a helpful contribution to compliance with positive obligations such as those stemming from Articles 2, 3 and 8 ECHR. Certainly, there has not yet, in England and Wales, been a challenge in the courts from a victim of abuse who has argued that a police force breached their protective positive obligations under the ECHR

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<sup>49</sup> *Ibid* at [29].

<sup>50</sup> Raphael Levy, 'Commissioner of Police of the Metropolis v *DSD*: The protection afforded under art.3 of the European Convention on Human Rights' [2019] *Public Law* 251 at 259.

<sup>51</sup> *DSD* (n 46) at [53].

<sup>52</sup> Grace (n 6).

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because of the sole use, misuse or under-use of a scheme and a relevant disclosure. But there is a small, and growing, body of case law that sees an application of the positive obligation standard developed in the *DSD* case; and the next section of this article turns to consider the implications of those cases to date.

### 5. Applying the ‘egregious errors’ standard for police investigations

There are not (as yet) too many examples of the new operational standard of ‘egregious errors’ set out by the majority of the UKSC in *DSD*, but some have emerged in the case law on standards in police investigations and the protection of victims. We can see the dual standard of positive obligations under Articles 3 and 8 ECHR (we can call them the structural and operational standards) being considered in a case decided by the High Court in Northern Ireland. McAlinden J explained in *C v Chief Constable of the Police Service of Northern Ireland*<sup>53</sup> that:

In general terms, in order to be an effective deterrent, laws which prohibit conduct constituting a breach of Article 3 and Article 8 must be rigorously enforced and complaints of such conduct must be properly investigated... The binary nature of the positive obligation arising under these articles can give rise to an examination of whether the domestic legal provisions relating to rape are so flawed as to amount to a breach of the state’s positive obligation under Articles 3 and 8 (the systemic failings) or whether the investigation into an allegation of rape was so flawed as also to amount to a breach of the state’s obligations under the same articles (the operational failings).<sup>54</sup>

In finding a breach of Article 3 in *C*, concerning a rape involving a highly vulnerable victim, McAlinden J (at 92) summarised the rationale for the application of the standard of an ‘egregious error’ from *DSD*:

The operational failings in this case cannot be described as minor or insignificant. The officers concerned... accepted that they had failed to conduct a thorough investigation into an allegation of stranger rape... These failings occurred against a background of systemic shortcomings in relation to training. The adverse impact on the effectiveness of the investigation into the allegation of stranger rape directly resulting from these matters was compounded significantly by the inability of the PSNI to arrange [the suitable] interview of a vulnerable victim to be promptly carried out. This combination

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<sup>53</sup> [2020] NIQB 3.

<sup>54</sup> *Ibid* at [77].

of failings cannot be regarded as anything other than a failure to carry out an effective investigation.<sup>55</sup>

In the context of the operation of the DVDS in England and Wales, 'egregious errors' amounting to non-minor or significant failings might include a failure to disclose (sufficient) information about possible abuse to an eventual victim; a failure to do so urgently or quickly enough; or a failure to put further and wider supportive or preventive measures in place in relation to this possibly violent relationship situation.

Another case driven by the 'egregious errors' standard in *DSD* is the judgment in *R (LXD) v Chief Constable of Merseyside Police*,<sup>56</sup> which concerned threats to kill from an organised crime group made against a family with children at their home. 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 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".<sup>57</sup> The 'proper steps' to protect the victims, which had been taken, were: "EM and SM were circulated as wanted. An ANPR marker was put on the car reported to have been driven by SM. Search warrants were executed at the homes of EM and SM".<sup>58</sup>

## 6. Putting the human rights issues around the DVDS into a constitutional perspective

While the Government has given the DVDS a considerable policy 'push' by placing the revised guidance on a statutory footing, following Section 77 of the Domestic Abuse Act 2021, it is important to note that a different use of police information in public protection disclosures (compared to the promotion of 'Clare's Law') has not received the same support, and instead, has been marshalled as evidence that the wider system of UK human rights law needs substantial reform. The target of this criticism has been the use by police of 'threat to life notifications', known informally as '*Osman* warnings' due to their central role in warning those individuals who are facing a 'real and immediate risk to life', including such a risk from organised crime groups (as in *LXD*, discussed above). The Government have taken aim at this practice as a waste, in their eyes, of police resources. In the December 2021 'Bill of Rights' consultation paper, the Ministry of Justice stated that:

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<sup>55</sup> *Ibid* at [92]

<sup>56</sup> [2019] EHCW 1685.

<sup>57</sup> *Ibid* at [100].

<sup>58</sup> *Ibid* at [56].

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Since those engaged in serious crime are disproportionately likely to face ‘a real and immediate risk to life’, they (rather than ordinary members of the public) are more likely to need the protective services required by the *Osman* ruling. One force reported that up to 75% of all Threat to Life notifications – required by the *Osman* ruling – may be issued to serious criminals or gangs. As a result of the straitjacket approach required by human rights case law, a substantial amount of police time is being diverted to provide witness protection to serious criminals. This inevitably displaces police resources allocated to protecting wider society and means that forces are constrained to act in a risk-averse way, taking measures to prevent costly litigation rather than spending resources on protecting the public.<sup>59</sup>

As such, *Osman* warnings, comprising a pragmatic sharing of police intelligence to try and help safeguard the rights to life and freedom from violence for persons at risk, have something thematically in common with DVDS disclosures; but the former, unlike the latter, have become one of a number of motivating factors for HRA reform. It is appropriate, therefore, to briefly consider here the Government’s latest plans for the HRA, or specifically, the relationship between the UK human rights law system and the ECHR. The Queen’s Speech of 2022 explained that the government would “introduce a Bill of Rights to ensure there is a proper balance between the rights of individuals, our vital national security and effective government, strengthening freedom of speech, our common law traditions and reducing reliance on Strasbourg case law”.<sup>60</sup> *DSD*, and the important new standard around the avoidance of ‘egregious errors’ in police investigations and public protection work is, however, a domestic legal development. So, it is just as much of a concern, in the context of the protection of and support for vulnerable victims of domestic abuse, that the briefing notes to the Queen’s Speech in 2022 explained a particular intention to pull down what the HRA has done in little over 20 years, both doctrinally, and culturally, around rights. The Government’s proposed contemporary Bill of Rights was aimed chiefly at:

- “Curbing the incremental expansion of a rights culture without proper democratic oversight, which has displaced due focus on personal responsibility and the public interest.”<sup>61</sup>
- “Reducing unnecessary litigation and avoiding undue risk aversion for bodies delivering public services.”<sup>62</sup>
- “Establishing the primacy of UK case law, clarifying there is no requirement to follow the Strasbourg case law and that UK Courts cannot interpret rights in a more expansive manner than the Strasbourg Court.”<sup>63</sup>

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<sup>59</sup> Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, December 2021 at 43.

<sup>60</sup> *The Queen’s speech 2022: Background briefing notes* at 13.

<sup>61</sup> *Ibid* at 118.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

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- “Ensuring that UK courts can no longer alter legislation contrary to its ordinary meaning and constraining the ability of the UK courts to impose ‘positive obligations’ on our public services without proper democratic oversight by restricting the scope for judicial legislation.”<sup>64</sup>
- “Recognising that responsibilities exist alongside rights by changing the way that damages can be awarded in human rights claims, for example by ensuring that the courts consider the behaviour of the claimant when considering making an award.”<sup>65</sup>

Indirectly, some of these proposals would amount to an attack on the rights of women and girls. The particular point about trying to ensure that the “UK Courts cannot interpret rights in a more expansive manner than the Strasbourg Court” would put at risk any further deepening or refinement of the *DSD* standard concerning the need to avoid ‘egregious errors’ in public protection work.

The Bill of Rights Bill was withdrawn in June 2023, but it would have been an awkward direction of travel, doctrinally, when most substantive provisions of the Istanbul Convention have been ratified and put in place in UK law.<sup>66</sup>

The Istanbul Convention requires Council of Europe states like the UK to take “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>67</sup> Under the Convention, as noted by Lisa Grans: “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...[while the] preventive obligations in the Istanbul Convention are more detailed, but...their content also needs to be spelled out”.<sup>68</sup>

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”, “to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals” under Article 8;<sup>69</sup> and to take “all reasonable measures to prevent the

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* at 119.

<sup>66</sup> See: <https://www.theguardian.com/society/2022/may/31/uk-to-partially-ratify-domestic-abuse-convention-after-10-year-delay>

<sup>67</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011), Article 7(1).

<sup>68</sup> Lisa Grans, ‘The Istanbul Convention and the Positive Obligation to Prevent Violence’ (2018) 19(1) *Human Rights Law Review* 133 at 154.

<sup>69</sup> As per *Irene Wilson v UK* (2012) Case No 10601/09 at [37].

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recurrence of violent attacks" against individuals under Article 3.<sup>70</sup> However, while the UK has ratified the Istanbul Convention for the most part, there has been considerable criticism of the decision to enter a reservation in relation to a category of migrant women victims of domestic abuse: "The UK government has decided to reserve Article 59 of the convention, which requires states to grant residence to survivors whose immigration status depends on an abusive partner, a reservation that has been criticised by a coalition of more than 80 women's organisations."<sup>71</sup>

## 7. New (statutory) guidance on the operation of the DVDS in England & Wales

As mentioned above, the Home Office has published statutory guidance, which is binding on police forces in England and Wales under Section 77 of the Domestic Abuse Act 2021. This statutory guidance has revisited the standard for disclosures under the DVDS at common law, so it is worth highlighting the changes around this issue, and where they are rooted.

When Jess Phillips MP moved a proposed amendment to Clause 64 of the Domestic Abuse Bill (as it then was), it was to entail the following standards:

"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."<sup>72</sup>

The government ministers steering the Domestic Abuse Bill through Parliament made a commitment to re-visit the disclosure standard in forthcoming statutory guidance, which they duly have done, as highlighted below.

I have a professional interest in the process of drafting the statutory guidance in that I was fortunate to be able to work with the Home Office in order to suggest proposed wording for a legal description that would flesh out the very broad 'pressing need' test at common law. In my book on Domestic Abuse Disclosure Schemes, I reflected on the case law that had seen a handful of opportunities for the judiciary to expand on the 'pressing need' standard in *obiter dicta*. In drawing on this case law as it stood in 2020/21, I formulated the following expansion upon the 'pressing need' test, based on that small body of case law, in order to show the full common law position on the legalities of DVDS disclosures, as I understand them to be:

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<sup>70</sup> *Opuz v Turkey* (2009) 33401/02 at [161]-[162].

<sup>71</sup> Above n 66.

<sup>72</sup> Above n 11

“Disclosure of limited information under the DVDS is permissible were necessary in the public interest, as is reasonable to achieve the purpose of preventing crime or alerting members of the public to an apprehended danger, in good faith and where there is a pressing need for that disclosure, entailing i) a reasonable cause to suspect a person is likely to suffer significant harm and ii) grounds to conclude a disclosure is required to safeguard their welfare.”<sup>73</sup>

The first part of this paragraph reflects the ambit of the common law basis of the DVDS (i.e. “disclosure of limited information under the DVDS is permissible were necessary in the public interest, as is reasonable to achieve the purpose of preventing crime or alerting members of the public to an apprehended danger, in good faith and where there is a pressing need for that disclosure”), and the second part of the paragraph attempts to show how the ‘pressing need’ threshold should be interpreted.

The final statutory guidance on the operation of the DVDS as published by the Home Office uses the following summary of the common law position on the ‘pressing need’ test:

“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. The following three-stage test should be satisfied before a decision to disclose is made: a. it is reasonable to conclude that such disclosure is necessary to protect A, and any relevant children, from being the victim of a crime; b. there is a need for such disclosure, which considers that there is i) reasonable cause to suspect a person would be likely to suffer harm and; ii) grounds to conclude a disclosure is required to safeguard their welfare.”

Human rights standards *are* mentioned in the disclosure tests in the new (April 2023) guidance, specifically the Article 8 ECHR right to privacy of possible disclosure subjects. But the Article 3 ECHR rights of (potential/repeat) victims of domestic abuse, which should weigh in the balance very heavily against the Article 8 rights of any (potential) disclosure subject/abuser, as per the European Court of Human Rights in *Talpis*, are not mentioned. The Home Office guidance explains that, as the third and final part of a “three-stage disclosure test”:

interfering with the rights of B, including B’s rights under Article 8 of the European Convention of Human Rights to have information about their previous convictions kept confidential, is necessary and proportionate for the prevention of crime. This involves balancing the consequences for B if their 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 they wish to make representations, so as to ensure that the police have all the necessary information at their disposal to

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<sup>73</sup> Grace (n 6) at 192.

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conduct the balancing exercise, however, such a decision must be based on an assessment of risk of harm to A if B were to be informed, and should not be done if there is any risk of harm to A. A should also be informed of the need to involve B and given the option to withdraw their application on this basis. 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>74</sup>

Paragraph 90 of the guidance is, however, more promising, as it appears to respond to the element of operation of the DVDS that was identified as a weakness in part of the amendment moved by Jess Phillips MP – i.e., that there should be more emphasis on operational planning to safeguard victims after a disclosure. It also notes the situation where a possible subject of a disclosure has little of note recorded about them by the police:

There may be concerns that relate to B’s current behaviour towards A within the disclosure application e.g. abusive or threatening behaviour. In this case, even though there is no recorded information held by the police or other agencies to disclose to the applicant, the applicant may still be contacted to talk about concerns over B’s current behaviour. This discussion should cover steps the applicant should take in relation to these concerns to safeguard A from the risk of harm posed by B. The police, with input from domestic abuse specialist organisations or an IDVA, or the multi-agency panel if used, will consider what safeguarding measures could be introduced to support A in the short, medium and long term, and determine the roles and responsibility of each agency to ensure that the safety plan remains victim-centred. This could include the application of a protection order, for example a Stalking Protection Order or a Domestic Violence Protection Order, or referral to a MARAC.”<sup>75</sup>

Other notable revisions in the disclosure decision-making process include the addition of mentions of the Data Protection Act 2018, as it applies to the work of law enforcement agencies and particular standards applicable to the police management of personal information. Also addressed is the issue of deciding whether and how to inform the subject of a disclosure that such a step has been taken about them. Importantly, a series of appendices, particularly Annexes F, G and H, are attached to the guidance, which summarise the complex considerations of disclosure decision-making and provide a template for the recording of decision-making in this regard. It can be hoped, as a result, that the content and nature/process of disclosures as they are made to (potential/repeat) victims of domestic abuse can be made more consistent, and as noted above, as part of a more holistic approach to public protection and support when it comes to police work to prevent that victimisation.

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<sup>74</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Statutory Guidance* (April 2023) at [89].

<sup>75</sup> *Ibid* at [90].

## 8. Conclusions and reflections

DVDS disclosures cannot be treated as a magic bullet. In that way, they are no different from the process of arrest, or the threat of prosecution *per se*. As Lewis et al. have noted:

What years of scholarship have made clear is the futility of considering interventions in isolation... we must be realistic about the potential of a single, brief, transient contact with the police... arrest or protection orders cannot, alone, stop violent men.<sup>76</sup>

DVDS disclosures should not be considered in isolation from other public protection interventions. Case law has developed, or is developing, post-*DSD*, toward a consideration of whether shortcomings in a policing response to a reported serious risk of harm might be an 'egregious error'. A DVDS disclosure without sufficient wrap-around measures, or monitoring and support for a victim/potential victim, could be such an 'egregious error' in particular circumstances, depending on the risks faced. It is important, then, that the guidance published under the statutory duty in Section 77 of the Domestic Abuse Act 2021 takes pains to specify a multi-agency approach that should not leave victims as the recipients of disclosures in isolation from other means of support. This is especially important for compliance with human rights standards, in particular with regard to the operation of the DVDS, as the UK has largely ratified the Istanbul Convention with its own support requirements. And on a pragmatic point, since we can expect to see the number of DVDS disclosures per annum rise in the coming years, with less restrictive wording in the statutory guidance around the disclosure threshold than might have been chosen, it is important that public protection-related funding is increased to reverse the decline in prosecution for some types of domestic abuse-flagged offences. The Government have recently published their intentions to achieve this, but the scale of that wider human rights reform project, and ensuring the effectiveness of a public protection landscape of which the DVDS is only a very small part, is a daunting one from a policymaking perspective.

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<sup>76</sup> Ruth Lewis et al. 'Protection, prevention, rehabilitation or justice? Women's use of the law to challenge domestic violence' (2000) 7(1-3) *International Review of Victimology* 179 at 202.

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