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People with Disability Australia (PWDA)

Domestic Violence Disclosure Scheme Discussion Paper

Submission

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About People with Disability Australia

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

Expertise

People with Disability Australia has extensive expertise in the area of violence, including domestic violence, against children and adults with disability. As a national peak representative body for people with disability, we provide policy advice to numerous inquiries related to violence, including violence against children with disability. Recent examples include the Senate Inquiry into Domestic Violence, the Senate Inquiry into Violence, Abuse and Neglect of People with Disability, and the Third Action Plan for the National Framework for Protecting Australia's Children.

We were partners in Women with Disabilities Australia's *Stop the Violence* project, which explored sexual assault and domestic violence responses to women and girls with disability. Additionally, we have been funded as a Royal Commission Community-Based Support Service by the Department of Social Services to provide individual advocacy to people with disability who are affected by the Royal Commission into Institutional Responses to Child Sexual Abuse. We have also recently partnered with Domestic Violence NSW to produce a set of resources designed to assist domestic violence services in becoming more accessible for people with disability.

Introduction

PWDA has some serious concerns about the impact of the Domestic Violence Disclosure Scheme on people with disability, especially women. People with disability experience much higher levels of domestic violence than people without disability.

This situation is particularly pronounced in NSW. Of the NSW women who reported experiencing violence in the Personal Safety Survey in 2011-12, 43% had long-term illness or disability. This is 6 percentage points higher than the national average, which sees 37% of the cohort of women experiencing violence having disability or a long-term illness. This is in

spite of the fact that NSW has the same proportion of women with disability as other states.¹

Additionally, the Personal Safety Survey excludes a number of settings in which people with disability experience domestic violence (as defined in the Crimes (Domestic and Personal Violence) Act 2007), so this is likely an underestimation of the incidence of violence against women with disability.

People with disability experience substantial barriers to having violence against them recognised as domestic violence; having Police recognise and respond adequately to domestic violence; successfully making a report; having a case properly investigated; achieving successful prosecution; and being recognised as credible providers of testimony to support a case.² In other words, few of the protective mechanisms available for other members of the community are accessible for people with disability. Additionally, few domestic violence service providers are accessible to people with disability, or understand the complexity of the situations that people with disability experience domestic violence in.

While the *It Stops Here* reforms include specific mention of people with disability as a priority grouping, actions specific to people with disability are limited to one, relating to education of the domestic violence services sector. This has meant that despite strong advocacy by disability advocates in relation to each initiative under the reforms, the Domestic Violence Safety Assessment Tool, the Information Sharing Protocols, the Safer Pathways referral pathway (and its attendant Safety Action Meetings and Safety Action Plans) are not inclusive of people with disability.

Prioritising the inclusion of people with disability in each of these initiatives would do more to address domestic violence against people with disability than the Domestic Violence Disclosure Scheme. However, if the Scheme goes ahead, the impacts for people with disability could be substantial. To ensure that all the protections that exist in the community for other people extend to people with disability, there are some suggestions below about the inclusivity of the Scheme.

The proposal to enable the disclosure of relevant information about prior instances of convictions or orders about a potential perpetrator has a number of risks attached. The implementation of Clare's Law has not yet been fully assessed, and the premise that victims of domestic violence will be empowered by further information about potential perpetrators is not yet demonstrated. The evidence is not in, and there are several risks attached, particularly in relation to holding victims responsible for their victimisation, especially if they choose to remain in a relationship despite a disclosure of a violent history on the part of the (potential) perpetrator.

Yet there are also a number of key issues with the proposed Scheme for people with disability, especially in terms of the intention to empower them. The remainder of this

¹ Women NSW (2014) *Women in NSW*, Women NSW, Department of Family and Community Services, The Government of NSW.

² Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime – Research Report*, Victorian Equal Opportunity and Human Rights Commission

paper provides a response to and recommendations regarding the specific questions raised in the Domestic Violence Disclosure Scheme Discussion Paper.

Whether to include a Right to Ask and/or Right to Know in a NSW model DVDS

The context in which 'Clare's Law' operates in the UK is quite different to the New South Wales context for the proposed Domestic Violence Disclosure Scheme, especially for people with disability. In the UK, there are robust safeguards around people with disability, especially in ensuring that support workers do not have a history of violence. This includes a Barring and Disclosure Service, similar to the Victorian proposed 'Black List' for disability support workers found guilty of violence against people with disability, but with lower threshold (not requiring conviction).

People with disability should have a Right to Ask and/or Right to Know in a NSW model DVDS

In Australia, disability service providers are required to perform criminal record checks on any new employees. However, these checks solely disclose convictions, which are rare in relation to violence against people with disability. They also do not include any other orders such as Apprehended Domestic Violence Orders.

Support workers primary contact is with people with disability not the service providers that employ them. Therefore, it is people with disability who are more likely to begin to suspect support workers may become violent or have a history of violence as opposed to their service provider. However, the person with disability often has to simply take it on trust that the service provider has done their due diligence in relation to the employee. This is disenfranchising, and means that people with disability cannot act from a position of knowledge in any conversations with the service provider about concerns they may have.

The limitation of DVDS eligibility to S. 5 a)-c) of the Crimes (Domestic and Personal Violence) Act 2007 is thus highly problematic, because Australia and NSW provides few safeguards for people with disability in relation to their support workers when compared to the UK. Denying people with disability access to the same protections as all other members of the community, despite legislative recognition that domestic violence can occur in these relationships and settings, may even be discriminatory. It is therefore particularly important that people with disability have the same access as any other member of the community to request information about a person in a position to commit domestic violence against them, if they seek it. People with disability should be eligible for the Right to Ask in relation to all relationships and settings described in the Crimes (Domestic and Personal Violence) Act 2007, Section 5.

s. 5 should be adopted in full as defining eligibility for the DVDS.

Associates of people with disability, including services and individual advocates, should have a Right to Ask. This is because people with disability may face impediments in requesting information, especially if the processes for a request are inaccessible, rely on email or private phone numbers (which are difficult to access for people living in residential facilities) or rely on interaction with Police. This last impediment arises because people with disability

may have a less than positive history of interactions with Police, and may fear that disclosing domestic violence will lead to unwanted outcomes such as the removal of children.³

Associates of potential victims, including domestic violence service providers and individual advocates, should have a Right to Ask.

However, the Right to Ask ought not to extend to service providers seeking disclosures about their clients. This may unfairly prejudice service providers against particular clients, and on the basis of a history of violence which may not be ongoing. It is also a perverse potential outcome of the proposed Domestic Violence Disclosure Scheme.

In many cases, people with disability are accommodated in institutional settings which fail to fulfil the human rights of people with disability. Violent responses in this context may be ‘maladaptive responses to a maladaptive environment.’ There is already concern that, under the National Disability Insurance Scheme, service providers may cherry-pick the ‘easy’ clients, leaving those with higher support needs with no services. Additionally, sourcing this information is likely to dramatically impact the client-support worker relationship. It would be highly problematic if the Domestic Violence Disclosure Scheme impacted on the disability services market.

Disability service providers should be precluded from a Right to Ask and a Right to Know about their clients, to protect these clients.

The Right to Know ought to be directed to the potential victim themselves, *especially* when they are people with disability. Many people with disability are routinely denied the opportunity to make choices, from the small everyday decisions about what to eat and when, through to larger decisions about where they would like to live and with whom. This happens even for people with disability who do not have a substitute decision-maker assigned under Guardianship or Financial Management orders. This means that they frequently have limited control over their lives, and this puts them at much higher risk of violence. It is important, then, that the disclosure of domestic violence is directed to them, to ensure their empowerment in this situation.

Additionally, in order to protect people with disability from reprisals, the person who is the subject of the disclosure ought not to be notified. There are also risks in notifying service providers, and it would be advisable to ensure that people with disability had adequate supports around them, including access to independent advocates when a disclosure is made.

Any further disclosures, including to service providers employing support workers, should be made only once the safety and security of the potential victim has been assured.

When information should be disclosed

There are many appropriate situations when information should be disclosed. A current, prospective or previous relationship (including all relationships under s. 5 of the Crimes (Domestic and Personal Violence) Act 2007) may be made safer by the disclosure of

³ Children are removed from parents with disability at a rate 10 times that of other parents. Australian Cross Disability Alliance, *Submission 142* to the Senate Inquiry into Domestic Violence. See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence

information regarding a history of violence. Discretion may be required to decide whether a disclosure is appropriate in relation to a prospective relationship. For those entering into a residential setting with others, or acquiring a new support worker, however, the ability to source disclosures in relation to prospective relationships may be particularly important.

It should be possible for disclosures to be made in relation to a current prospective or previous relationship defined under s. 5 of the Crimes (Domestic and Personal Violence Act).

The threshold for the disclosure of information – that is, at what point there is sufficient concern regarding the potential for violence – should depend on individual circumstances.

A Safety Action Meeting, drawing on the expertise of disability advocates or domestic violence service providers with experience in relation to culturally and linguistically diverse communities or Aboriginal or Torres Strait Islander communities, should decide whether a disclosure should be made in a particular case.

What information should be disclosed

Information relevant to the likelihood of future violence may be more diverse than solely domestic violence orders or convictions. It may be relevant to disclose a history of violence, even where this has not resulted in orders or convictions (which are rare where a person with disability is the victim), and where this has not been perpetrated against people in the relationships listed in s. 5 of the Crimes (Domestic and Personal Violence) Act. This is likely to be the case especially for people who have lived interstate, where convictions may be for crimes which would be differently categorised in NSW.

However, discretion must be used in relation to these disclosures as violence perpetrated by people with disability, particularly in institutional settings, is still frequently misunderstood to indicate a problem with the person as opposed to a legitimate response to a restrictive or problematic environment.

A person with a history of violence in institutional settings who is now living in the community with their partner does not necessarily indicate any likelihood of future violence. A good grasp of the specific situations of people with disability may be required to ensure that the person or service disclosing the information can give the potential victim robust and reliable information about their current risk.

A Safety Action Meeting, drawing on the expertise of disability advocates and/or domestic violence service providers with experience in relation to culturally and linguistically diverse communities or Aboriginal or Torres Strait Islander communities, should be responsible for ensuring only appropriate disclosures are made, and that contextual information be included where relevant.

What process could be adopted for applications, approvals and disclosures

The processes involved in requesting a disclosure must be fully accessible. This includes ensuring information is available in Easy English and that the application form is available online and in hard copy.

The processes involved in requesting a disclosure must be fully accessible.

It should be possible for applications to be made in a range of settings, and submitted by third parties where necessary, given that many people in violent situations have ambivalent

reactions to the Police. Approvals and disclosures should be decided upon and actioned by a committee of people with relevant expertise, such as the Safer Pathways Safety Action Meetings. This mechanism could also request additional and more specific experts be present in particular cases. Given that receiving a disclosure may be very upsetting for a potential victim, the availability of services, including those specialising in disability advocacy where appropriate, is essential.

Wrap-around services should be in place as part of the disclosure to the potential victim.

What risk assessments and other safeguards should be in place.

Individuals seeking a disclosure may be indicating a suspicion or occurrence of domestic violence. A Domestic Violence Safety Assessment Tool (suitably amended to reflect the breadth of domestic violence victims) should be part of both the application and disclosure processes. This will help to ensure that risks are minimised and that the safety of potential victims is maintained.

Many people with disability have had their experiences of domestic violence against normalised, or may never have acquired an understanding of their rights, or what violence looks like. In this regard, it would be important for the services assisting them to explore the different forms of domestic violence, and to support them in considering whether their experiences fall within this definition.

A Domestic Violence Safety Assessment Tool, modified to allow for the specific risk factors for people with disability, should be performed both at application and disclosure points, to maximise the safety of potential victims.

People with disability seeking a disclosure must be fully apprised of what domestic violence is, as defined under the Crimes (Domestic and Personal Violence) Act, and what their rights are.

We thank the NSW Government, and the Department of Family and Community Services, for the opportunity to make this submission.