

2018

Domestic Violence Disclosure Schemes: Effective Law Reform or Continued Assertion of Patriarchal Power?

Elizabeth Greene
Bond University

Jodie O'Leary
Bond University

Follow this and additional works at: <https://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

Domestic Violence Disclosure Schemes: Effective Law Reform or Continued Assertion of Patriarchal Power?

Abstract

At the time of writing, the issue of domestic violence is under the spotlight in Australia. In Queensland, the focus on reducing the incidence of domestic violence has increased since the Taskforce on Domestic and Family Violence released the 'Not Now, Not Ever' report. One of the most recent developments in Queensland is the Queensland Law Reform Commission's Review and Report about whether a domestic violence disclosure scheme ('DVDS') should be introduced in Queensland. A DVDS aims to provide potential victims of domestic violence (and sometimes others) with details of their partners' or potential partners' history of domestic violence. This arguably allows potential victims to make more informed decisions about the relationship moving forward. DVDSs exist in England and Wales, Scotland and New Zealand. However, as yet, given their short life span, there have not been comprehensive reviews as to the impact of such schemes upon victims and perpetrators. Further, although New South Wales is piloting a DVDS, a full evaluation as to the success or otherwise of the pilot is yet to be completed. As the empirical evidence about DVDSs is sparse, this article considers analogous schemes targeting sex offenders in Australia, the US and the UK, to better comprehend and evaluate the effectiveness of such schemes. The article argues that, given the results related to sex offender registers and associated notification systems, DVDSs will not be effective in reducing recidivism, nor will recipients of information be likely to take proactive action. Further, while victims of domestic abuse come from diverse backgrounds, and domestic violence encompasses various forms of relationships, the majority of victims are women, and most perpetrators are men. Similarly, most victims of sexual offences are women. This article argues that the use of DVDSs, like sex offender registers, shifts responsibility for avoiding such abuse from the male perpetrators and society generally onto mostly female recipients of the disclosed information. This is a continued manifestation of the patriarchal power underpinning such violence.

Keywords

family, domestic, offender, register

Domestic Violence Disclosure Schemes: Effective Law Reform or Continued Assertion of Patriarchal Power?

ELIZABETH GREENE* AND JODIE O'LEARY**

Abstract

At the time of writing, the issue of domestic violence is under the spotlight in Australia. In Queensland, the focus on reducing the incidence of domestic violence has increased since the Taskforce on Domestic and Family Violence released the 'Not Now, Not Ever' report. One of the most recent developments in Queensland is the Queensland Law Reform Commission's Review and Report about whether a domestic violence disclosure scheme ('DVDS') should be introduced in Queensland. A DVDS aims to provide potential victims of domestic violence (and sometimes others) with details of their partners' or potential partners' history of domestic violence. This arguably allows potential victims to make more informed decisions about the relationship moving forward. DVDSs exist in England and Wales, Scotland and New Zealand. However, as yet, given their short life span, there have not been comprehensive reviews as to the impact of such schemes upon victims and perpetrators. Further, although New South Wales is piloting a DVDS, a full evaluation as to the success or otherwise of the pilot is yet to be completed. As the empirical evidence about DVDSs is sparse, this article considers analogous schemes targeting sex offenders in Australia, the US and the UK, to better comprehend and evaluate the effectiveness of such schemes. The article argues that, given the results related to sex offender registers and associated notification systems, DVDSs will not be effective in reducing recidivism, nor will recipients of information be likely to take proactive action. Further, while victims of domestic abuse come from diverse backgrounds, and domestic violence encompasses various forms of relationships, the majority of victims are women, and most perpetrators are men. Similarly, most victims of sexual offences are women. This article argues that the use of DVDSs, like sex offender registers, shifts responsibility for avoiding such abuse from the male perpetrators and society generally onto mostly female recipients of the disclosed information. This is a continued manifestation of the patriarchal power underpinning such violence.

* Assistant Professor, Faculty of Law, Bond University

** Assistant Professor, Faculty of Law, Bond University

I Introduction

The Queensland Law Reform Commission ('QLRC') has recently considered and recommended against the introduction of a Domestic Violence Disclosure Scheme ('DVDS') in its jurisdiction.¹ It is not the only Australian jurisdiction to have considered the introduction of a DVDS.² The South Australian Government announced that it 'is committed to exploring a state-wide DVDS trial'³ and New South Wales ('NSW') introduced a DVDS pilot despite the lack of evidence demonstrating the effectiveness of DVDSs.⁴

DVDSs are not the only type of offender register to be proposed or adopted in Australia. Sex offender registers exist in every Australian state and territory (in most of those jurisdictions the focus is upon sex offences against children).⁵ However, it is only in Western Australia that there is significant scope for various persons to be notified of a sex offender's history.⁶

There are differences between the form of sex offender registers and the associated notification ('SORN') systems and DVDSs. Nevertheless, some important aims are the same. Both look to disclose information so that victims/potential victims can take protective measures, and both aim to reduce recidivism. Therefore, evidence as to the impact of SORN systems might be informative in the consideration of the potential effectiveness of DVDSs in these respects.

Another similarity between DVDSs and SORN systems is the victim group. Like victims of domestic violence, victims of sexual violence are

¹ Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, Report No 75 (June 2017); Queensland Law Reform Commission, *Review about whether a Domestic Violence Disclosure Scheme should be Introduced in Queensland*, Consultation Paper, WP No 75 (December 2016).

² See, eg, Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws*, Final Report, Project No 104 (2014) ('*Enhancing Family and Domestic Violence Laws*'); and Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016); Northern Territory Government, Department of Attorney-General and Justice, *Report on Consultation: Review of the Domestic and Family Violence Act* (July 2016); Tasmanian Government, Department of Justice, *Family Violence: Strengthening Our Legal Responses*, Consultation Paper (October 2016).

³ Attorney General's Department (SA), *Consultation Response: Domestic Violence Discussion Paper*, Consultation Response (2017) 4.

⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 4280–2 (Pru Goward, Minister for Women and Minister for the Prevention of Domestic Violence and Sexual Assault).

⁵ *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offender Reporting and Registration) Act* (NT); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Sex Offenders Registration Act 2004* (Vic); *Community Protection (Offender Reporting) Act 2004* (WA). For a summary of each of the acts see Australian Institute of Family Studies, *Offender Registration Legislation in each Australian state and territory* (2013).

⁶ *Community Protection (Offender Reporting) Act 2004* (WA) Pt 5A. Note also that South Australia has some limited options of disclosure where a relevant offender fails to report: see *Child Sex Offenders Registration Act 2006* (SA) Pt 5B.

largely women.⁷ The 2012 Australian Bureau of Statistics Personal Safety Survey confirms that '[w]omen aged 18 years and over were more likely than men aged 18 years and over to have experienced sexual assault since the age of 15', the difference in percentages being 17% of women, as opposed to 4% of men.⁸ The Australian National Research Organisation for Women's Safety to Reduce Violence Against Women and Their Children, further explains that one in five women and one in 22 men have experienced sexual violence, and of those women, over 99% experienced sexual assault by a male perpetrator.⁹ Similarly, women were more likely than men to have experienced partner violence, with the difference in percentages being 17% of women and 5.3% of men.¹⁰ These statistics underpin statements such as that made in the *National Plan to Reduce Violence Against Women and Their Children* that 'at every level of society, gender inequalities have a profound influence on violence against women and their children.'¹¹

This article adds to the work done by other scholars as to the effectiveness of DVDSs.¹² It draws an analogy with SORN systems in assessing the potential effectiveness of DVDSs. The introduction of DVDSs raises many important issues deserving of dedicated attention, such as the impact of DVDSs on privacy and confidentiality, the susceptibility of DVDSs to misuse, the potential impact that a DVDS would have on the number of Domestic Violence Orders that are contested

⁷ See, eg, Urbis, *Literature Review on Domestic Violence Perpetrators* (September 2013) <https://www.dss.gov.au/sites/default/files/documents/09_2013/literature_review_on_domestic_violence_perpetrators.pdf> 7 '[f]emales have disproportionately higher rates of victimization of physical and sexual violence during their lifetimes. This is particularly the case where perpetrators are known to victims, and even more so when perpetrators are in a familial relationship with victims.'

⁸ Australian Bureau of Statistics, *Demographics of Those who have Experienced Sexual Assault* (7 November 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter5002012>>.

⁹ Peta Cox, 'Violence Against Women in Australia: Additional Analysis of the Australian Bureau of Statistics' (Research Report, ANROWS, 2012) 2–3.

¹⁰ Australian Bureau of Statistics, *Experience of Partner Violence* (7 November 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter7002012>>.

¹¹ Commonwealth, *National Plan to Reduce Violence Against Women and their Children: Including the First Three-year Action Plan* (Policy Document, Department of Social Services, 2011) 15 ('*National Plan*'). See also VicHealth, 'Australians' Attitudes to Violence Against Women: Findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS)' (Report, 2014) 34: 'Taken together, [the large and complex body of research on the relationship between violence against women and the inequality in power and resources, gender role and gender identities] indicate a strong relationship between the various markers of gender inequality and violence against women.'

¹² Kate Fitz-Gibbon, '2015 Churchill Fellowship Report' (Report, 28 August 2016) <https://www.churchilltrust.com.au/media/fellows/Fitz-Gibbon_K_2015_Innovative_legal_responses_to_intimate_homicide.pdf> ('*2015 Churchill Fellowship Report*'); Kate Fitz-Gibbon and Sandra Walklate, 'The Efficacy of Clare's Law in Domestic Violence Law Reform in England and Wales' (2017) 17(3) *Criminology and Criminal Justice* 284; Jane Wangmann, 'Has he been Violent Before: Domestic Violence Disclosure Scheme' (2016) 41(1) *Alternative Law Review* 230. See also Jane Wangmann, 'Violent Offenders Registers Sound Good, but are a Costly, Unproven Distraction' *The Conversation* (online), 8 July 2015 <<https://theconversation.com/violent-offenders-registers-sound-good-but-are-a-costly-unproven-distraction-44182>>.

(and the resulting burden on the court's resources and processes), and the impact of DVDSs on minority communities.¹³ However, this article focuses on the mutual aims of DVDSs and SORNs: the reduction of recidivism and the provision of information so that victims and potential victims are better placed to protect themselves. First, the article outlines the features of various forms of DVDSs from relevant jurisdictions (notably from England and Wales, and NSW) and discusses the findings as to their effectiveness. It then compares the features of SORN systems (from Australia — particularly Western Australia, the UK and the USA) to determine the important similarities and differences between these and DVDSs. It considers the research related to the effectiveness of SORN systems in the context of domestic violence. Finally, noting that the majority of victims of the types of offences for which these schemes are established are women, the article argues that such schemes represent a continued assertion of patriarchal power.

II Context

In April 2015, the Council of Australian Governments ('COAG') agreed to take 'urgent collective action ... collective action ... to address [the] unacceptable level of violence against women.'¹⁴ While questions have been posed about the earnestness of such a resolution,¹⁵ states have conducted numerous inquiries into this issue in the past decade. These inquiries have recognised the prevalence of domestic and family violence and examined, inter alia, various regulatory solutions with the aim of promoting its reduction.¹⁶ All of the reports from those inquiries agree that while victims of domestic abuse come from diverse backgrounds, and domestic violence encompasses various forms of relationships, domestic violence is an 'inherently gendered crime' as the majority of victims are women and most perpetrators are men.¹⁷

¹³ Thanks to the anonymous reviewer who raised these issues. For discussion of many of these issues see, eg, Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1, Ch 6.

¹⁴ Council of Australian Governments, 'COAG Meeting Communiqué' (Media Release, 17 April 2015) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communiqu%C3%A9-17-april-2015>>.

¹⁵ Jane Wangmann, 'Australia's 'Urgent' Action on Family Violence has Fallen Years Behind', *The Conversation* (online), 22 April 2015 <<http://theconversation.com/australias-urgent-action-on-family-violence-has-fallen-years-behind-40303>>.

¹⁶ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, Final Report, ALRC Report No 114, NSWLRC Report No. 128 (2010) ('*Family Violence*'); Standing Committee on Social Issues, New South Wales Parliament Legislative Council, *Domestic Violence Trends and Issues* (2012); Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws*, above n 2; Special Taskforce on Domestic and Family Violence in Queensland, Queensland Government, *Not Now, Not Ever – Putting an End to Domestic and Family Violence in Queensland* (2015); Victoria, Royal Commission into Family Violence, above n 2; Social Development Committee, Parliament of South Australia, *Report into Domestic and Family Violence*, Report No 39 (2016).

¹⁷ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 16, 51; Standing Committee on Social Issues, above n 16, xxi; Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws*,

Most of the reports agree that preventative measures are necessary to reduce the incidence of domestic violence.¹⁸ The Australian *National Plan to Reduce Violence against Women and their Children* focused strongly on the need for prevention.¹⁹ The abovementioned state inquiries include regulatory recommendations aimed at primary prevention (such as community-wide educational programs) and tertiary prevention initiatives (such as the strengthening of the domestic violence protection order scheme — specifically to improve police enforcement but, also, to permit nationwide recognition). The disclosure or sharing of information about domestic violence history can be considered in the context of prevention.

There are two types of information sharing or disclosure options:

1. sharing of information about protection orders between agencies, particularly between police, courts and other government departments; and
2. disclosure of criminal/domestic violence history of alleged perpetrators to partners/potential partners or, in some instances, to other community members.

Each of the inquiries mentioned consider the first form of disclosure to be an important and potentially effective preventative measure.²⁰ Information sharing can assist in identifying gaps in service provision and help support vulnerable victims by providing timely responses.²¹

There is less agreement as to the value of the second form of disclosure — often referred to as a DVDS or a domestic violence register. A DVDS aims to provide potential victims of domestic violence (or other interested

above n 2, 11; Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws*, Discussion Paper, Project No 104 (2013) 11; Special Taskforce on Domestic and Family Violence in Queensland, above n 16, 72; Royal Commission into Family Violence, above n 2, 17; Social Development Committee, above n 16, 33. Although we recognize there is some disagreement about preferred terminology (that is, whether reference should be made to family violence, domestic violence, intimate partner violence or violence against women) we have used the phrase domestic violence throughout to refer to violence in an intimate partner or familial situation. Further, we recognize the feminist argument against the use of the term victim and the preference for the term survivor. However, we opt for the term victim in this work.

¹⁸ See, eg, the Royal Commission into Family Violence, above n 2, 11 ('[T]he existing focus on crisis response and justice system mechanisms must be matched by a similar focus on, and investment in, prevention, early intervention and recovery'), ch 36; Special Taskforce on Domestic and Family Violence in Queensland, above n 16, 21 (recommendation 15); Standing Committee on Social Issues, above n 16, ch 5, xvii ('[w]e urge the Government to pursue reforms across the policing, court and service systems, matched with a much greater focus on prevention and early intervention.')

¹⁹ *National Plan*, above n 11, 10.

²⁰ See, eg, Royal Commission into Family Violence, above n 2, ch 7; Special Taskforce on Domestic and Family Violence in Queensland, above n 16, 230–3 (recommendations 78, 79); Standing Committee on Social Issues, above n 16, 78 (recommendations 15–16); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 16, ch 30. See also Annabel Taylor, Nada Ibrahim, Shelley Wakefield and Katrina Finn, 'Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement: State of Knowledge Paper' (Research Report, ANROWS, 2015).

²¹ Taylor et al, above n 20, 41.

parties) with details of a relevant person's history of domestic violence. This arguably allows the potential victim to make more informed decisions about any relationship, the nature of that relationship, and ways they might make informed decisions to take protective measures moving forward. New South Wales implemented a pilot scheme in early 2016.²² The Western Australian Law Reform Commission and the Victoria Royal Commission into Family Violence recommended against the introduction of such a scheme.²³ The Queensland Law Reform Commission subsequently reviewed and reported on the introduction of such a scheme in Queensland, and recommended against doing so.²⁴ The Government of South Australia released a discussion paper in 2016 seeking feedback about the introduction of a DVDS,²⁵ and announced that it was committed to exploring a DVDS.²⁶

The justification for refusing to support a DVDS in Western Australia, Victoria and Queensland related to the lack of evidence of the effectiveness of such a scheme.²⁷ DVDSs exist in England and Wales, Scotland and New Zealand.²⁸ However, given their short life span, there have been no comprehensive reviews as to the impact of such schemes upon victims and perpetrators.²⁹ Further, although NSW is piloting a DVDS, a full evaluation as to the success or otherwise of the pilot is still forthcoming.³⁰

Scholars have also highlighted the lack of evidence about the effectiveness of DVDSs. For example, in 2015 Fitz-Gibbon examined innovative legal responses to intimate homicide in the United Kingdom ('UK'), United States of America ('USA') and Canada.³¹ She reported that

²² New South Wales, *Parliamentary Debates*, above n 4

²³ Law Reform Commission of Western Australia, above n 2, 180; Royal Commission into Family Violence, above n 2, 145.

²⁴ Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1.

²⁵ Attorney General's Department (SA), *Domestic Violence*, Discussion Paper (2016) 51.

²⁶ South Australia Attorney General's Department (SA), above n 3.

²⁷ Law Reform Commission of Western Australia, above n 2, 179; Royal Commission into Family Violence, above n 2, 145; Queensland Law Reform Commission, *Review about whether a Domestic Violence Disclosure Scheme should be Introduced in Queensland*, above n 1 [7.40].

²⁸ Queensland Law Reform Commission, *Review about whether a Domestic Violence Disclosure Scheme should be Introduced in Queensland*, above n 1, 33. There is also a privately-run National Domestic Violence Registry in the US, which allows anyone to search online, see: National Domestic Violence Registry, (US) 2015 <<http://www.domesticviolencedatabase.net>> This registry is a privately-run enterprise. It is a national database which details individuals who have been convicted of domestic violence. The National Domestic Violence Registry carries the motto 'Our Knowledge Helps Save Lives' and appears to exist to allow persons to look for their partner on the register. The website advertises that it is easy to add offenders to their registry, requiring that their name, the offence they have been convicted of, their personal details (height, weight, eye colour and hair colour) and their date of birth be provided, although email submissions are accepted. It is clear from the homepage that any persons listed on the register must have been convicted of an offence in a court of law, and it also clarifies that not all offenders are contained within the list. There are no state-run domestic violence registries in America.

²⁹ Queensland Law Reform Commission, above n 28, 35, 41, 42; see also Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1 [5.11].

³⁰ Queensland Law Reform Commission, *Review about whether a Domestic Violence Disclosure Scheme should be Introduced in Queensland*, above n 1, 49.

³¹ Fitz-Gibbon, *2015 Churchill Fellowship Report*, above n 12.

‘[t]here is an urgent need for research to critically examine and document the impact of [DVDSs] from a system and victim perspective.’³² She opposed the introduction of DVDSs in Australian states and territories.³³ In an article with Walklate, she argued that the English DVDS (‘Clare’s Law’) would not have been effective had it existed in the case of its namesake.³⁴ Wangmann has also expressed opposition to the rollout of DVDSs given the lack of ‘evidence that indicates they enhance women’s safety.’³⁵

III DVDSs and their Effectiveness

The DVDSs that exist in England and Wales and the DVDS in NSW are not identical and there is limited empirical information available as to their effectiveness. This part outlines the details of those DVDSs and canvasses the limited available research.

A *Clare’s Law (England and Wales’ DVDS)*

A DVDS was piloted in 2012,³⁶ as a response to the murder of Clare Wood. Her killer was her former partner, who had prior convictions for the harassment and assault of his former partners, and who had served two prison terms for these offences. The national attention the case garnered, together with a campaign led by the victim’s father, eventually resulted in the introduction of a DVDS scheme known as ‘Clare’s Law’.³⁷ This disclosure scheme, which was implemented across England and Wales from March 2014, allows police to disclose certain information under the ‘police’s common law power to disclose information where it is necessary to prevent crime’.³⁸ However, disclosure is subject to the *Human Rights Act 1998* (UK) c 42 and the *Data Protection Act 1998* (UK) c 29.³⁹ The scheme is comprised of two functions labelled the ‘Right to Ask’ and the ‘Right to Know’.

The ‘Right to Ask’ function enables members of the public (whether a partner or a third party) to ask police about a previous history of domestic violence or violent acts. Under Clare’s Law, when a request for disclosure is made, after initial police vetting, a multi-agency panel of police, probation officers, and other agency personnel thoroughly check the

³² Ibid 51.

³³ Ibid 54 (recommendation 18).

³⁴ Fitz-Gibbon and Walklate, ‘The Efficacy of Clare’s Law in Domestic Violence Law Reform in England and Wales’, above n 12, 290–1.

³⁵ Wangmann, ‘Has he been Violent Before: Domestic Violence Disclosure Scheme’, above n 12, 234; see also Wangmann, ‘Violent Offenders Registers Sound Good, but are a Costly, Unproven Distraction’, above n 12.

³⁶ For fourteen months, from July 2012 to September 2013.

³⁷ Home Office, ‘Clare’s Law to Become a National Scheme’ (Media Release, 25 November 2013) <<https://www.gov.uk/government/news/clares-law-to-become-a-national-scheme>>.

³⁸ Home Office, ‘Domestic Violence Disclosure Scheme (DVDS) Guidance’ (December 2016) 4 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf>.

³⁹ Ibid 4.

request, to ensure that disclosure is only made where it is proportionate and necessary to protect the partner from being the victim of a crime.⁴⁰ Where a third party makes an application for disclosure, it may be made to that person. However, it will usually be made to the partner or it can be made to another person assessed as being in the best place to safeguard the partner.⁴¹ When disclosure is approved, trained police officers and advisers provide support to the victims as they receive and react to such information.⁴² The types of information that may be disclosed include details of previous convictions (other than spent convictions), or other information that gives rise to concern regarding the potential risk of domestic abuse (this may include allegations, arrests or charges).⁴³

The ‘Right to Know’ function allows police the discretion to proactively disclose information in prescribed circumstances. As with the ‘Right to Ask’ function, the decision to disclose will be based on the assessment that it would be ‘lawful, proportionate and necessary’ to do so.⁴⁴ Under this function, a person may receive disclosure because the police receive information which they consider puts someone they know at risk of domestic abuse, and they deem that person to be best placed to protect the potential victim.⁴⁵

Clare’s Law is not, therefore, a public register, and there are strict confidentiality rules attached to any disclosures made.⁴⁶ The information, while being kept confidential, is to be used to keep the potential victim and their family safe; to learn about, and access, available support; and to ask for advice on how to stay safe.⁴⁷

B The New South Wales DVDS

The NSW DVDS was the subject of a Discussion Paper released in May 2015, which resulted in a Consultation Report.⁴⁸ Some submissions made in response to the Discussion Paper raised, inter alia, the following concerns:

⁴⁰ Ibid 8–19. The requirement of necessity and proportionality comes from the limits imposed by the *Human Rights Act 1998* (UK) c 42, which incorporates the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8. Further, decisions to disclose must comply with the *Data Protection Act 1998* (UK) — see specifically s 4, 29 and sch 1.

⁴¹ Home Office, ‘Domestic Violence Disclosure Scheme (DVDS) Guidance’, above n 38, 8.

⁴² Ibid 20.

⁴³ See ibid 6 and 26, Annex B for a non-exhaustive list of offences where convictions and/or allegations may be disclosed.

⁴⁴ As stated above, n 40, the requirement of necessity and proportionality comes from the limits imposed by the *Human Rights Act 1998* (UK) c 42.

⁴⁵ Home Office, ‘Domestic Violence Disclosure Scheme (DVDS) Guidance’, above n 38, 20.

⁴⁶ Ibid 20–21.

⁴⁷ Ibid 50, Annex I.

⁴⁸ NSW Government, *NSW Domestic Violence Disclosure Scheme*, Discussion Paper (2015); NSW Government, *NSW Domestic Violence Disclosure Scheme*, Consultation Report (2015), <https://www.women.nsw.gov.au/_data/assets/file/0010/335386/Abridged-DVDS-Consultation-Summary-FINAL.pdf>.

- that there was scant evidence supporting the success of Clare's Law;
- that any information disclosed may not outweigh the emotional attachment that persons have to their partners, despite risks to their safety; and, similarly
- that it is risky to assume that disclosure will lead to action and 'places the responsibility and pressure on a potential victim'.⁴⁹

Regardless of these concerns, the Report concluded that the submissions received indicated 'broad support for the introduction of a pilot DVDS in NSW.'⁵⁰ The two-year pilot was rolled out in 2016.⁵¹ Four NSW area command centres are involved in the pilot: Oxley, Shoalhaven, St George and Sutherland.⁵² To allow for disclosure under the NSW DVDS, the Privacy Commissioner has made directions in accordance with the *Privacy and Personal Information Act 1998* (NSW) s 41 and the *Health Records and Information Privacy Act 2002* (NSW) s 62.⁵³

A NSW Government information sheet that contains an overview of the scheme begins by clarifying that the DVDS is not a register, but rather a tool for persons to seek information about offending history.⁵⁴ Both 'primary persons' and 'third parties' may apply for disclosure, the requirement being that a primary person is in, or has been in, an intimate relationship with the 'subject'. For a third party to be eligible to apply for disclosure they must be someone who holds concerns for the 'primary person'. Additionally, the 'primary person' must reside in one of the four pilot locations. The definition of 'intimate relationship' is taken from the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5, and includes relationships where people are or have been 'married or in a de facto relationship, or where a person has had an intimate personal relationship with another person, whether or not that relationship was of a sexual nature'.⁵⁵ The process to be followed is also outlined in the information sheet.⁵⁶ The NSW Police will receive and review applications for disclosure, and perform criminal history checks to determine whether disclosure is required.

In terms of what will be disclosed under this scheme, police will disclose any 'relevant offence' in the criminal history of the subject, together with the date of the conviction. The fact sheet then reveals that a 'relevant offence' is an offence of personal violence committed in a

⁴⁹ NSW Government, *NSW Domestic Violence Disclosure Scheme*, Consultation Report, above n 48, 4.

⁵⁰ *Ibid* 3.

⁵¹ New South Wales, *Parliamentary Debates*, above n 4.

⁵² *Ibid*.

⁵³ See Privacy Commissioner, *Direction for Domestic Violence Disclosure Scheme Pilot*, 13 April 2016; and Privacy Commissioner, 'Direction for Domestic Violence Disclosure Scheme Pilot', 13 April 2016.

⁵⁴ NSW Government, 'NSW Domestic Violence Disclosure Scheme' (Factsheet, October 2015) <https://www.women.nsw.gov.au/__data/assets/file/0009/335385/DVDS_Factsheet_Oct-15.pdf>.

⁵⁵ *Ibid* 8.

⁵⁶ *Ibid*.

domestic relationship — drawn from the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11. There is also scope for disclosure of other personal violence offences committed outside a domestic relationship if they are sexual offences, child abuse offences or murder. Any breaches of Apprehended Domestic Violence Orders will also be disclosed.⁵⁷ However, there are some offences that will not be disclosed under this scheme, including offences from jurisdictions outside of NSW, offences where no conviction is recorded, spent convictions and any other offence that is not a relevant offence. Existing Apprehended Domestic Violence Orders will also not be disclosed. This is an important feature of the pilot scheme, which must be openly communicated to any applicant, as is the caution that many instances of domestic violence are never reported, and therefore never heard in court. This is essential information as the purpose of the DVDS is to protect potential victims, and any person who feels concerned enough to make an application for disclosure needs to be fully aware that simply because nothing is disclosed about the subject of their application does not mean they are safe from harm.⁵⁸ The type of information that can be disclosed under the NSW DVDS is much narrower than the information that can be disclosed under Clare's Law.⁵⁹ For example, under Clare's Law any information that reveals a risk of harm to the potential victim may be disclosed, including failed prosecutions, allegations and evidence of non-criminal behaviour.⁶⁰ Nevertheless the additional threshold of 'pressing need' for disclosure required in the DVDS in England and Wales does not apply in NSW, perhaps highlighting that neither system is without flaws.

Where there is information to disclose, the disclosure will be made in person, to the 'primary person', at either the police station or another agreed safe place. The scheme requires, similarly to Clare's Law, that expert domestic and family violence support persons are present, so that the 'primary person' will have services on hand to assist with understanding the disclosure, and preparing for subsequent action (where necessary).

C *The Effectiveness of DVDSs*

The pilot of Clare's Law was subject to limited evaluation, as has been the national rollout.⁶¹ Early indications are that disclosure rates were not especially high during the pilot scheme, primarily because the risk of harm was assessed as insufficient (i.e. the need was assessed as not pressing) to

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ For further analysis of the differences between the two schemes see Wangmann, 'Has he been Violent Before: Domestic Violence Disclosure Scheme', above n 12, 231.

⁶⁰ Jamie Grace, 'Disclosing Domestic Violence' (2014) 97(1) *Criminal Justice Matters* 18, 19.

⁶¹ Home Office (UK), *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment*, Report (2013); Home Office (UK), *Domestic Violence Disclosure Scheme (DVDS): One Year On – Home Office Assessment of National Roll-Out*, Report (2016).

justify disclosure.⁶² The rate of disclosure outlined in the pilot report was 29% while it was approximately 40% in the 12-month evaluation report after the national rollout. However, the pilot assessment report did articulate that

[t]he majority of respondents who had received disclosures stated that the information the police had given them had helped them to make more informed choices about their relationship. As a result of the information disclosed, respondents stated they would be more likely to keep a closer look out for signs of domestic abuse in their relationship and seek support from family and friends. A small number of respondents reported that they were likely to seek support from support services following the disclosure.⁶³

This statement is of limited value, as the sample of respondents was small and may not be representative.⁶⁴ Regardless, feedback from police and partner agencies was largely positive.⁶⁵ There is no further evidence available as to whether disclosures impact upon recidivism or whether potential victims actually took action to remove themselves from danger.

An information sheet prepared by the NSW Government indicates that ‘a professional consulting firm, has been engaged to review and evaluate the NSW Scheme over the pilot period ... including impacts and outcomes for people applying for and receiving disclosures.’⁶⁶ However, there is no indication that the consulting firm will assess the impact of the DVDS scheme on recidivism and, given the short time-frame of the evaluation, this is unsurprising.⁶⁷

Although the results of any formal evaluation of the NSW DVDS have not been published, the Queensland Law Reform Commission reported that, from April to September 2016, 34 applications had been received, with 15 resulting in disclosure.⁶⁸ This is similar to the 40% disclosure rate reported in England and Wales. However, one of the main reasons for the lack of disclosure in England and Wales, relating to not meeting the threshold risk for disclosure, differs from the reasons for lack of disclosure in NSW. The QLRC indicates that circumstances that impacted on the lack of disclosure under the NSW DVDS included: ‘There were no relevant convictions to disclose; a victim may choose to not hear a disclosure requested by a third party; or a victim may change their mind after making an application.’⁶⁹

The DVDS in the UK is both proactive (under the Right to Know provision) and reactive (in that applications can be made for disclosure).

⁶² Claire Bessant, ‘Protecting Victims of Domestic Violence — Have we got the Balance Right?’ (2015) 79(2) *The Journal of Criminal Law* 102, 118. However, in some instances there was no information available to disclose.

⁶³ Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment*, above n 61, 14.

⁶⁴ *Ibid.*

⁶⁵ Home Office, *Domestic Violence Disclosure Scheme (DVDS): One Year On – Home Office Assessment of National Roll-Out*, above n 61, 4.

⁶⁶ NSW Government, ‘NSW Domestic Violence Disclosure Scheme’, above n 54, 3.

⁶⁷ *Ibid.*

⁶⁸ Queensland Law Reform Commission, *Review about whether a Domestic Violence Disclosure Scheme should be Introduced in Queensland*, above n 1, 48 [162].

⁶⁹ *Ibid.*

The NSW scheme is purely reactive, however. Like Clare's Law, a potential victim may be provided with information under the NSW DVDS where someone else has taken the initiative to apply for disclosure. As such, it is not solely up to the potential victim to apply. Both jurisdictions provide for limited disclosure (both in terms of what can be disclosed and to whom.) Both jurisdictions also provide support in the receipt of disclosure and there is some indication from the research on Clare's Law that supports the assertion that victims would be more vigilant following disclosure. However, the fact that victims in NSW chose not to hear disclosure or withdrew their application indicates that behavioural change is unlikely.

There is much more research that needs to be done to determine the effectiveness of DVDSs. Agan states that 'understanding whether sex offender registries work is potentially important because they serve as a precedent for other types of registries.'⁷⁰ Indeed, the effectiveness of SORN systems may be indicative of the potential effectiveness of DVDSs in relation to the impact of registers on recidivism and whether potential victims are likely to take proactive action. As such, SORN systems are considered here.

IV SORN Systems and their Effectiveness

The SORN systems that are compared in this article — those in Australia (particularly Western Australia), the UK and the USA — differ in important respects. This Part explains those SORN systems and the research related to their effectiveness.

A *Megan's Law (the US SORN system)*

In the US, under 'Megan's Law', police are required to release information about registered sex offenders to the public, making the register more relevant to the ordinary person in the community than DVDSs, which restrict disclosed information presumptively to primary persons (i.e. intimate partners) upon application. The form of disclosure under Megan's Law has been termed proactive,⁷¹ or general.⁷² The US SORN systems were federalised in 1994 with the enactment of the *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act 1994*, which mandated all states collect and maintain similar forms of data so that the information contained in these registries could be shared nationwide.⁷³ Offenders 'who were convicted of various criminal offences

⁷⁰ Amanda Agan, 'Sex Offender Registries: Fear without Function?' (2011) 54(1) *The Journal of Law & Economics* 207, 235.

⁷¹ Laura Whitting et al, 'The Impact of Community Notification on the Management of Sex Offenders in the Community: An Australian Perspective' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 240, 241.

⁷² See Carol Ronken and Hetty Johnston, 'Community Notification of Sex Offenders' (Position Paper, Bravehearts, June 2017) 2.

⁷³ Trevor Jones and Tim Newburn, 'Policy Convergence, Politics and Comparative Penal Reform: Sex Offender Notification Schemes in the USA and UK' (2013) 15(5) *Punishment & Society* 439, 445.

against children, or “sexually violent offences” against children or adults [were required] to register their address with a state law enforcement agency.⁷⁴ While this demonstrated the efforts of the legislature to respond to the campaign for better protection from recidivists, it was not until 1996 that community notification was incorporated into the legislation. This followed a case involving seven-year-old Megan Kanka, who was raped and murdered by a twice-convicted sex offender living locally.⁷⁵

Various amendments to the original Act refined and developed the law, and by the year 2000 all American states had SORN laws, although there are considerable variations among the respective state schemes.⁷⁶ These variations have resulted in some offenders being subjected to more extreme consequences than others. The notification requirements range from community notifications being made at public meetings to directions by a Judge to a convicted offender to affix a sign to his house declaring ‘Danger, registered sex offender lives here’.⁷⁷ Later, changes in the federal registration laws required ‘states to make information about registrable offenders readily accessible to the public via an internet site.’⁷⁸

B Sarah’s Law (the UK’s SORN System)

A sex offender registry was legislated for in the *Sex Offenders Act 1997* (UK). This scheme required offenders to report their name and address to police if they were convicted of a listed sexual offence, including adult-victim offences.⁷⁹ The Act’s purpose was directed towards the monitoring of sex offenders by police and other interested agencies. There was no provision made for community notification or public access to these registers.⁸⁰ Reluctance regarding the publication of such registers was noted in the 1996 consultation papers, where concerns raised the possibility of harassment of offenders, victim identification or offender networking.⁸¹ The Scheme has subsequently been broadened to require regular reporting and encompass a greater number of offences.⁸²

However, while the information contained in the register is not available for public consumption, there is also a Child Sex Offender

⁷⁴ Victorian Law Reform Commission, *Sex Offenders Registration*, Final Report (2011) [2.8]; see also Violent Crime Control and Law Enforcement Act of 1994, 42 USC § 170101(a)(1)(A) (1994); Violent Crime Control and Law Enforcement Act of 1994, 42 USC § 170101(a)(1)(A) (1994).

⁷⁵ See *EB v Verniero*, 119 F 3d 1077, 1081 (3rd Cir, 1997), and Jones and Newburn, above n 73.

⁷⁶ See discussion in Naomi Freeman, ‘The Public Safety Impact of Community Notification Laws: Re-arrest of Convicted Sex Offenders’ (2012) 58(4) *Crime and Delinquency* 539, 540; Robert Lytle, ‘Variation in Criminal Justice Policy-Making: An Exploratory Study Using Sex Offender Registration and Community Notification Laws’ (2015) 26(3) *Criminal Justice Policy Review* 211, 212, 214; and Whitting et al, above n 71, 242.

⁷⁷ Jones and Newburn, above n 73, 445.

⁷⁸ See the *Adam Walsh Child Protection and Safety Act* 42 USC §§ 16901-16991 (2010).

⁷⁹ *Sex Offenders Act 1997* (UK) c 51, sch 1, ss 2(3), (5).

⁸⁰ Jones and Newburn, above n 73, 448.

⁸¹ *Ibid* 447.

⁸² Victorian Law Reform Commission, above n 74, [2.17]. See now *Sexual Offences Act 2003* (UK) c 42, pt 2 and sch 3.

Disclosure Scheme operating across England and Wales, which allows third parties to formally ask the police whether someone (who has contact with a child or children) has a record for child sexual offences.⁸³ This type of scheme involves reactive or limited disclosure.⁸⁴ The disclosure scheme, known as ‘Sarah’s Law’, was enacted in 2008 as a pilot, in response to the abduction and murder of an eight-year-old child. The offender was a man who had previously served time in prison for sexual offences and child abduction.⁸⁵ The disclosure scheme was developed after consideration of ‘Megan’s Law’, but differs substantially in that disclosure is controlled and information is only disclosed to the person (or persons) whom the Multi-Agency Public Protection Authorities believe need(s) to know, and this person(s) may not be the applicant(s). By April 2011, ‘Sarah’s Law’ was in effect across all 43 police forces in England and Wales.

Disclosure follows a comprehensive process. There is a presumption of disclosure where the authority has reasonable cause to believe that the child sex offender poses a risk of causing serious harm to any child or children and disclosure to the member of the public is necessary to protect the child or children.⁸⁶ Not all applications are approved. An evaluation of the pilot program revealed that take-up was less than expected (only seven per cent of the applications resulted in disclosure) and the scheme was not unduly onerous for the police to maintain.⁸⁷ A small number of applicants (43) were interviewed and on the whole they thought ‘the pilot contributed to general levels of alertness about risks to, and protection of, children.’⁸⁸ More recently, the National Society for the Prevention of Cruelty to Children obtained data as to the use of Sarah’s Law between 2011 and 2014. It reported that one in six applications made under the scheme were successful and that the disclosure numbers varied significantly between locations, with some police services making disclosures at a rate as low as one per cent while others disclosed information in approximately one third of applications.⁸⁹

⁸³ Home Office, *Find out if a person has a record for child sexual offences* (26 March 2013) <<https://www.gov.uk/guidance/find-out-if-a-person-has-a-record-for-child-sexual-offences>>.

⁸⁴ Whitting et al, above n 71; Bravehearts, above n 72, 2.

⁸⁵ Jones and Newburn, above n 73, 448.

⁸⁶ *Criminal Justice Act 2003* (UK) c 44, s 327A(3).

⁸⁷ Hazel Kemshall et al, ‘Child Sex Offender Review (CSOR) Public Disclosure Pilots: A Process Evaluation – 2nd edition’, (2010) *Home Office Research Report 32*.

⁸⁸ *Ibid* ii.

⁸⁹ NSPCC, ‘“Sarah’s Law” Postcode lottery may leave children at risk from sexual abuse’ (30 July 2015) available at <https://www.nspcc.org.uk/what-we-do/news-opinion/sarahs-law-postcode-lottery/?_t_id=1B2M2Y8AsgTpgAmY7PhCfg%3d%3d&_t_q=sarahs+law&_t_tags=language%3aen%2csiteid%3a7f1b9313-bf5e-4415-abf6-aaf87298c667&_t_ip=10.99.66.5&_t_hit.id=Nspcc_Web_Models_Pages_NewsPage/_472cc9f4-8f6d-4ded-af3a-9d9412b8f081_en-GB&_t_hit.pos=1>.

C Australian SORN Systems (in particular the Western Australian System)

Each Australian state and territory has a register that requires the details of particular sex offenders (mostly those that have committed offences against children) to be registered.⁹⁰ Registered offenders have reporting requirements to keep police informed of their whereabouts, with the aim of reducing ‘the likelihood of reoffending and facilitating the investigation of future offences they may commit.’⁹¹ The police, or their agents, register and, usually at the discretion of the police commissioner, can share information about registered persons.⁹² The Australian National Child Offender Register provides a service that alerts law enforcement agents to the movement of registered offenders across jurisdictions.⁹³

Western Australia is the first Australian state to embrace a community notification system, having passed legislation in 2012 that allows for the disclosure of information to certain members of the public in certain situations. It has been reported that a national public register has been discussed and rejected by COAG.⁹⁴ Bills for public registers have also been introduced but have not been passed in numerous other Australian jurisdictions.⁹⁵ Currently, Western Australia remains alone in providing for public notification.

The Western Australian scheme has a three-tiered approach to disclosure. If a reportable offender goes missing (because, for example, they fail to comply with their reporting obligations) Tier 1 publication applies. Under this tier, a reportable offender’s photograph and personal details can be published on the community protection website.⁹⁶ This is more akin to the proactive, general disclosure available in the USA. Tier 2

⁹⁰ For a summary of the details of each state and territory see: Australian Government, Australian Institute of Family Studies, ‘Offender Registration Legislation in Each State and Territory’ (June 2013) at <<https://aifs.gov.au/cfca/offender-registration-legislation-each-australian-state-and-territory>>; see also Carolyn Adams and Krista Lee-Jones, ‘A Study into the Legislative – and related Key Policy and Operational – Frameworks for Sharing Information Relating to Child Sexual Abuse in institutional Contexts’ Report for the Royal Commission into Institutional Responses in Child Sexual Abuse (May 2016) 81; and James Vess, Brooke Langskaill, Andrew Day, Martine Powell and Joe Graffam, ‘A Comparative Analysis of Australian Sex Offender Legislation for Sex Offender Registries’ (2011) 44(3) *Australian and New Zealand Journal of Criminology* 404.

⁹¹ Adams and Lee-Jones, *ibid* 82.

⁹² *Ibid* 83.

⁹³ *Ibid* 81.

⁹⁴ *Ibid* 81, referring to ABC News, Federal Government Resisting Internal Pressure to Create National Sex Offender Register: NT Register Introduced after National System Rejected at COAG, (16 October 2014), <<http://www.abc.net.au/news/2014-10-16/government-resists-pressure-for-national-sex-offenderregister/5817112>>.

⁹⁵ See, eg, Child Protection (Nicole’s Law) Bill 2009, a private members bill that lapsed in NSW and was reintroduced as Child Protection (Nicole’s Law) Bill 2015; the Sex Offender and Child Homicide Offender Public Website (Daniel’s Law) Bill 2015 was withdrawn; in Queensland the Child Protection (Offender Reporting – Publication of Information) Amendment Bill 2013 was referred to the Legal Affairs and Community Safety Committee, which recommended against passing the Bill. The Bill failed. There are also privately-run registers, however these are outside the scope of this article.

⁹⁶ *Community Protection (Offender Reporting) Act 2004* (WA) ss 85F and 85G.

publication allows for photographs and the locality of dangerous sexual offenders and serious repeat reportable offenders — and other persons whose details have been authorised for publication by the Minister for Police because they have been convicted of an offence punishable by imprisonment for five years or more, and concern is held that they pose a risk to the lives or sexual safety of one or more persons or persons generally — to be accessed by applicants who reside in the locality of the offenders.⁹⁷ While this tier is proactive, it is limited in terms of accessibility. Tier 3 publication can occur when a parent or guardian applies to the Commissioner of Police for information about whether a person of interest, who has regular unsupervised contact with their child, is a reportable offender. The Commissioner has a discretion whether to disclose.⁹⁸ The third tier is more akin to the limited, reactive disclosure available in the United Kingdom.

V Effectiveness of SORN Systems

SORN systems have been much debated since their inception. Those in favour of opening sex-offender registers to the public argue that all community members should be aware if a convicted sex offender has moved into their neighbourhood. It is suggested that promoting such awareness will increase vigilance and reduce the risk of reoffending.⁹⁹ Opponents claim that such a register thwarts the very nature of our justice system and does not have any tangible impact on rates of offending.¹⁰⁰ They suggest that once an offender has served their punishment they should be entitled to move forward with their life and not be followed by their prior mistakes.¹⁰¹ Further, being named on such a register can impact negatively upon reintegration and the possibility of rehabilitation, including by impeding housing and employment prospects, and through increasing the risk of vigilante action.¹⁰²

⁹⁷ That is, those who reside in the same suburb and the adjoining suburb: see <<https://www.communityprotection.wa.gov.au/About?cookieCheck=true>>.

⁹⁸ *Community Protection (Offender Reporting) Act 2004* (WA) s 85J.

⁹⁹ See some evidence of reduced offending in JJ Prescott and Jonah E Rockoff, 'Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour' (2011) 54(1) *The Journal of Law and Economics* 161; and Grant Duwe and William Donnay, 'The Impact of Megan's Law on Sex Offender Recidivism: The Minnesota Experience' (2008) 46(2) *Criminology* 411; see also Whitting et al, above n 71, 242.

¹⁰⁰ Evidenced in, for example, Agan, above n 70; Kristen Zgoba, et al, 'Megan's Law: Assessing the Practical and Monetary Efficacy' (December 2008) available at <<https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>>; Richard Tewksbury and Wesley Jennings, 'Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories' (2010) 37(5) *Criminal Justice and Behavior* 570.

¹⁰¹ See Bravehearts, above n 72, 3–4.

¹⁰² Jill Levenson and Leo Cotter, 'The Effect of Megan's Law on Sex Offender Reintegration' (2005) 21(1) *Journal of Contemporary Criminal Justice* 49; Richard Tewksbury, 'Collateral Consequences of Sex Offender Registration' (2005) 21(1) *Journal of Contemporary Criminal Justice* 67; see discussion in Whitting et al, above n 71, 244. Cf, Laura Whitting, Andrew Day and Martine Powell, 'An Evaluation of the Impact of Australia's First Community Notification Scheme' (2016) *Psychiatry, Psychology and Law*, DOI: 10.1080/13218719.2016.1247606, 10, whose research talking with police officers from a WA squad responsible for managing the WA scheme found that only two of the 21 officers were

This article focuses on the impact of SORN systems upon recidivism and change in victim behaviour. It considers how the results of the research for SORN systems may apply to DVDSs.

VI Recidivism

Overall, the evidence in Australia, the UK and the USA indicates that SORN systems have no demonstrable effect on reoffending.¹⁰³ However, there are some inconsistent findings in the literature. For example, on the issue of registration only, Prescott and Rockoff have found that ‘actual registration of released sex offenders is associated with a significant decrease in crime.’¹⁰⁴ They suggest that the reason is due to the increased monitoring by law enforcement officers and, consequently, increased potential for punishment if they reoffend.¹⁰⁵ Registration, they find, has a greater downward impact upon the rate of offending against those known to the offender, but there is no impact on the number of offences committed against strangers. While they indicate that there is some specific deterrence impact of registration, there is no evidence of general deterrence (that is, there is no evidence that non-registered people are deterred from committing sex offences).¹⁰⁶ This appears to be the only study from the USA that differentiates registration from notification.¹⁰⁷

Australian research to date is limited to the perceptions of police officers as to the value of sex offender registries.¹⁰⁸ Powell et al found, after interviewing 24 police officers across Australia, that all police thought that ‘although it is unrealistic to expect a registry to eliminate all offending from convicted offenders, having a register was better (in terms of contributing to public safety) than having no registry at all.’¹⁰⁹ However, these views were based on anecdotal evidence. And views differed between officers in the same jurisdictions, who had access to the same recidivism data.

Of the studies regarding notification it is important to differentiate between the results of the USA studies of the proactive, general, disclosure systems and those in Western Australia and the UK, which are much more reactive in nature. This is because the unlimited public availability of identification details may causally impact on recidivism (and general deterrence) in different ways to the systems that restrict access to information to particular persons.

aware of acts of vigilantism (both of which did not result in charges) and that an examination of the agency’s system found only one other instance of an individual being charged with a vigilante offence.

¹⁰³ See Whitting et al, above n 71, 247; Zgoba, et al, above n 100, 7; and Kathleen Lampley, *The Impact of Sex Offender Registration and Community Notification on Recidivism in Alabama* (PhD Thesis, Capella University, 2016) 74.

¹⁰⁴ Prescott and Rockoff, above n 99, 164.

¹⁰⁵ Ibid and 180–1.

¹⁰⁶ Ibid 180.

¹⁰⁷ Victorian Law Reform Commission, above n 74, 55.

¹⁰⁸ Martine Powell, Andrew Day, Mairi Benson, Jim Vess & Joe Graffam, ‘Australian Police Officers’ Perceptions of Sex Offender Registries’ (2014) 24(1) *Policing and Society: An International Journal of Research and Policy* 120.

¹⁰⁹ Ibid 123.

Specifically, one of the biggest concerns about proactive disclosure is that it will impede an offender's integration into the community.¹¹⁰ This is because it has been shown to create physical obstacles to reintegration, in that it may impact on housing and employment prospects and may result in a loss of social supports.¹¹¹ The Australian police involved in one of the only studies of Australian registers were overwhelmingly opposed to a public register on the basis that, inter alia, being 'ostracised and denied social support was perceived to increase pressure and risk of re-offending.'¹¹² A more restricted disclosure system (such as that in the UK and Tier 3 — and even potentially Tier 2 in Western Australia) may be less likely to have such an impact. Certainly, UK research has been cited as supporting the view that 'limited disclosure of information to members of the public has fewer negative consequences than blanket disclosure.'¹¹³ But that research had a significant flaw in that those who were interviewed had not been subjected to disclosure.¹¹⁴ As Vess et al stated,

[w]hile it appears reasonable to assume that many of the negative outcomes reported for offenders and their families that result from public awareness of their offending are avoided by laws that restrict access to this information, the effects of registration on sex offenders in Australia are essentially unknown at this time. However, the limited empirical evidence from the US indicates that community notifications are not particularly effective in reducing sexual reoffending.¹¹⁵

In the USA, some studies provide support for the assertion that notification laws reduce sexual reoffending.¹¹⁶ Those studies specifically considered offenders with the highest risk classification, 'who were subjected to the most extensive notification.'¹¹⁷

The majority of American research, however, indicates that SORN systems do not reduce offending, and some find a correlation with an *increase* in recidivism.¹¹⁸ In New Jersey, a report was released in 2008 about research that was designed to examine the effect of 'Megan's Law'

¹¹⁰ See discussion in Whitting et al, above n 71, 244.

¹¹¹ Jill Levenson, David D'Amora and Andrea Hern, 'Megan's Law and its Impact on Community Re-entry for Sex Offenders' (2007) 25 *Behavioral Sciences and the Law* 587. See also Tewksbury and Jennings, above n 100, 580; Whitting et al, above n 71, 244.

¹¹² Powell et al, above n 108, 125.

¹¹³ Laura Whitting, Andrew Day and Martine Powell, 'Police Officer Perspectives on the Implementation of a Sex Offender Community Notification Scheme' (2016) 18(4) *International Journal of Police Science & Management* 261, 263 citing Hazel Kemshall and Jason Wood 'Child Sex Offender Review (CSOR) Public Disclosure Pilots: A Process Evaluation – 2nd edition', Research Report (March 2010).

¹¹⁴ Ibid.

¹¹⁵ Vess et al, above n 90, 422.

¹¹⁶ See, eg, Grant Duwe and William Donnay, 'The Impact of Megan's Law on Sex Offender Recidivism: The Minnesota Experience' (2008) 46(2) *Criminology* 411 and Elizabeth Letourneau, Jill Levenson, Dipankar Bandyopadhyay, Kevin Armstrong and Debajyoti Sinha, 'Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes' (2010) 37(5) *Criminal Justice and Behavior* 537. See also further discussion in Whitting et al, above n 71, 247 and 250.

¹¹⁷ Whitting et al, above n 71, 255.

¹¹⁸ Whitting et al, above n 71, 247.

on the overall rate of sexual offending, its specific deterrent effect on re-offending, and the costs associated with implementing and maintaining these registers in that state.¹¹⁹ The results of this study showed, inter alia, that Megan's Law had no demonstrable effect on sexual re-offending, and no effect on reducing the number of victims of sexual offences.¹²⁰ Another study in that state established no discernible differences in rates of recidivism pre- and post- the introduction of its SORN system, concluding that the 'SORN is not likely an effective deterrent for sex offender recidivism'.¹²¹ A study in Iowa also found that sex offender registry and notification laws did not reduce 'the rate of sex offender recidivism'.¹²² On a broader scale, Prescott and Rockoff examined data from 15 states in their research, which found an increase in recidivism following the introduction of community notification laws.¹²³ Further, Drake and Aos,¹²⁴ and Socia and Stamatel,¹²⁵ conducted meta-analyses, and found that sex offender registration and community notification laws had no impact on reoffending rates. From their research, Tewksbury, Jennings and Zgoba note that recidivism is linked to whether an offender is in a high-risk category and suggest that regulatory policy should target the risk factors of those offenders, rather than applying a SORN system universally.¹²⁶

Australian research that involved interviewing 21 police officers involved in administering the community notification system in Western Australia reveals a similar sentiment among respondents. That is, few thought that the scheme would be an effective deterrent. Further, respondents recognised that differences in offender characteristics would impact on the deterrent effect. That is, the scheme would not 'deter opportunistic offenders [and those] living itinerant lifestyles'.¹²⁷

Care must be taken in applying the recidivism research related to sex offenders under SORN systems to domestic violence perpetrators whose history may be disclosed under a DVDS. While there are similarities between the SORN systems and DVDSs, in that largely the victims of the offences related to these systems (sex offences and domestic violence) are women, and that both these types of offences often go unreported, there are important differences. Notably, for present purposes, rates of recidivism differ. The rate of recidivism for sex offenders is generally reported to be

¹¹⁹ Zgoba et al, above n 100.

¹²⁰ Ibid.

¹²¹ Richard Tewksbury, Wesley Jennings and Kristen Zgoba, 'A Longitudinal Examination of Sex Offender Recidivism prior to and following the Implementation of SORN' (2012) 30 *Behavioral Sciences and the Law* 308, 325.

¹²² Tewksbury and Jennings, above n 100, 579.

¹²³ Prescott and Rockoff, above n 99.

¹²⁴ Elizabeth Drake and Steve Aos, *Does Sex Offender Registration and Notification Reduce Crime? A Systematic Review of the Research Literature* (Washington State Institute of Public Policy, 2009).

¹²⁵ Kelly Socia Jr and Janet Stamatel, 'Assumptions and Evidence Behind Sex Offender Laws: Registration, Community Notification, and Residence Restrictions' (2010) 4 *Sociology Compass* 1.

¹²⁶ Tewksbury, Jennings and Zgoba, above n 121, 324.

¹²⁷ Whitting, Day and Powell, above n 113, 265.

among the lowest of all offender types.¹²⁸ Further, the victims of the sexual offenders who are subject to SORN systems are not restricted to those in an intimate partner or family violence context. It may be hypothesised, then, that domestic violence perpetrators have readier access to their victims and, as they are statistically more likely to reoffend, they are less likely to be deterred by the existence of a register that records their past offences and from which such information can be disclosed to a partner. This deterrence may be felt even less in DVDSs like the NSW scheme, which does not provide for the Right to Know option. Such a DVDS requires the victim (or a third party) to ask for disclosure, which would suggest disclosure will be less likely to occur than in the systems where police can pass on information as they perceive necessary. If such disclosure is less likely to occur, then perhaps the balancing exercise that the perpetrator engages in to be deterred from offending would not result in the consequences outweighing the perpetration of violence. As such, our conclusions from an analysis of the relevant literature of the potential impact of DVDS upon recidivism, which have been determined by drawing analogies with SORN systems, are indicative at best.

What our analysis of the research discussed above *does indicate* is that the DVDS is unlikely to impact significantly upon recidivism. While the information sharing aspect of disclosure may (consistently with the research findings regarding sex offender registries) reduce recidivism, the same cannot be said for the DVDS. DVDSs are limited to orally providing information (usually to the victims). They do not disclose information to the general public. As such, it is less likely that DVDSs will see the increases in rates of recidivism that have sometimes been reported for the SORN systems in the United States. Further, the United States' studies that found a reduction in sexual offending are of limited value as the level of notification available under a DVDS is much less extensive than the US SORN systems (which are publicly available on the internet). As stated above, the majority of findings related to community notification in SORN systems found that there is no reduction in offending. If that is the case for sex offenders, who are less likely to reoffend than perpetrators of domestic violence, it would seem even less likely that DVDSs are likely to reduce recidivism.

The available evidence on the limited effectiveness of SORN systems in relation to reducing recidivism, coupled with the differences between sex offenders and domestic violence offenders, suggest that it would be

¹²⁸ See discussion in Karen Gelb, Sentencing Advisory Council, *Recidivism of Sex Offenders: Research Paper* (January 2007); and Tewksbury, Jenning and Zgoba, above n 121, 309–10. The research in relation to Domestic Violence recidivism in Australia is limited, but research in relation to recidivism of violent domestic violence offenders after two years has indicated the rate of recidivism at 8% (Robin Fitzgerald and Timothy Graham, 'Assessing the Risk of Domestic Violence Recidivism' (May 2016) *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* No. 189) while the rate of recidivism of a domestic violence incident over a ten year period in Victoria was 38.4% (Melanie Millstead, Crime Statistics Agency, 'How Many Repeat Family Violence Perpetrators were there in Victoria over the Past Ten Years?' (April 2006) *In Fact* No. 2).

prudent to invest resources into targeted programs rather than a DVDS. Like the research for sex offenders, which stresses the importance of offender characteristics, the individual characteristics of domestic violence perpetrators are likely to impact rates of recidivism. An individualised program that addresses offending behaviour has a greater prospect of reducing recidivism, rather than a blanket, universal scheme such as a DVDS. If a DVDS is not going to achieve a reduction of recidivism it may still have some utility if potential victims change their behaviour.

VII Behavioural Change of Potential Victims

Research from the United States has found that members of the public ‘rarely access and utilize sex offender registries and are generally misinformed about their contents.’¹²⁹ This lack of access has been confirmed even in those communities with registered sex offenders, as research has found community members are ‘highly unlikely to know of their presence and residence.’¹³⁰ While there is some evidence that demonstrates increased vigilance of community members upon receiving information as to the nearby residential location of sex offenders,¹³¹ much of the evidence thus far indicates that ‘community members simply are not motivated by notification to change their personal safety habits.’¹³² And generally those ‘laws do little to encourage individuals to adopt preventative measures for themselves or their children.’¹³³ A related criticism of the register argues that a false sense of security may be engendered as members of the community believe that known offenders are being monitored, and feel protected, when it is proven that most victims of sexual abuse suffer at the hands of a family member or known acquaintance.¹³⁴

¹²⁹ See discussion in Elizabeth Mustaine, Richard Tewksbury, David Connor and Brian Payne, ‘Criminal Justice Officials’ Views of Sex Offenders, Sex Offender Registration, Community Notification, and Residency Restrictions’ (2015) 36(1) *Justice System Journal* 63, 65 referring to eg Amy Anderson and Lisa Sample, ‘Public Awareness and Action Resulting from Sex Offender Community Notification Laws (2008) 19(4) *Criminal Justice Policy Review* 371.

¹³⁰ Mustaine, above n 129, referring to Keri Burchfield, ‘Assessing Community Residents’ Perceptions of Local Registered Sex Offenders: Results from a Pilot Survey’ (2012) 33(4) *Deviant Behavior* 241 and Sarah Craun, ‘Evaluating Awareness of Registered Sex Offenders in the Neighborhood’ (2010) 56(3) *Crime and Delinquency* 414.

¹³¹ Whitting et al, above n 71, 242 referring to eg, Roxanne Lieb and Corey Nunlist, *Community Notification as Viewed by Washington’s Citizens: A 10-Year Follow-Up* (Washington State Institute for Public Policy, 2008).

¹³² Rachel Bandy, ‘Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviors’ (2011) 10(2) *Criminology and Public Policy* 237, 255.

¹³³ Lisa Sample, ‘The Need to Debate the Fate of Sex Offender Community Notification Laws’ (2011) 10(2) *Criminology & Public Policy* 265, 265 discussing Amy Anderson and Lisa Sample, ‘Public Awareness and Action Resulting from Sex Offender Community Notification Laws (2008) 19 *Criminal Justice Policy Review* 371; Amy Anderson, Mary Evans and Lisa Sample, ‘Who Accesses the Sex Offender Registries? A Look at Legislative Intent and Citizen Action in Nebraska’ (2009) *Criminal Justice Studies: A Critical Journal of Crime, Law, and Society* 22; and Victoria Simpson Beck and Lawrence Travis, ‘Sex Offender Notification and Protective Behavior’ (2004) 3 *Violence and Victims* 289.

¹³⁴ Whitting et al, above n 71, 242–3.

An important consideration for a DVDS is the unique dynamic that exists in situations of domestic violence, as it is well documented that victims of domestic violence are often trapped in abusive relationships due to a lack of control, or confusion regarding their choices,¹³⁵ or are simply not willing to leave.¹³⁶ However, the assumptive basis of DVDS schemes is that, once disclosure has been made, the victim will leave the relationship. Fitz-Gibbon and Walklate suggest that the success of a DVDS would be impacted by, inter alia, the complex nature of the relationship between the victim and offender.¹³⁷ The Queensland Law Society also note that:

A DVDS appears to be premised on the understanding that accessing information about a partner or ex-partner's criminal history will allow a person at risk to make an informed decision about the relationship and their safety. In the Society's view, this understanding is flawed and fails to acknowledge the dynamics of disempowerment and control present in relationships involving family violence. Victims of family violence do not remain in violent relationships because they are unaware of the presence or risk of violence. Rather, this decision is often underpinned by a variety of complex factors, including fear for their safety, fear of homelessness, a lack of access to appropriate support services, fear of children being removed and shame associated with culture or religion.¹³⁸

As Wangmann observes, these victims may not appreciate, or take advantage of, opportunities to escape these relationships.¹³⁹ This may explain the small number of potential and actual victims who sought support from domestic violence support and prevention services following receipt of information under the UK's pilot DVDS.¹⁴⁰ Additionally, the evidence available from a study of the pilot UK scheme revealed that, once disclosure had been made, the involvement of the authorities was limited unless the potential victim requested further help, and even in situations where help was requested, resources were not always available to facilitate this.¹⁴¹ These concerns highlight the need for extreme care to be taken when planning for the consequences of disclosure under a DVDS, in order to avoid creating outcomes that further endanger the victims involved.¹⁴²

Although the DVDSs discussed in this article do have measures in place to lessen the likelihood that an applicant will be under a misconception following lack of disclosure, the research related to SORN systems indicates that, where disclosure is made, behavioural change is unlikely.

¹³⁵ For further discussion of this issue see Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1, [6.93]–[6.106].

¹³⁶ Fitz-Gibbon and Walklate, above n 12, 295.

¹³⁷ *Ibid* 284–300, 291–5.

¹³⁸ Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1, [6.95].

¹³⁹ Wangmann, 'Has he been Violent Before: Domestic Violence Disclosure Scheme', above n 12, 234.

¹⁴⁰ Jamie Grace, 'Clare's Law, or the National Domestic Violence Disclosure Scheme: The Contested Legalities of Criminality Information Sharing' (2015) 79(1) *The Journal of Criminal Law* 36, 38–9.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* 296.

And this would appear even more unlikely to occur in the domestic violence context, even if support services are provided.

DVDSs then, like SORNs, appear to have little utility in terms of reducing recidivism and in changing victim behaviour. Why, then, are they in favour in some jurisdictions? Could it be that, given the gendered nature of the offences, these registries are an extension of patriarchy?

VIII Registries and Patriarchy

Patriarchy has been defined as ‘the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general.’¹⁴³ This definition alludes to the binary conceptions of patriarchy. On the one hand patriarchy can be individual, direct or familial, and on the other it can be institutional, structural, societal or systemic.¹⁴⁴

Feminist scholars have used patriarchy to explain violence against women since the 1970s.¹⁴⁵ Particularly, domestic violence has been said to correlate with the use men make of violence against their female partners ‘to reinforce the patriarchal power of the household or to force the females in question to behave according to their expected gender roles.’¹⁴⁶ However, research casts doubt about this type of explanation. For example, some studies indicate that it is the men with the *least* power that are likely to use violence.¹⁴⁷ Instead, as Hunnicutt asserts, ‘violence against women is more of a consequence of patriarchies than the cause of them.’¹⁴⁸ The patriarchy Hunnicutt is referring to is the societal kind.¹⁴⁹ Johnson explains that a patriarchal society has five characteristics that support male privilege:

1. male dominance;
2. male identification;
3. male centeredness;
4. an obsession with control; and

¹⁴³ Gerda Lerner, *The Creation of Patriarchy* (OUP, 1986) 239.

¹⁴⁴ See, eg, explanations of some of these different forms of patriarchy, specifically: social and familial in Walter S DeKeseredy, ‘Feminist Contributions to Understanding Woman Abuse: Myths, Controversies, and Realities’ (2011) 16(4) *Aggression and Violent Behavior* 297, 299; direct and structural in Melinda York, *Gender Attitudes and Violence against Women* (LFB Scholarly Publishing LLC, 2001) 5; and individual and institutional in Jesse Robert McKee, *Patriarchal Ideology and Violence Against Women: A Theoretical Contribution Using Longitudinal, Individual-level Analyses* (PhD Thesis, Old Dominion University, May 2014).

¹⁴⁵ See, eg, Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Fawcett Columbine, 1975) and R Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case against the Patriarchy* (Free Press, 1979).

¹⁴⁶ Dobash and Dobash, above n 145, 2.

¹⁴⁷ See discussion in Gwen Hunnicutt, ‘Varieties of Patriarchy and Violence Against Women: Resurrecting “Patriarchy” as a Theoretical Tool’ (2009) 15(5) *Violence Against Women* 553.

¹⁴⁸ *Ibid* 561.

¹⁴⁹ This is further evident in her definition of patriarchy: see *ibid*, 557: ‘social arrangements that privilege males, where men as a group dominate women as a group, both structurally and ideologically.’

5. oppression of women.¹⁵⁰

While there has also been some controversy over the use of this form of patriarchy (and particularly criticism has been levelled at it being thought to be immutable and proffered as the sole explanation or ultimate reason for violence),¹⁵¹ the themes of male dominance, power and control pervade the literature.¹⁵² Particularly, it is generally accepted that domestic violence is ‘a gendered phenomenon encompassing a complex and continuing pattern of coercive and controlling behaviour that deprives the victim of her liberty and her autonomy.’¹⁵³

The position taken in this article aligns with Hunnicutt’s nuanced view of patriarchy.¹⁵⁴ She asserts that ‘[v]iolence against women is a product of patriarchal social arrangements and ideologies that are sustained and reinforced by other systems of domination.’¹⁵⁵ There is little doubt that, as stated earlier in this article, the conduct compared here — sexual offences and domestic violence — are gendered crimes that are products of a patriarchal society.¹⁵⁶

The question, then, is whether the patriarchal system that informs violence against women is also manifested in the disclosure schemes discussed in this article. Regulatory solutions, such as those involved in this discussion, have the potential to reduce the impact of patriarchy in society if they are carefully implemented. Alternatively, laws can have a juridogenic effect¹⁵⁷ — that is, their operation can be harmful. Specifically, in this context, laws can bolster and maintain patriarchy.¹⁵⁸ Indeed, other scholars have reported that the processes of the legal system can further victimise and disempower women and extend the space in which they are

¹⁵⁰ Allan G Johnson, *The Gender Knot: Unraveling our Patriarchal Legacy* (Temple University Press, Rev edn, 2005) 5.

¹⁵¹ See, for example, Donald G Dutton, *Rethinking Domestic Violence* (University of British Columbia Press, 2006), see also discussion in, eg, Kristin L Anderson, ‘Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches’ (1997) 59 *Journal of Marriage and the Family* 655, 655–6; and Hunnicutt, above n 147, 553.

¹⁵² See Hunnicutt, above n 147. For example, at 567, Hunnicutt states ‘there is a subterranean embrace of [patriarchy] as the conceptual properties of patriarchy masquerade under different names throughout the literature’. For further discussion on the use of control in the literature, for example, see Michael P Johnson, Kathleen J Ferraro, Research on Domestic Violence in the 1990s: Making Distinctions’ (2000) 62 *Journal of Marriage and Family* 948.

¹⁵³ Heather Douglas, ‘Legal Systems Abuse and Coercive Control’ (22 August 2017) *Criminology and Criminal Justice* (Online First) <http://journals.sagepub.com/doi/full/10.1177/1748895817728380> 11, citing Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press, 2007).

¹⁵⁴ Hunnicutt, above n 147, 554 notes five components to her argument, particularly that there are varieties in patriarchal structures and there are labyrinths of power in patriarchal systems. *Ibid* 567.

¹⁵⁶ See also McKee, above n 144, 2–3; and Hunnicutt, above n 147, 557.

¹⁵⁷ Carol Smart, *Feminism and the Power of Law* (Taylor and Francis, 1989) 12.

¹⁵⁸ See Smart, *ibid*; Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); Zillah R. Eisenstein, *The Female Body and the Law* (University of California Press, 1988); John Stuart Mill, *The Subjection of Women* (Prometheus ed, 1986), all referred to in Lynne Henderson, ‘Law’s Patriarchy’ (1991) 25(2) *Law & Society Review* 411.

subjected to the coercive control of an intimate partner.¹⁵⁹ Bishop warns that a legal approach that purports to protect victims of domestic violence ‘may largely dismiss the impact of gendered relations in the commission of domestic violence’ and ignore ‘some of its own inherent reinforcement of gendered roles and stereotypes.’¹⁶⁰ Here we examine whether that is the case with disclosure systems.

Currently, in Australia, disclosure schemes (where a person’s criminal conduct is disclosed by the State to others) are only used in relation to the gendered offences of sexual and domestic violence. It may be postulated that the victims of these crimes are particularly vulnerable and in need of additional protection. This may justify the exceptionalism of these laws, which contravene the privacy rights otherwise evident in Australian laws surrounding criminal histories.¹⁶¹ However, this exceptionalism may also perpetuate the patriarchal ideal that women are powerless. Glick and Fisk assert that ‘[i]nherent in the idea that women are to be protected is the corresponding belief that women are weak and helpless. Furthermore, if women are to be protected, then men are placed in the dominant role of protectors.’¹⁶² However, pursuant to both Clare’s Law and the NSW DVDS, it is generally left to the women to take protective measures. Unlike the mandatory arrest and mandatory prosecution schemes that have been criticised for further disenfranchising the victims of domestic violence,¹⁶³ these schemes generally provide for disclosure to the primary person who then needs to act to protect themselves. In some instances, in England and Wales, disclosure can be made to others if they are better placed to protect the potential victim. The presumption, however, is that the woman retains her autonomy in receiving information and deciding what to do with it.

Frazier and Falmagne identified the contradictory nature of violence prevention initiatives that simultaneously situate ‘women in positions of victimhood and empowerment.’¹⁶⁴ DVDSs are indeed such an initiative. Both categories of crime subject to registers in Australia, domestic and

¹⁵⁹ See Douglas, above n 153; and Emily Sack, ‘Battered Women and the State: The Struggle for the Future of Domestic Violence Policy (2004) 6 *Wisconsin Law Review* 1657.

¹⁶⁰ Charlotte Bishop, ‘Domestic Violence: The Limitations of a Legal Response’ in Sarah Hilder and Vanessa Bettinson (eds) *Domestic Violence* (Palgrave Macmillan, 2016) 60–1.

¹⁶¹ Currently, the accessibility of criminal records is governed by Australian privacy laws, and while there are certain allowances made in employment situations, generally no one can access such information without the person’s consent, and what may be disclosed is limited depending on the nature of the request. Criminal records are classified as “sensitive personal information” — see eg. *Information Privacy Act 2009* (Qld) Schedule 5 as discussed in eg Bronwyn Naylor, ‘Criminal Records and Rehabilitation in Australia’ (2011) 3(1) *European Journal of Probation* 79, 84. See also the discussion of ‘Access to and Disclosure of Criminal History and Other Information in Queensland’ in Chapter 4 of Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1.

¹⁶² Christopher Kilmartin and Julie Allison, *Men’s Violence Against Women, Theory, Research, and Activism* (Lawrence Erlbaum Associates, Publishers, 2007) 121.

¹⁶³ See, eg, discussion in Cheryl Hanna, ‘No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions’ (1996) 109(8) *Harvard Law Review* 1849, 1865; and Linda G Mills, ‘Killing Her Softly: Intimate Abuse and the Violence of State Intervention’ (1999) 113 *Harvard Law Review* 550.

¹⁶⁴ Kathryn E Frazier and Rachel Joffe Falmagne, ‘Empowered Victims? Women’s Contradictory Positions in the Discourse of Violence Prevention’ (2014) 24(4) *Feminism & Psychology* 479.

sexual violence, have in the past been viewed by society in part by victim precipitation or victim blaming. That is, the sort of sentiment evident in statements such as ‘she asked for it’ or ‘she could just leave.’¹⁶⁵ Disclosure systems can also result in victim blaming. As we have identified above, the effect of disclosure on offender behaviour (and recidivism) is likely to be minimal. Rather, the success of such systems in preventing crime relies on a change in victim behaviour.¹⁶⁶ Individuals (or the community in some instances) become responsible for preventing their own victimization, and states are absolved of responsibility.¹⁶⁷ While the DVDSs compared here do retain some form of state control (in that they are reactive and disclosure is much more limited and discretionary than the example of the SORN systems in the USA), it is still usually the women who decide what to do with the information; it is the women who are required to self-regulate. This is problematic because, if the women fail to self-regulate, by engaging in safekeeping, they invite further scrutiny and, potentially, further blame.¹⁶⁸ Ultimately, the potential victims are targeted by this initiative rather than the perpetrator,¹⁶⁹ in what Dunlap has described as soft misogyny.¹⁷⁰

As mentioned above, the choices women make when armed with information about their partners must be recognised as being framed within the patriarchal context. The Queensland Council for Civil Liberties recognised this issue in its submission to the Queensland Law Reform Commission:

Whilst it is undeniable that [the provision of] information is essential to people taking action in any circumstance, it is not often sufficient. The focus on the delivery of information ignores other factors affecting people’s capacity to take action including power relationships, lack of resources and inequality.¹⁷¹

Women whose lives have been controlled in various ways, including by lack of access to finances and isolation from support, are in a disenfranchised position when it comes to taking action to protect

¹⁶⁵ See discussion of victim precipitation and victim blaming in eg, Sandra Walklate, *Victimology: The Victim and the Criminal Justice Process* (Routledge, Routledge Revivals edition, 2013) 17; Sandra Walklate, *Gender, Crime and Criminal Justice* (Willan Publishing, 2nd edn, 2004); and in Pamela Davies, *Gender, Crime and Victimisation* (Sage, 2011) 71.

¹⁶⁶ See Walklate, *Victimology: The Victim and the Criminal Justice Process*, *ibid* 122.

¹⁶⁷ See Jane Aiken and Katherine Goldwasser, ‘The Perils of Empowerment’ (2010) 20 *Cornell Journal of Law and Public Policy* 139, 168 and see discussion of this with respect to Megan’s law in Jonathan Simon, ‘Managing the Monstrous: Sex Offenders and the New Penology’ (1998) 4 *Psychology, Public Policy and Law* 452, 461–2.

¹⁶⁸ Wangmann, ‘Has he been Violent Before: Domestic Violence Disclosure Scheme’, above n 12, 232; Fitz-Gibbon and Walklate, above n 12, 294. See discussion of this with respect to rape victims in Alex Campbell, ‘Keeping the “Lady” Safe: The Regulation of Femininity Through Crime Prevention Literature’ (2005) 13 *Critical Criminology* 119, 132.

¹⁶⁹ And the responsibility has been alleged to have shifted from the state and other stakeholders as well: Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1, [6.192], [6.194].

¹⁷⁰ Justine A Dunlap, ‘Soft Misogyny: The Subtle Perversion of Domestic Violence Reform’ (2016) 46 *Seton Hall Law Review* 775.

¹⁷¹ Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme*, above n 1, [6.30].

themselves.¹⁷² Imposing the burden of self-protection on such women fails to recognise the overarching system of patriarchy and control they face.

IX Conclusion

Regardless of the limits that SORN systems have been shown to have on recidivism and behavioural change of victims, there are other goals of such laws. Sample, for example, considered the symbolic importance of such laws.¹⁷³ Referencing her research with Kadleck in 2008 that involved interviewing legislators in Illinois, she noted that legislators alluded to a symbolic function of the laws, as they

admitted the passage of registration, notification, and civil commitment laws were meant to acknowledge public concern, express their understanding of the public's fear, and demonstrate their willingness to address the perceived growing sex offender problem. They also admitted that they believed these laws would have little to no appreciable effect on sex offenders' behaviors, but they believed their legislative actions would make citizens feel safer.¹⁷⁴

A discussion as to whether the public feels safer because of these laws is outside of the scope of this article.¹⁷⁵ Of relevance though is the comparison that Sample makes with the symbolism involved in sex offender laws to the symbolism in domestic violence laws. Domestic violence laws, she says

were not only intended to protect women from domestic abuse, but also were meant as an acknowledgment by legislators that a problem existed and that the plight of women mattered to them. Women's groups heralded the passage of these laws for their symbolic message.¹⁷⁶

However, as discussed above, the symbolic message emanating from the DVDS is not positive. Considering the ineffectiveness of SORN systems, it appears unlikely that DVDSs will reduce the recidivism of perpetrators and protect women. Instead, responsibility shifts to the victims and potential victims in these scenarios, who may be blamed if they fail to self-regulate. Further, the resources necessary to implement a DVDS will potentially be re-directed away from services that are more effective and less harmful.¹⁷⁷

The Victorian Royal Commission into Family Violence stated that '[c]hanges to the law must be avoided which, while superficially or symbolically attractive, do not actually advance the safety of victims and

¹⁷² Jane Aiken and Katherine Goldwasser, 'The Perils of Empowerment' (2010) 20 *Cornell Journal of Law and Public Policy* 139, 160–2.

¹⁷³ Sample, above n 133, 267.

¹⁷⁴ Sample, above n 133, 267 referring to Lisa Sample and Colleen Kadleck, 'Sex Offender Laws: Legislators' Accounts of the Need for Policy' (2008) 19 *Criminal Justice Policy Review* 40.

¹⁷⁵ For a discussion of the research in this area see Sample, above n 133, 269.

¹⁷⁶ Sample, above n 133, 266.

¹⁷⁷ See, eg, Department of Attorney-General and justice, *Report on Consultation: Review of the Domestic and Family Violence Act* (July 2016) 99: 'The majority of stakeholders noted that a DVDS would likely required significant resources which would be better spent on the expansion and continued operation of existing services and initiatives.'

the community, or the accountability of perpetrators.¹⁷⁸ Not only does the research suggest that DVDSs will be ineffective, the window-dressing of a DVDS potentially sends the wrong message, reinforcing gender stereotypes and perpetuating patriarchy.

¹⁷⁸ State of Victoria, Royal Commission into Family Violence, above n 2, 224.