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Protecting victims of domestic violence – have we got the balance right?

That States should act to prevent domestic violence and protect victims is clearly acknowledged in international law. Yet international law confirms also that victims, perpetrators, and their families have rights to privacy, to a family life and to a home. The extent to which rights to respect for private and family life should be interfered with in order to protect victims remains in dispute.

With the aim of improving the protection afforded to domestic violence victims in England and Wales, in 2011-2012 the police and courts piloted the use of two new short-term protective measures; domestic violence protection notices and orders. Between 2012 and 2013 the police also piloted the domestic violence disclosure scheme, which saw prospective victims provided with information about their partner's previous violent behaviour. The disclosure scheme and the domestic violence protection orders and notices are to be rolled out nationally from March 2014. In this article, consideration is given to the impact these two initiatives will have on the privacy of victims and perpetrators, an issue not considered in government evaluations of the pilots. This article analyses whether the rollout of these new initiatives is justified, given their potential for interference in private and family life.

Keywords:

Domestic violence, privacy, private life, Article 8

Introduction

'Until the nineteenth century, the ideal of family privacy, an ideal central to the philosophy underlying the liberal state, largely shielded the family from state intervention.'¹ Whilst in England and Wales a marked change in approach has become evident, with significantly increased protection now offered to victims of domestic violence, the extent to which the state should intervene in private family life to protect such victims continues to provoke debate.

Domestic legislative developments affording improved protection to victims can be ascribed to various factors: an improved domestic understanding of domestic violence and its effects, campaigning by women's movements and organizations supporting women,² but also by numerous international conventions which condemn violence against women.³

The difficulty for legislators, of course, is that whilst these international conventions argue persuasively that states should act to protect domestic violence victims, certain conventions also afford rights to perpetrators of domestic violence, and to the families of victims and perpetrators.⁴ These rights, including rights to respect for private and family life, often conflict with rights to protection afforded to victims.

¹ A Diduck and F Kaganas, *Family Law, Gender and the State – Texts, Cases and Materials* (Hart Publishing,,³rd Edition, 2012) at p547

² A Matczak, E Hatzidimitriadou and J Lindsay, *Review of Domestic Violence Policies in England and Wales* (Kingston University and St Georges, University of London, 2011)

³ Including UN, *Declaration on the Elimination of Violence against Women of 20 December 1993* (GA/RES/48/104); 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence

⁴ For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms

It is against this backdrop that this article examines two sets of measures which were rolled out across England and Wales in March 2014. First, we will consider domestic violence protection notices ('DVPNs') and Domestic Violence Protection Orders ('DVPOs').⁵ The second initiative we consider is the Domestic Violence Disclosure Scheme ('the disclosure scheme').

Drawing upon the international literature and jurisprudence which debate the role that the state should play in protecting domestic violence victims, outlining how protection afforded to domestic violence victims in England and Wales might be improved, this article questions whether the introduction of DVPNs, DVPOs and the disclosure scheme is justified.

International obligations

Public authorities in England and Wales must act in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention').⁶ Accordingly courts, the police and the Crown Prosecution Service, must take positive steps to protect life⁷ and prevent torture and inhuman and degrading treatment.⁸ Victims of domestic violence may enforce such rights and seek a remedy for their breach at the domestic level⁹ and through proceedings before the European Court of Human Rights (ECtHR) when all domestic remedies have been exhausted. The provisions of the European Convention may thus be seen as fundamental in the fight against domestic violence.¹⁰

The European Convention is not, however, the only convention which requires the UK Government to act to prevent violence, protect victims and punish perpetrators. The 1948 UN Universal Declaration on Human Rights¹¹ ('the Universal Declaration'), for example is arguably of crucial importance in signalling that no-one should be subjected to torture, cruel, inhuman or degrading treatment or punishment,¹² that slavery and servitude are not to be tolerated,¹³ and that no individual should be permitted to kill another.¹⁴ Numerous further international provisions exist with the specific aim of improving the protection afforded to women victims of violence: 1993 UN Declaration on the Elimination of Violence against Women,¹⁵ the European Parliament Resolution on the Elimination of Violence against Women,¹⁶ the Council of Europe's Recommendation on the protection of women against violence,¹⁷ and 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence ('The Istanbul Convention'). This final convention is remarkable for its lofty aspiration 'to create a Europe free from violence

⁵ DVPO appear to be based upon similar legislative provisions operating elsewhere in Europe; the Austrian Protection against Domestic Violence Act 1996 and the German Protection from Violence Act 2002 (ACPO, *Tackling Perpetrators of violence against women and girls: ACPO Review for the Home Secretary (ACPO, 2009)* at p 50)

⁶ Section 6 Human Rights Act 1998

⁷ Article 2 European Convention

⁸ Article 3 European Convention

⁹ Section 7 Human Rights Act 1998

¹⁰ Shazia Choudhry and Jonathan Herring, *Domestic Violence and the Human Rights Act 1998: a new means of legal intervention?* [2006] PL 752

¹¹ GA/RES 217A (III), U.N. Doc A/810 .

¹² Article 5 European Convention

¹³ Article 4 European Convention

¹⁴ Article 3 European Convention

¹⁵ UN, *Declaration on the Elimination of Violence against Women of 20 December 1993* (GA/RES/48/104)

¹⁶ 26 Nov 2009

¹⁷ Council of Europe, *Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence*

against women and domestic violence.¹⁸ It is in many ways also a unique convention, in seeking to tackle both gender-based violence and domestic violence suffered by men, older relatives and children.¹⁹ It stands in contrast, therefore, both to the international conventions which focus explicitly on violence against women,²⁰ and to international conventions which afford broad rights to all sections of the public.²¹ The key importance of this Convention, compared to many international conventions, is that, once in force, when a State ratifies this Convention '[p]reventing and combating such violence is no longer a matter of goodwill but a legally binding obligation.'²²

At present it is only the provisions of the European Convention that are directly enforceable by victims of domestic violence in England and Wales²³. Consideration of this particular Convention's role in preventing domestic violence and protecting victims is in any event justified when one notes the ECtHR's strong disapprobation of states which fail to protect victims. (This is not to suggest that the other international provisions are irrelevant. Indeed, in the cases of *Bevacqua* and *Opuz* the ECtHR made clear that even in a case brought under the European Convention the ECtHR would have consideration for such other important international obligations.²⁴)

Before we look at the European Convention provisions which require the state to protect victims of domestic violence we must of course acknowledge that this Convention also affords certain rights which conflict with these rights to protection. These conflicting rights are best described as rights to freedom from state intervention. State intervention in the domestic violence context might entail: police arrest and removal of a perpetrator of violence from the family home; prosecution of that perpetrator; inter-agency information sharing to determine how to protect a victim and their family, or the removal of a child from that situation. The key focus of this article is the balance that the government must achieve between the rights to protection and the right to respect for private life. The balancing of rights that is necessitated is, as we will see, undoubtedly difficult to undertake in cases of domestic violence. In order to understand the factors that public authorities must consider, we will first explore the protections that are offered to victims of domestic violence through Articles 2, 3, 8 and 14.²⁵ We will subsequently consider the right to respect for private life, and the issue of non-intervention in cases of domestic violence.

Obligations to protect victims

In *Osman v United Kingdom*²⁶ the ECtHR made clear that Article 2 of the European Convention imposes an obligation upon the state to protect individuals from threats to their

¹⁸ Preamble to the Istanbul Convention and Explanatory Notes to the Convention, paragraph 1

¹⁹ Ibid

²⁰ For example the 1993 UN Declaration, the European Parliament Resolution on the Elimination of Violence against Women and the Council of Europe's Recommendation on the protection of women against violence

²¹ For example the Universal Declaration and the European Convention

²² <http://www.womenlobby.org/news/New-Resources/article/how-to-use-the-council-of-europe-accessed-19/12/2013>. At the present time 8 states have ratified the Convention; 10 ratifications are required for the Convention to enter into force

²³ Although the Istanbul Convention will impose legally binding obligations on those who ratify it the UK government has yet to ratify the Convention. The Convention has yet to be ratified by 10 states and is not yet in force

²⁴ *Bevacqua and S v Bulgaria* App no: 71127/01 12 June 2008 [49-53]; *Opuz v Turkey* (2010) 50 EHRR 28 [72-82].

²⁵ Note Article 4, which prohibits slavery and servitude, and Article 5, which affords a right to liberty and security of person, might potentially also be relevant to some cases of domestic violence

²⁶ *Osman v UK* (1990) 1 FLR 193; Although *Osman* does not concern domestic violence its dicta have been cited with approval in cases relating to domestic violence, for example *Opuz v Turkey* (2010) 50 EHRR 28 at [128]; *Kontrova v Slovakia* (2007) 4 EHRR 482 at [49]

lives posed by third parties, where ‘the authorities knew or ought to have known ... of a real and immediate risk to the life’ of that identified individual. In the event that the state subsequently fails ‘to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk’ then the state will be considered to have breached Article 2²⁷. The recent domestic case of *Sarjantson v Chief Constable of Humberside Police*²⁸ takes the above conclusions further; it is not necessary to know the specific identify or name of the individual at risk of violence. ‘The essential question ... is whether the police knew or ought to have known that there was a real and immediate risk to the life of the victim of the violence and whether they did all that could reasonably be expected of them to prevent it from materialising’.²⁹ In the domestic violence context, therefore, if the police fail to take reasonable measures to respond to allegations of domestic violence which indicate risk to life,³⁰ even if they do not know the specific identify of the alleged victim, any resulting death would potentially breach Article 2.

Many of the claims made in domestic violence cases brought before the ECtHR, where the severity of the violence is such that an Article 2 claim might not be founded, are based alternatively upon Article 3.

‘Article 3 enshrines one of the most fundamental values of a democratic society ... The obligation on all contracting parties under Article 1 of the ECHR ... taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.’³¹

Although the ECtHR has confirmed that ‘ill-treatment’ must attain a minimum level of severity to fall within Article 3,³² and that Article 3 protection will therefore not apply to all cases of domestic violence, ECtHR jurisprudence suggests that treatment which involves actual bodily injury or intense physical or mental suffering is likely to be covered by Article 3.³³ In light of current understanding that domestic violence encompasses forms of non-physical abuse, including psychological and emotional abuse, coercion and intimidation,³⁴ it is important that we recognise the suggestions of Choudhry and Herring that:

‘Treatment which humiliates or debases an individual; shows a lack of respect for, or diminishes human dignity; or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance may also be characterised as degrading and fall within the prohibition of Article 3’, particularly if the object of such treatment ‘was to humiliate and debase the person concerned’ and if ‘it adversely affected his or her personality in a manner incompatible with Article 3.’³⁵

²⁷ *Osman v UK* (1990) 1 FLR 193 at [116]

²⁸ [2013] EWCA Civ 1252

²⁹ *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252 at [25]

³⁰ *Kontrova v Slovakia* [2007] ECHR 419 App 7510/04; the mother made various reports to the police regarding her husband’s violence. This violence ultimately resulted in the death of their 2 children. The ECtHR considered her article 2 rights had been breached by the police failing to act

³¹ *E v UK* (2003) 36 EHRR 31 at [88]

³² *Ireland v UK*(1978) 2 EHRR 25 at [162]

³³ *A v UK* (1999) 27 EHRR 61

³⁴ Non-physical abuse such as psychological and emotional abuse, coercion and intimidation are now explicitly recognised as forms of domestic violence; Home Office, Domestic Violence and Abuse, <https://www.gov.uk/domestic-violence-and-abuse>

³⁵ S Choudry and J Herring, *Domestic violence and the Human Rights Act 1998: a new means of legal intervention?* [2006] PL 752 at p759

Article 8 is the third key European Convention article to impose positive obligations upon the state towards the victims of domestic violence. The ECtHR has contemplated the notion of private life which is protected by Article 8 in numerous cases,³⁶ making clear that whilst;

the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person ... It can ... embrace multiple aspects of the person's physical and social identity ... Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world ...³⁷

Article 8 thus implies freedom from interference with an individual's physical or personal space, rights not to be subjected to unwanted contact, rights to be protected from physical interferences with one's body, and thus to be protected from violence. Article 8 is additionally recognized to offer protection to interference with one's mental state. Where a victim of domestic violence suffers physical harm *and*, as a result of physical or non-physical abuse, subsequently suffers emotional and psychological problems which then impair that individual's ability for self-development, Article 8 will undoubtedly be engaged.³⁸

Whilst we will shortly consider why some academics contend that respect for a victim's privacy justifies non-intervention or limited state intervention in cases of domestic violence, we must certainly recognize that compelling arguments can be made to suggest that state intervention is in fact required to protect many aspects of a victim's private life.³⁹ ECtHR jurisprudence indeed explicitly states that article 8 imposes positive obligations upon the state, which require it to intervene to protect actual and potential victims of such violence.⁴⁰

Whilst, if one considers the international obligations outlined above, it is certainly incumbent upon the state to act to prevent domestic violence, to fully understand the nature of the state's obligations to domestic violence victims, particularly female victims, we must, however, also consider Article 14.

It is the case of *Opuz v Turkey*⁴¹ which highlights the particular importance of Article 14 in actions where the state has failed to provide effective protection for female victims of violence. *Opuz* signals clearly that where the attitude of those charged with implementing the law (not necessarily the law itself) has resulted in or exacerbated the harm suffered by such a victim, the Article 14 prohibition on discrimination may be breached. *Opuz* thus illustrates the 'more nuanced approach to the role of the state' regarding domestic violence

³⁶ See *Von Hannover v Germany* (2005) 40 EHRR 1, *Marper v UK* [2008] ECHR 1581

³⁷ *Marper v UK* [2008] ECHR 1581 at [66]

³⁸ See Choudhry and Herring, *Domestic violence and the Human Rights Act 1998: a new means of legal intervention?* [2006] PL 752 at 769; Choudhry and Herring, *Righting Domestic Violence*, (2006) 20 Int'l JL Pol & Fam 95 at [98]

³⁹ Choudry and Herring, *Domestic violence and the Human Rights Act 1998: a new means of legal intervention?* [2006] PL 752 at 768-769

⁴⁰ *Bevacqua and S v Bulgaria* [2008] ECHR 498, app 71127/01 at [64-65] "While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. Children and other vulnerable individuals, in particular, are entitled to effective protection... Furthermore, the authorities' positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.'

⁴¹ (2010) 50 EHRR 28

described by Elizabeth Schneider; an approach which recognises the range of institutions and extent of culture that may be 'complicitous in violence'.⁴² Where the police, for example, fail to investigate a complaint of domestic violence because it is a 'family matter', or where a judge fails to afford protection to a woman because he accepts a perpetrator's argument that the violence is justified on the grounds of custom, or honour, a climate 'conducive to domestic violence'⁴³ may thus be created. Where the Crown Prosecution Service (CPS) discontinue a prosecution because a female victim has withdrawn their statement, or where the sanction meted out to a domestic violence perpetrator is insufficient to deter repeat offending, allegations of breach of Article 14 alongside one or more of the other articles considered above may thus be justified, on the basis of gender-based discrimination.⁴⁴

Domestic violence continues to be a significant problem in England and Wales, affecting both men and women; approximately 1.2 million women experienced domestic violence during the survey period, whilst in the same period there were 800,000 male victims.⁴⁵ Significantly more women are affected by men; women are the victims in more than seven out of ten incidents of domestic violence⁴⁶ and '... the vast majority of serious and recurring violence is perpetuated by men towards women'.⁴⁷ The conclusion that can thus be drawn is that the UK government has no room for complacency. It must be mindful of its substantive obligations under Articles 2, 3 and 8 and also under Article 14. If the UK is to comply with its international obligations, it is essential that an effective legal framework is in place to protect victims, and that authorities such as the police and the CPS demonstrate clearly that domestic violence is not tolerated, and that when they are aware of a risk of violence they will act to prevent it, and to punish the perpetrator.

Article 8 reconsidered

The issue that we have, of course, so far largely ignored in our consideration of Article 8, is its flip side; the negative obligations imposed upon the state that require it to refrain from interference in private and family life. We have of course moved on significantly from the position fifty years ago when domestic violence was not recognized as a legal problem and marriage made domestic violence permissible and acceptable.⁴⁸ Nonetheless the Article 8 right to respect for private and family life is frequently cited as a means to inhibit legal intervention in domestic violence cases.⁴⁹ Academics continue to debate the extent to which privacy, and the protections afforded by Article 8, justify non-intervention or limited

⁴² Elizabeth Schneider, *Engaging with the state about domestic violence: Continuing dilemmas and gender equality*, (1999-2000) 1 Geo J Gender & L 172 at p177

⁴³ *Opuz v Turkey (2010) 50 EHRR 48* at [198]; Patricia Londono, *Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights* (2009) HRLR 9(4) 657

⁴⁴ *Opuz v Turkey (2010) 50 EHRR 48*

⁴⁵ Home Office, *Statistical News Release: 'Homicides, fire arm offences and intimate violence 2010/11: Supplementary volume 2 to Crime in England and Wales 2010/11*, 19 January 2012

⁴⁶ HM Government, *Call to end violence against women and girls* (TSO, 2010) at p5

⁴⁷ Home Affairs Select Committee, *Domestic Violence, Forced Marriage and Honour-based Violence 6th Report of 2007-08, HC 263-1* (TSO, 2008) at [20]

⁴⁸ Elizabeth Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking back and Looking Forward*, (2008-9) 42 Fam LQ 353

⁴⁹ Choudry and Herring, *Righting Domestic Violence* (2006) 20 IJLPF 20 95; *Opuz v Turkey (2010) 50 EHRR 48* at [123] the Turkish authorities argued that they 'could not be expected to separate the applicant and her husband and convict the latter while they were living together as a family, as this would amount to a breach of their rights under Article 8 of the Convention' and at [137] 'The Government claimed that each time the prosecuting authorities commenced criminal proceedings ... they had to terminate those proceedings ... because the applicant and her mother withdrew their complaints. In their opinion, any further interference by the authorities would have amounted to a breach of the victims' Article 8 rights'

intervention in the domestic sphere. Until we have a full understanding of the arguments relating to both aspects of Article 8 it will not be possible for us to effectively analyse how well our current legal framework meets international legal obligations, and more importantly to determine whether DVPOs, DVPNs and the Disclosure Scheme are an appropriate addition to the English legal framework.

An important initial point to make in any discussion of the contested notion of privacy is that much of the literature discussing privacy emanates from across the Atlantic, and is therefore at least in part influenced by US jurisprudence, albeit also by the writings of English theorists such as Locke and Mills. This is not to suggest, that the theories about what privacy is or does are not valid on this side of the Atlantic. Rather it is to recognize that in the UK debates about privacy are relatively embryonic, at least when compared to debates in the United States, which arguably began with the 1890 publication of Samuel Warren and Louis Brandeis's seminal work, 'The right to privacy'.⁵⁰ Whilst Warren and Brandeis at that time depicted privacy as 'a right to be let alone', many distinguished academics have subsequently developed the concept of privacy, through a multitude of different definitions of privacy. Indeed it has now been suggested that 'conceptions of privacy typically fall into one of six categories or combinations of the six. ... 1) the right to be let alone; 2) limited access to the self; 3) secrecy; 4) control of personal information; 5) personhood; 6) intimacy ... and 7) privacy as a cluster concept.'⁵¹ Whilst none of these conceptions has gone without criticism, the author's does not intend to explore these criticisms here. Rather, a brief overview is provided of three key components of the concept of particular relevance in the domestic violence context.

The first component, considered to be at the core of the liberal conception of privacy is the notion of inaccessibility, whether that be inaccessibility of our possessions, our body, our name, our reputation or our information.⁵² This notion that our body and our information, should be inaccessible to others is clearly reflected in the ECtHR's jurisprudence.⁵³ Within the UK the developing action for misuse of private information equally reflects an expectation of inaccessibility to private information⁵⁴. The important point for this author, therefore, is that if privacy encompasses the ability to control dissemination of one's information⁵⁵ then the right to respect for private life is clearly engaged when information is disclosed under the Disclosure Scheme.

The second element of privacy, the essence of the right, is that it protects close personal relationships.⁵⁶ Privacy is 'one of the preconditions of intimate relations'.⁵⁷ The fact that Article 8 protects 'the right to establish and develop relationships with other human beings'⁵⁸ might certainly be used as an argument against various forms of state intervention in domestic violence cases: state mandatory arrest and prosecution policies; disclosure

⁵⁰ S Warren and L Brandeis, *The Right to Privacy*, (1890) Harv L Rev Vol. IV No. 5

http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html

⁵¹ R Kemp and A Moore, *Privacy*, (2007) Library Hi Tech 5 (1) 58 at 63, drawing on the earlier analysis of D Solove (2002) *Conceptualising Privacy* CLR 90. Note, however, that suggestions privacy can simply be defined as one of six concepts, or a cluster of several fail to acknowledge that many academics contend that there is no such thing as privacy as a distinct phenomenon in its own right (the eliminativists); David Matheson, *A distributive reductionism about the right to privacy*, (2008) *The Monist* 91 (1)108

⁵² A Allen, *Coercing privacy* (1998-1999) 40 Wm. & Mary L. Rev. 723-757

⁵³ See *Pretty v UK* (2002) 35 EHRR 1; *Marper v UK* [2008] ECHR 1581

⁵⁴ See *Campbell v MGN* [2004] UKHL 22

⁵⁵ As suggested by *Campbell v MGN Ltd* [2004] UKHL 22; *Von Hannover v Germany* (2005) 40 EHRR 1

⁵⁶ *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 at [19]

⁵⁷ Scott Anderson, *Privacy without the right to privacy* (2008) *The Monist* 91 (1) 81 at p83

⁵⁸ *Marper v UK* [2008] ECHR 1581 [66]

schemes which allow perpetrators' private information to be shared with potential victims; and the making of court orders which prevent perpetrators from contacting their partners, or entering their home.

Finally, privacy is viewed by many as 'a means to affirm one's ability to be a moral agent' or as the autonomy or freedom to engage in one's own thoughts, decisions and actions. Certainly, this is again an important issue in the domestic violence context, particularly when the state effectively takes the decision to prosecute or to obtain a protective order out of the victim's hands.

Privacy: a shield against state interference or the legitimization of violence?

There are many feminists who, particularly in the US, stress the importance of protecting women's privacy, both privacy in the sense of the right to be let alone⁵⁹ and privacy in the sense of decisional privacy, the ability to exercise control over decisions about one's life.⁶⁰ It is from such feminists that we hear suggestions that certain responses to domestic violence, particularly mandatory criminal justice interventions, disenfranchise abuse victims,⁶¹ and pose particular problems 'for poor women and women of colour who are less likely to see state intervention as helpful to them and their communities.'⁶² These writers contend that the law should offer a range of remedies, and the necessary support to enable women to decide what remedies are best for them.⁶³ These academics ultimately argue that the law should afford women⁶⁴ greater decisional privacy, allowing them to decide 'whether and to what extent the abuse should become a matter for public concern...';⁶⁵ women should be allowed 'to choose whether to continue with or end their intimate relationships'. ... 'women should not be compelled to testify against their wishes and ... third party applications should not be made possible without the victim's consent.'⁶⁶ These issues are all pertinent to our discussion of DVPNs and DVPOs.

In stark contrast, other feminist scholars, argue strongly for state intervention in the private family sphere, in order to protect victims. These feminists argue that the state must make decisions for victims because domestic violence impairs their rational decision-making ability.⁶⁷ They contend that privacy (freedom from state interference) does not benefit victims; it instead protects only the autonomy of the abuser at the expense of the victim or children.⁶⁸ They claim that proponents of privacy have 'tended to overlook the risks of harm that privacy poses,' and have failed to recognize that 'the private sphere of home and family

⁵⁹ Hulse *Privacy and Domestic Violence in Court* (2009-10) 16 Wm. & Mary J. Women & L. 237-289 at p246

⁶⁰ S Kim, *Reconstructing family privacy* (2005-6) 57 Hastings L.J. 557-600 at p581

⁶¹ Hulse, *Privacy and Domestic Violence in Court* (2009-2010) 16 Wm. & Mary J. Women & L. 237-289 at p248

⁶² Elizabeth M Schneider, *Engaging with the state about domestic violence: Continuing dilemmas and gender equality*, (1999-2000) 1 Geo J Gender & L 173

⁶³ Linda G Mills, *Killing her softly: Intimate abuse and the violence of state intervention* (1999) 113 Harv L Rev 550-613 at p612. As we will see shortly the introduction of DVPNs adds a new short term measure to the existing range of remedies and if accompanied by appropriate support DVPNs and DVPOs may provide what some women want and need.

⁶⁴ Since domestic violence affects men and women references to 'women' might alternatively be read as 'domestic violence victims'

⁶⁵ Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State – Texts, Cases and Materials* (Hart Publishing, 3rd Edition, 2012) at p608 citing E Stanko *Should I Stay or Should I Go? Some Thoughts on the Variants of Intimate Violence* (1997) 3 *Violence Against Women* 629

⁶⁶ Diduck and Kaganas, *Family Law, Gender and the State – Texts, Cases and Materials* (Hart Publishing, 3rd Edition, 2012) at p608

⁶⁷ Hulse, *Privacy and Domestic Violence in Court* (2009-2010) 16 Wm. & Mary J. Women & L. 237-289 at p249

⁶⁸ Kim, *Reconstructing family privacy*, (2—5-2006) 57 Hastings L.J. 557-600 at p576

is a site of peril and subordination,⁶⁹ They perceive privacy as permitting, encouraging and legitimising violence against women.⁷⁰ A stance of non-intervention is particularly condemned for the threat that it may pose to children.⁷¹

Since valid arguments are undoubtedly raised by proponents for and against maintaining privacy in cases of domestic violence, it is perhaps inevitable that disagreements about the state's role continue. It seems, however, that even proponents of privacy accept that a private sphere entirely free of state interference is an 'impossible ideal.'⁷² Indeed, neither the right to respect for private life afforded by Article 8 nor the right to privacy afforded by Article 12 of the Universal Declaration is unqualified. Article 12 refers to the right not to be subjected to 'arbitrary interference'. Interference with Article 8 of the European Convention is permissible in prescribed circumstances, including where necessary to prevent disorder or crime, to protect health or morals, or to protect the rights and freedoms of others. Perhaps most importantly, both the Universal Declaration and the European Convention **require** the state to intervene in certain circumstances, for example in order to protect the (absolute) right to life.

Shazia Choudhry and Jonathan Herring certainly suggest, that the need for the state to interfere with the right to respect for private life is particularly evident when one considers that Article 3 is an absolute right and that there are therefore 'no circumstances in which it is permissible for the state to infringe this right.'⁷³ It is their argument that 'the rights of another party [such as the perpetrator] cannot justify an infringement of someone's article 3 rights',⁷⁴ and indeed it is hard to disagree with the view that the perpetrator's qualified rights should not be allowed to trump the victim's absolute rights.

Where some might disagree with Choudhry and Herring, however, is in relation to their comments 'that other rights of the victim cannot justify an infringement of article 3'⁷⁵ and that 'it cannot be successfully argued that a family's right of privacy justifies non-intervention by the state if that non-intervention is an infringement of one family member's article 3 rights.'

The difficulty, this author suggests, arises when the victim's own qualified right to non-intervention conflicts with her absolute rights to protection. Must the state always intervene, whether the circumstances?

A similar question arises even when a domestic violence case does not reach the level of severity that is required for Article 3, but instead engages Article 8. Article 8, by both providing a right to be protected from domestic violence and the right to freedom from state interference undoubtedly imposes a difficult burden upon the state. The state must in each case weigh up the different elements of the right to privacy. It must balance the victim's rights to protection and to freedom from interference one against the other whilst also balancing the victim's rights against the rights of others, including the perpetrator.

⁶⁹ Allen, *Coercing Privacy* (1998-1999) 40 Wm. & Mary L. Rev 723-757 at p742

⁷⁰ Kim, *Reconstructing family privacy* (2005-2006) 57 Hastings L.J. 557-600 at p574 quoting E Schneider (2000) *Battered women and feminist lawmaking* 87-88

⁷¹ Kim, *Reconstructing family privacy* (2005-2006) 57 Hastings L.J 557-600 at p581; Shazia Choudhry Mandatory Prosecution and Arrest in domestic violence in Julie Wallbank, Shazia Choudhry, Jonathan Herring (eds), *Rights, Gender and the Law*, Routledge 2010 page 150, 153

⁷² Allen, *Coercing Privacy* (1998-1999) 40 Wm. & Mary L. Rev. 723-757 at p745

⁷³ Choudhry and Herring, *Righting Domestic Violence*, (2006) 20 IJLPF 95-119 at p98

⁷⁴ Ibid

⁷⁵ Ibid

According to Choudhry and Herring, the answer, where conflicts arise between the victim's rights, is, to intervene. Certainly, in a domestic violence case the state cannot justify its failure to protect a victim's article 3 rights by referring to that person's right to respect for private life.⁷⁶ What though of the situation, where the victim does not seek protection from the state, but in fact objects to state intervention?

The EctHR is itself, not ignorant to these debates about how and whether states should intervene in cases of domestic violence when a victim is not supportive of state action, acknowledging a lack of 'consensus among State Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints.'⁷⁷ What the EctHR makes clear in *Opuz*, however, is that to simply treat a case of domestic violence as a private matter is not an option.⁷⁸ Authorities should seek to 'strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action.'⁷⁹ In determining whether intervention, for example in the form of a prosecution unsupported by the victim, should proceed, certain factors should be considered: the seriousness of the allegation, the nature of the injuries, whether a weapon was used, whether threats are continuing, premeditation, the effects on children of the household, whether a threat to the health of the victim or others is ongoing, the current and historical state of the relationship between the victim and perpetrator, and the perpetrator's criminal record.⁸⁰

On the basis of the EctHR's ruling in *Opuz*, therefore, it seems that there may be instances when it might be appropriate for the state to limit its interference, where such interference is contrary to the victim's wishes. The issue, as in so many cases relating to European Convention rights, will be one of proportionality. Ideally, the state should provide a range of alternative means by which to protect domestic violence victims, together with the support that victims need to enable them to effectively determine the best option for them. As we will see in our next section, the English law does currently afford a range of remedies to domestic violence victims. These are not, however, all without criticism. The issue that we will consider shortly, therefore, is how the new measures might improve the protection offered to domestic violence victims, and indeed whether they might help the state strike the necessary balance between Articles 2, 3 and 8.

The current English law

It is primarily through the civil law that domestic violence victims receive protection; usually by obtaining either a non-molestation order and/or an occupation order.

A non-molestation order ('NMO') will prohibit an individual from molesting another individual with whom they are associated, or from molesting a relevant child.⁸¹ There are now relatively few domestic violence victims who fall outside the definition of associated persons.⁸² Furthermore, since it is accepted that molestation 'covers a wide range of

⁷⁶ See *Opuz v Turkey* (2010) 50 EHRR 48

⁷⁷ *Opuz v Turkey* (2010) 50 EHRR 48 at [138]

⁷⁸ *Opuz v Turkey* (2010) 50 EHRR 48 at [144] reiterating the EctHR's earlier findings in *Bevacqua and S v Bulgaria* no 71127/01 [83]

⁷⁹ *Opuz v Turkey* (2010) 50 EHRR 48 at [138]

⁸⁰ *Opuz* [138]

⁸¹ Section 42(1) Family Law Act 1996

⁸² Section 62(3) FLA 1996

behaviour ...', and encompasses 'but is wider than violence',⁸³ an NMO is a valuable order that can be used to prohibit a wide range of behaviours which demonstrate the respondent's intent to cause distress or harm to the victim.⁸⁴

By contrast to the non-molestation order, an occupation order ('OO') does not prohibit violence; rather OOs are sought to regulate occupation of the family home (to exclude a violent individual from the home or a defined area around the property and/or to ensure the victim can remain in the home whilst the order is in force). Whilst an OO may afford substantial protection to a domestic violence victim, not all victims will be able to benefit from such orders, when they most need them. First, only limited categories of individuals can apply for an OO.⁸⁵ Second, research suggests that the courts have been unwilling to grant without notice OOs.

Perhaps the most significant problem for the victim who seeks either an NMO or OO, however, is that they must apply personally to court. Legal costs and a lack of legal aid can be a significant barrier to obtaining an order.⁸⁶ A potential remedy does exist at Section 60 FLA, a provision which permits a third party to apply for a remedy on the victim's behalf. However, unlike Section 63C FLA which permits a third party⁸⁷ to apply for a forced marriage protection order, Section 60 has not been implemented. Of course, the use of Section 60 could be seen as overly paternalistic and, if one believes that it should be the victim's choice whether an order is sought, also an interference with victim autonomy. If a third party were to seek a non-molestation order on the victim's behalf, however, more applications might proceed to fruition (at least where third party evidence is available to support the application) not least because the victim's feelings of guilt and fear of reprisals from the perpetrator would potentially be alleviated.⁸⁸ More victims might thus be protected.

Where the criminal law, instead of the civil law, is used to prosecute the perpetrator of domestic violence,⁸⁹ decision-making is almost entirely removed from the victim's hands. The victim is not party to the proceedings. They may provide a victim personal statement commenting upon matters such as bail, intimidation and how the violence has affected them; they may choose to give evidence in support of their allegations of domestic violence. It is, however, the police's decision whether to arrest a perpetrator or to investigate an allegation of violence. It is the Crown Prosecution Service (CPS) who decide whether prosecution is in the public interest, and thus whether the state will seek to punish the perpetrator.

Key factors for the CPS when it decides whether to pursue a prosecution include the victim's willingness to engage in the criminal process and the nature of the victim's relationship with

⁸³ 'It encompasses any form of serious pestering or harassment and applies to any conduct which could properly be regarded as such a degree of harassment as to call for the intervention of the court; Law Commission Report (No 207) *Domestic Violence and Occupation of the Family Home*, (HMSO, 1992)

⁸⁴ *Johnson v Walton* [1990] 1 FLR 350, *Vaughan v Vaughan* [1973] 3 All ER 449; *Horner v Horner* [1982] 2 All ER 495

⁸⁵ Those who are legally entitled to occupy a property, their current or former spouse, civil partner or cohabitant

⁸⁶ Mandy Burton, *Legal Responses to Domestic Violence*, (Routledge Cavendish, 2009) at p47; Home Affairs Select Committee, *Domestic violence, forced marriage and honour-based violence*, (HC) 2007-08 263-II at [283-4]

⁸⁷ Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009 SI 2009/2023

⁸⁸ Burton, *Legal Responses to Domestic Violence* (Routledge Cavendish, 2009) at p48

⁸⁹ Whilst there is no specific offence of domestic violence, the perpetrator of domestic violence may be prosecuted for one or more of a range of criminal offences including: offences such as harassment (s2 Protection from Harassment Act 1997); assault occasioning actual bodily harm (s47 Offences against the Person Act 1861 (OAPA)⁸⁹), malicious wounding and inflicting grievous bodily harm (s20 OAPA), wounding and causing grievous bodily harm with intent (s 18 OAPA) or, making threats to kill (s16 OAPA)⁸⁹.

the perpetrator.⁹⁰ Such willingness to engage in the process will itself be influenced by various factors, including intimidation by the perpetrator and the provision or lack of provision of support and protection for the victim themselves.⁹¹ Crucially, 'research indicates that from a victim's perspective, the ability of the [criminal justice system] to provide safety is key to the decision about 'staying in' or 'dropping out' of the system'⁹² (and thus also to the state punishing the perpetrator, and potentially preventing further violence). For the victim, however, such safety is not guaranteed; unless the victim seeks and obtains protection through the civil courts they are largely reliant upon the police and the courts to ensure they are safe whilst criminal proceedings progress. Whilst one might imagine that bail conditions, for example conditions not to contact a victim, would be an effective means by which to afford victim safety, Mandy Burton has suggested that 'the protection offered to victims of domestic violence through bail conditions must ... be questioned.'⁹³

Domestic violence protection orders and notices

At present, it seems that the legal framework for protecting victims of domestic violence, punishing perpetrators and preventing further violence, could be improved. One particular situation where domestic violence victims face significant risks is when the police attend a domestic violence incident but do not subsequently remand the perpetrator in custody. Civil injunctions will not always be readily, immediately available⁹⁴, yet research highlights;

'this is a time of increased risk to a victim. Where a risk assessment is undertaken it is frequently deemed necessary for the victim to consider leaving the address (with dependants where applicable) and/or for an injunction to be sought to prevent further abuse or harassment.... Leaving home can have a negative impact on the victim's well-being and causes disruption to the victim's children and could well be another factor in the prosecution attrition rate.'⁹⁵

It is in response to this shortcoming that the provisions of Sections 24-30 of the Crime and Security Act 2010 were piloted in three police force areas in 2011 -2012. Their roll out nationwide was subsequently recommended,⁹⁶ and DVPNs and DVPOs are available nationally from March 2014.

The evaluation of the pilots ('the evaluation') certainly seems to offer some support for wider roll out of DVPNs and DVPOs. DVPOs were viewed positively by practitioners as a welcome addition to existing responses. The majority of victim-survivors who benefited

⁹⁰ Note the list of factors outlined by the ECtHR in *Opuz* at [138] as relevant when considering whether to proceed with prosecution includes the victim's current and past relationship with the perpetrator

⁹¹ M Hester et al, *Domestic Violence: Making it through the Criminal Justice System* (Northern Rock Foundation, 2003)

⁹² Unattributed, *Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) Section 24-33 Crime and Security Act 2010: Interim Guidance Document for Police Regional Pilot Schemes, June 2011-June 2012*, at p1

⁹³ M Burton, *Legal Responses to Domestic Violence* (Routledge Cavendish, 2009) at p103. Since Burton made this comment the criminal courts have gained new powers to make restraining orders upon sentence and upon acquittal (Section 5 and 5A(1) PHA 1997), however these provisions come into play at the end of proceedings and will not protect a victim from reprisals or intimidation during proceedings.

⁹⁴ Unattributed, *Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) Section 24-33 Crime and Security Act 2010: Interim Guidance Document for Police Regional Pilot Schemes, June 2011-June 2012* (2012) at [1.5]

⁹⁵ *Ibid* at [1.4]

⁹⁶ Liz Kelly et al, *Evaluation of the Pilot of Domestic Violence Protection Orders*, Home Office, November 2013 ('the Evaluation') at p7

from a DVPO considered DVPOs to be useful. They felt they made them safer.⁹⁷ The qualified conclusions of the evaluation are that DVPOs were effective in reducing domestic violence and abuse,⁹⁸ and that, particularly in cases where the police had been called out on three or more occasions, DVPOs resulted in reduced re-victimisation (or at least a reduction in further police call outs).⁹⁹ The evaluation thus reflects the positive findings relating to similar schemes overseas¹⁰⁰.

These measures were also welcomed, pre-pilot, as 'potentially human rights enhancing measures.'¹⁰¹ As we consider below, however, these measures, will also interfere with victims' and perpetrators' human rights.¹⁰² Although questions were asked, pre-pilot, about how victims' and children's rights to protection would be balanced with competing rights to home, private and family life,¹⁰³ the current government guidance on implementing DVPNS and DVPOs provides no advice on how such a balance should be achieved. The issue of how DVPNS and DVPOs impact upon victims' and perpetrators' rights was largely disregarded in the evaluation (whilst the evaluation remarks on the absence of challenges to orders on human rights grounds, no consideration is given to how the police and courts undertook the human rights balancing exercise, or whether perpetrators wished to, but were unable to bring such challenges). Unfortunately, human rights issues again appear to have been ignored in the DVPO impact assessment,¹⁰⁴ perhaps understandably given the lack of consideration of human rights in the evaluation. It is suggested, here, however, that the human rights implications of DVPNS and DVPOs cannot be ignored.

A DVPN is essentially a written notice, personally served by the police upon the alleged perpetrator ('P'), which states why it has been issued, what is prohibited and the consequences of breach. It must state that P is prohibited from molesting the victim ('V'). It may also include provisions similar to those found in OOs, which ensure V can continue to occupy the family home and which regulate P's rights to enter and occupy the property and its environs.

The benefits of a DVPN can be seen immediately; the fact that P is forbidden from molesting V, that P may also be told to leave the home and area, potentially offer V immediate protection and respite from violence. It is equally evident, however, that a DVPN, particularly a DVPN which restrains P from entering the family home, will impact upon P's ability to maintain his relationship with V and any children and will prevent P from being able to choose where and with whom to live. It thus affects his private and his family life.

The legislation currently envisages that a DVPN will last for 48 hours maximum, with an application for a DVPO being made during that period. This short time period seems sensible when one considers that the threshold for granting a DVPN is relatively low, the

⁹⁷ Ibid

⁹⁸ The quantitative research findings do suggest DVPOs were effective (subject to the qualification that there may have been other factors that influenced the statistics). Note the analysis does not take account of severity of incidents (whether the level of harm escalated or decreased). The average follow-up period was approximately one year, and further research will be needed to ascertain long term impact. (See the Evaluation at p6)

⁹⁹ It is unknown whether victims did not call the police again because violence had reduced or because they did not want the police to grant another DVPN, or did not want another DVPO to be made (this is not considered in the evaluation report)

¹⁰⁰ Home Office, *Tough new powers to help victims break cycle of domestic violence*, Press Release, 29 September 2009 <http://press.homeoffice.gov.uk/press-releases/tough-new-powers>

¹⁰¹ Joint Human Rights Committee, *Human Rights Joint Committee – Twelfth Report of Session 09/10*, 23 February 2010 HL67/HC 402 at [1.101]

¹⁰² European Convention Article 1, Protocol 1: right to property

¹⁰³ Lucy Crompton, *DVP Notices and Orders: Vulnerable to Human Rights Challenge?* [2013] Fam Law 1588

¹⁰⁴ Home Office, *Domestic Violence Protection Orders Impact Assessment*, October 2013.

DVPN is granted not by a court but by a police officer,¹⁰⁵ and there may be potentially significant impacts upon V, P and other family members. This view was apparently shared by the Joint Committee on Human Rights, who considered the short duration of DVPNs as one of several safeguards likely to assist in ensuring a proportionate balance between competing rights. Indeed, upon that basis the Joint Committee Rights concluded the DVPN provisions did 'not pose a significant risk of incompatibility with either the right to respect for home, family and private life or the right to respect for the peaceful enjoyment of possessions'.¹⁰⁶

Unfortunately, however, this safeguard cannot be guaranteed going forward. First, the evaluation recommends considering extending the length of a DVPN to between 4 and 7 days.¹⁰⁷ Second, and of greater concern, a DVPN may already, in some circumstances, last significantly longer than even 7 days. Provided that an application is made to the court for a DVPO within 48 hours of the DVPN being made, the DVPN then remains in force until the court determines the DVPO application. If the magistrates adjourn the DVPO hearing (as they are entitled to do) this means that P 'can remain excluded from his home until the end of the adjournment with no criminal charge and no finding of fact by a court'.¹⁰⁸ The impact upon P's Article 8 rights in such circumstances would be significant. Indeed, the Joint Committee made clear that '[t]he longer that a DVPN remains in force without full consideration of the case by an independent and impartial tribunal, the greater the risk that a longer eviction from the home coupled with a lack of judicial oversight could be disproportionate and in breach of the right to respect for private life and potentially, the right to a fair hearing by an independent and impartial tribunal'.¹⁰⁹

This is one of the reasons why it is so important that care is taken by the authorizing officer ('AO') who grants the DVPN, to ensure that not only are the statutory grounds for a DVPN satisfied, but that the appropriate balancing of human rights is undertaken.

The AO must be satisfied before granting a DVPN that there are reasonable grounds for believing P has been violent to or has threatened violence to V, that V is an associated person (as defined under the FLA 1996) and that the notice is necessary to protect V from violence or a threat of violence.¹¹⁰ Unfortunately neither the statute nor the guidance define the term 'violence'. The protection offered to victims will depend greatly upon whether violence is defined to mean physical violence,¹¹¹ or whether a more expansive definition is adopted encompassing both physical and non-physical forms of abuse.¹¹² The evaluation sheds no light on how the term was interpreted, and indeed fails to identify the lack of definition as a problem. It is suggested, however, that this issue should be addressed within government guidance, to ensure the police and courts do use the wider definition, encompassing both the physical and non-physical elements of harm which engage Articles 3 and 8.

¹⁰⁵ Currently a superintendent but the evaluation recommends that consideration be given, on operational grounds, to grant the power to an inspector

¹⁰⁶ Joint Human Rights Committee, *Human Rights Joint Committee – Twelfth Report of Session 09/10*, 23 February 2010 HL67/HC 402 at 1.110

¹⁰⁷ The evaluation at p7

¹⁰⁸ Lucy Crompton, *DVP Notices and Orders: Vulnerable to Human Rights Challenge?* [2013] Fam Law 1588 at p1592

¹⁰⁹ Joint Human Rights Committee, *Human Rights Joint Committee – Twelfth Report of Session 09/10*, 23 February 2010 HL67/HC 402 at [1.111]

¹¹⁰ Crime and Security Act 2010 s24

¹¹¹ As in *Danesh v Kensington and Chelsea Royal London Borough Council* [2006] EWCA Civ 1404, [2007] 1 WLR 69

¹¹² *Yemshaw v London Borough of Hounslow* [2011] UKSC 3; Home Office, *Domestic Violence and Abuse*,

<https://www.gov.uk/domestic-violence-and-abuse>

Before issuing a DVPN the AO must also consider other matters: the welfare of any children; representations by P; the opinion of anyone other than V who lives in the premises from which P would be excluded; and the wishes of V.¹¹³ They must consider: what the DVPN will achieve and whether that aim could be achieved by less disruptive means such as bail conditions; whether the risk of harm is too great to allow P to return to the home; and whether the removal and exclusion of P is the only option to reduce the threat or risk of violence. There are clear echoes in this guidance of the doctrine of proportionality inherent in ECtHR jurisprudence, as is appropriate given the potential for interference with P's and V's home and family life. It is also appropriate that the views of both V and P are considered.

It is important to note, however, that despite oblique references to the rights of V, P and other family members, the guidance provides no detail of V's rights under Articles 2, 3 and 8, nor P's Article 8 rights, nor the application of these rights.¹¹⁴ Indeed the only reference to Article 3 relates to P, and the risk that P's Article 3 rights may be breached if the DVPN removes P from their home and that removal (perhaps because they are mentally ill or have a learning disability) results in them suffering inhumane or degrading treatment, for example because they lack adequate shelter, food, water or basic hygiene facilities.¹¹⁵ It is unsurprising, therefore, that questions have been raised about whether the AO will be able to effectively conduct the human rights balancing exercise.¹¹⁶ Whilst the DVPN itself lasts only 48 hours, and is accordingly of an interim nature, it is no less important that the balancing exercise is appropriately undertaken at that stage. As Crompton notes 'the damage of unfairly removing a suspect from his home is not easily redressed nor is the stigma of labelling him an abuser when there is insufficient evidence to arrest him and there have been no findings by a civil court.'¹¹⁷ The 'long lasting or permanent effects' of such interim decisions cannot be ignored.¹¹⁸

Once a DVPN has been issued, as noted earlier, the guidance envisages that the police will automatically apply to a specialist domestic violence court, or the magistrates' court for a DVPO. The court may make a DVPO if satisfied on the balance of probabilities that the grounds, which mirror the grounds for the DVPN, are met. This DVPO will last for at least 14 days but no more than 28.¹¹⁹ It must prohibit molestation. It may include provisions regulating occupation and use of the family home.¹²⁰

It is when the DVPO is granted, particularly when exclusion requirements are attached, that the most significant incursion into V and P's rights will undoubtedly be felt. The Joint Committee were clearly not convinced that a DVPO was needed, noting;

'The DVPO lasts for a significantly longer time-frame and has the potential to impact significantly on the home, family and private life of both the victim and the suspect. ... the Government does not appear to have provided evidence for the need for a

¹¹³ Crime and Security Act 2010 s24(3) and (5)

¹¹⁴ Lucy Crompton, *DVP Notices and orders: vulnerable to human rights challenge?* [2013] Fam Law 1588

¹¹⁵ Unattributed, *Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) Section 24-33 Crime and Security Act 2010: Interim Guidance Document for Police Regional Pilot Schemes, June 2011-June 2012* at [5.2.11]

¹¹⁶ Lucy Crompton, *DVP Notices and orders: vulnerable to human rights challenge?* [2013] Fam Law 1588, 1589

¹¹⁷ Lucy Crompton, *DVP Notices and orders: vulnerable to human rights challenge?* [2013] Fam Law 1588 at p1589

¹¹⁸ See *Micallef v Malta* (2010) 50 EHRR 37 at p39 cited by Lucy Crompton, *DVP Notices and orders: vulnerable to human rights challenge?* [2013] Fam Law 1588 at p1589

¹¹⁹ Sections 28(10) and (11) Crime and Security Act 2010

¹²⁰ Section 28(6) - 28(8) Crime and Security Act 2010

“Go” order which lasts for up to a month. We note that the time-frame for these orders in other jurisdictions appears to be much shorter.’¹²¹

Indeed the Joint Committee had such concerns about DVPOs that they suggested the Government should provide further evidence that such a measure was appropriate, particularly given the availability of alternative civil law protection.¹²² Despite these comments the Government chose to proceed with the 28 day DVPO. 78% of the 414 DVPOs made during the pilots were imposed for the full 28 days.¹²³ Furthermore, more than two-thirds (69%) included restrictions from entering the home or coming near the victim.

These statistics might not cause such concern, if there were evidence to indicate that magistrates, when making DVPOs, had balanced the respective rights of V and P. In fact statistics indicate that the emphasis may have been on protecting V. Certainly it seems far easier to obtain a DVPO than an OO. Whilst it is settled jurisprudence that an OO is a draconian remedy, which should be used only in exceptional circumstances,¹²⁴ DVPOs were made in 89% of cases (and in 69% of these cases with exclusion requirements attached). This can perhaps be explained by the less stringent statutory test which applies to DVPO applications, and the lack of an explicit balancing requirement. It undoubtedly, however, raises questions about whether courts are considering the rights of both V and P when making DVPO applications.¹²⁵

Questions also remain to be answered about how V’s rights to protection and V’s rights to privacy or autonomy have been balanced. Whilst the magistrates must consider V’s opinion before making an order,¹²⁶ it is clear that the Government intended it to be possible for DVPOs to be obtained even if V did not support the proceedings.¹²⁷ Although it seems that some DVPOs may have been refused because of victim opposition,¹²⁸ the evaluation provides insufficient information to confirm to what extent victims views are influencing the police and the courts.¹²⁹

In any event, it is suggested that more advice could be provided to practitioners about V’s rights, the balance to be achieved between V’s protection and autonomy, and the benefits of listening to and working with V. Certainly, Mills has suggested that ‘battered women are safest ... and feel most respected – when they willingly partner with state actors ... a battered woman needs a healing response to the intimate abuse, one that nurtures her strengths and empowers her to act.’¹³⁰

¹²¹ Joint Human Rights Committee, *Human Rights Joint Committee – Twelfth Report of Session 09/10*, 23 February 2010 HL67/HC 402 at 1.112

¹²² *Ibid*

¹²³ Evaluation page 61.

¹²⁴ See *Chalmers v Johns* [1999] 1 FLR 392 per Thorpe LJ at [395]; *Dolan v Corby* [2012] 2 FLR 1031

¹²⁵ Lucy Crompton, *DVP Notices and orders: vulnerable to human rights challenge?* [2013] Fam Law 1588 at p1592

¹²⁶ Section 28(4) Crime and Security Act 2010

¹²⁷ Unattributed, *Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) Section 24-33 Crime and Security Act 2010: Interim Guidance Document for Police Regional Pilot Schemes, June 2011-June 2012* at [5.2.5] and [5.5.8]; *The Magistrates’ Courts (Domestic Violence Protection Order Proceedings) Rules 2011* SI 2011/1434 effecting amendments to the Civil Evidence Act 1995 and the Magistrates’ Court (Hearsay Evidence in Civil Proceedings) Rules 1999

¹²⁸ Evaluation page 16, 54 DVPOs were refused (11%) but note some of these applications were withdrawn or adjourned.

¹²⁹ The police are not obliged to seek V’s views when applying for a DVPO, although they must do so before granting a DVPN. The magistrates must similarly consider V’s views before making the DVPO

¹³⁰ L Mills *Killing her softly: Intimate abuse and the violence of state intervention*, (1999) 113 Harv L Rev 550 at p551

More advice could also be provided about how these remedies can be used alongside existing protective remedies. Previously a short term remedy of this type (civil in nature, applied for by a third party) has been lacking. However, in the immediate aftermath of a domestic violence incident one can see advantages in a short term notice which gives both parties breathing space and can be used to calm a situation down. This alternative to existing protective remedies may meet the needs of women who fear the criminal justice system, who cannot access civil protection themselves and/or who wish their relationship to continue.¹³¹ It is arguable that the DVPN and DVPO may help also those victims who seek longer term protection, provided that these victims also receive support from appropriate services.

The Government appear to have envisaged that DVPOs would be used to provide safety while victims sought longer term protection through NMOs and OOs¹³². Evaluations of overseas initiatives suggest such notices and orders 'can be very effective if victims also receive immediate help and support from specialist domestic violence services, to ensure that effective safety planning and longer term support and protection is put in place.'¹³³ One can thus envisage real potential for DVPNs and DVPOs to improve the circumstances of victims of violence.¹³⁴ Unfortunately, however, the key to these provisions seems to be support, support to help a victim decide whether to apply for an NMO or to support a criminal prosecution, and disappointingly the evaluation indicates that referrals were made to support services in only 60.9% of DVPO cases.¹³⁵ If a victim cannot obtain support to obtain longer term protection whilst protected by the DVPO, then the benefits of the DVPO appear significantly limited. Concerns have already been noted about whether the intrusion into P's rights resulting from a DVPO is justified, particularly if the balancing of V and P's rights is not seen to be undertaken. If a victim will not be able to use a DVPO to protect herself in the longer term, then one must certainly ask whether removing the perpetrator from the home for 28 days can be justified as necessary and proportionate.

Domestic Violence Disclosure Scheme

The second of the Government's initiatives differs markedly different from the first. In stark contrast to existing legal remedies and to the DVPNs and DVPOs (which are broadly used either to protect victims of violence or to punish perpetrators) the Disclosure Scheme is designed to help victims avoid or leave relationships which might put them at *risk of domestic violence*.

The aim of the Disclosure Scheme is to enable someone (V) who is in a relationship with a previously violent individual (P) to obtain the information that they need to make informed

¹³¹ The literature suggests what many victims want is 'simply to get the violence or harassment to stop', not to criminalize their partner but perhaps to restore 'the balance of power between the [two of them] by giving the victim a powerful shield offering real protection'; Platt, HHJ, *The Domestic Violence, Crime and Victims Act 2004 part I: Is it working?* [2008] Fam Law 642 at p646; see also M Hester, *Making it through the Criminal Justice System: Attrition and Domestic Violence* (2005) 5 *Social Policy & Society* 79-90 at p86

¹³² Joint Human Rights Committee, *Human Rights Joint Committee – Twelfth Report of Session 09/10*, 23 February 2010 HL67/HC 402 at 1.108

¹³³ Home Office, *Tough new powers to help victims break cycle of domestic violence*, Press Release, 29 September 2009 <http://press.homeoffice.gov.uk/press-releases/tough-new-powers>

¹³⁴ See Carolyn Hoyle and Andrew Sanders, *Police response to domestic violence: from victim choice to victim empowerment*, (2000) 40 *Brit J Criminol* 14 at p19; These measures could be used to create 'conditions which enable women to best understand what is in their interests, ... and then to support them in the choices they have made – whether these choices include invoking criminal justice intervention or not'

¹³⁵ Evaluation report p61

choices about whether and how V takes forward that relationship.¹³⁶ Such information will be made available to V under one of two new disclosure processes. Under the right to ask process it will be V, or a third party upon V's behalf, who will ask for information about P. Under the right to know process V will be contacted by the police or a partner agency and provided with information about P's history of violence (even when V has not sought such information).

Whichever disclosure route is used, before any disclosure is made, minimum checks will be made of the Police National computer, the Violent and Sexual Offenders Registers (if relevant) and local intelligence systems. Where checks indicate V faces an immediate risk of harm then the police must take immediate safeguarding action. In all other cases any decision to act, including decisions to disclose will be taken following discussion with other safeguarding agencies, ideally the relevant Multi-agency Risk Assessment Conference (MARAC). That inter-agency information sharing is crucial to determining risks posed to V and to the wider community is emphasised throughout the guidance. It is ultimately the local decision-making forum rather than the police which will determine whether a disclosure should be made, although police information will form the majority of the information disclosed.

The Disclosure Scheme, similarly to the DVPNs and DVPOs was initially piloted. During the 14 month pilot period 231 right to ask requests for information were received; 59 disclosures made. Under the right to know scheme 155 right to know requests were initiated by the police; 52 disclosures were made. The disclosure rate was relatively low (29%) with primary reasons for non-disclosure being insufficient information suggesting a risk was posed to V, absence of a pressing need to disclose, or a failure to meet the scheme criteria. Disappointingly, before decisions were taken roll the disclosure scheme out nationally, there was no evaluation of the scheme's effectiveness, nor any assessment of the scheme's impact on victims and perpetrators. Instead the assessment which was undertaken focused on capturing views of the disclosure process both from individuals who had received disclosures and those involved in determining whether disclosures should be made.¹³⁷ Whilst individuals whose information was disclosed may have suffered significant interference with their rights, their views were not considered.

The purpose of this section is, therefore, again to explore the potential impact of the scheme upon human rights. The first thing to note in this regard is that whilst the clear aim of the Disclosure Scheme is to improve victim protection,¹³⁸ what is interesting about this scheme, is the fact that it has also been lauded as a means to 'empower women', by enabling them to 'make informed choices' about whether they continue their relationship. Whilst there will undoubtedly be some interference with V's private life¹³⁹ when a disclosure is made under the right to know scheme, it is not interference with V's right to private life that causes most concern. It is the balance between the V's rights to protection and P's Article 8 rights that is our focus.

We should recall that the UK courts have, in interpreting Article 8, determined that 'the law now focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and

¹³⁶ Home Office, *Domestic Violence Disclosure Scheme* (2012) at p4

¹³⁷ Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment*, November 2013 ('the Pilot Assessment')

¹³⁸ Home Office, *Domestic Violence Disclosure Scheme Impact Assessment*, Oct 2013

¹³⁹ Specifically the right to develop relationships with other human beings

respect of other people.¹⁴⁰ Disclosure of P's information to V and to other agencies thus undoubtedly engages Article 8.¹⁴¹

That Article 8 is engaged is, of course, not the end of the matter. Although 'an individual's personal autonomy ... should make him – master of all those facts about his own identity ... and also of the "zone of interaction" ... between himself and others...his control of them can ... be loosened, abrogated, if the State shows an objective justification for doing so.'¹⁴² The domestic courts have confirmed indeed, in *R (Wood) v Commissioner of the Metropolis*, that Article 8

'should not be read so widely that its claims become unreal and unreasonable. ...'First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a "reasonable expectation of privacy" ... Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the State pursuant to Article 8(2).'¹⁴³

Reading the Disclosure Scheme guidance¹⁴⁴ it is clear that vast quantities of information about P may be disclosed. Disclosures will not only include information about unspent convictions for 'domestic' violence (as one might expect), but information may also be disclosed about offences which one might not ordinarily relate to domestic violence: burglary, affray, possession of a firearm, theft, robbery, cruelty to children, arson, people trafficking and offences under the Sexual Offences Act 2003. Even if a conviction has not been obtained, allegations of offending may still be disclosed, provided disclosure is deemed necessary to protect V. Third party reports of suspected violence, or even malicious allegations made by a former partner might be disclosed. Where it is considered that P should not be told of proposed disclosures, in order to protect V, P will have no opportunity to put forward their own version of events.¹⁴⁵

The invasion into P's privacy is potentially significant; when P's information is disclosed this interferes both with P's right to control his information and his right to form relationships. The first of the tests in *Wood* is therefore satisfied. The guidance acknowledges that information about a person's previous convictions and police intelligence relating to them is confidential. P would thus be expected to have a reasonable expectation of privacy; the second test is also satisfied. The key question, therefore, is whether it is justified to interfere with P's right to private life by disclosing information to V because P has been convicted of, or is suspected of having committed a domestic violence-related offence.

The jurisprudence law certainly suggests there are instances where disclosure of an offender's information may be justified in order to protect the public. The leading case of *R v Chief Constable of the North Wales Police and Others, Ex parte Thorpe and Another*,¹⁴⁶ for example confirms that:

¹⁴⁰ *Campbell v MGN Ltd* [2004] AC 457 per Hoffman LJ at [51]

¹⁴¹ In most instances disclosures will be made to V even where a third party has made a request

¹⁴² [2009] EWCA Civ 414 [21] per Laws LJ

¹⁴³ *Ibid* at [22]

¹⁴⁴ Home Office, *Domestic Violence Disclosure Scheme*, 2012 (revised 2013)

¹⁴⁵ The guidance was amended following *X (South Yorkshire) v Secretary of State for the Home Department and Chief Constable of South Yorkshire* [2012] EWHC 2954 to ensure consideration be given to allowing P to make representations concerning disclosure.

¹⁴⁶ *R v Chief Constable of the North Wales Police and Others, Ex parte Thorpe and Another* [1999] QB 396, per Lord Bingham of Cornhill CJ at p410 (recently approved, subject to modifications by article 8 in *X (South*

‘if the police have information about an individual ‘which it would be damaging to that individual to disclose, and which should not be disclosed without some public justification’ the police may nonetheless ‘consider in the exercise of a careful and bona fide judgment that it is desirable or necessary in the public interest to make disclosure, whether for the purpose of preventing crime or alerting members of the public to an apprehended danger’ and in such a case it would not be improper ‘for them to make such limited disclosure as is judged necessary to achieve that purpose.’

Such jurisprudence clearly underpins the Government guidance, which refers extensively to the need to consider disclosure on a case by case basis, taking account of statutory and common law disclosure powers, the common law duty of confidence, Article 8 of the European Convention, the Data Protection Act 1998 and the Rehabilitation of Offenders Act 1974. It is unfortunate, however, that despite recognizing that legal protections are afforded to the perpetrator, the guidance does not provide sufficient information to enable practitioners to effectively balance the competing rights of V and P. There is a lack of clarity in the Guidance as to exactly why the duty of confidence, Data Protection Act 1998 and Article 8 apply, and a commensurately weak explanation of the considerations that apply under those provisions. Whilst the guidance does detail a three stage test to be satisfied before disclosures are made,¹⁴⁷ the pilot assessment indicates that practitioners have struggled to apply this test and particularly to understand what is meant by the key term ‘pressing need to disclose’.¹⁴⁸ The pilot assessment discovered clear differences in how individual professionals interpreted and understood the term,¹⁴⁹ differences which may have resulted in variations in disclosure rates between pilot areas. One practitioner suggested that ‘pressing need to disclose’ was not a useful term, and that a better question might be ‘is there an identifiable and ongoing risk that means we should disclose?’¹⁵⁰ This raises concerns that practitioners may have focused on risk rather than considering the requirements of Article 8(2). Of further concern are clear indications in the assessment that practitioners experienced difficulties in ensuring disclosures, and thus interference with P’s article 8 rights, were proportionate to the risks. The assessment document notes particularly a lack of consistency in the detail disclosed and the types of previous offences disclosed. Given suggestions in the assessment that recipients considered more detailed disclosures would be helpful, and comments from police officers that they had increasingly disclosed more detailed information about P’s previous violent behavior,¹⁵¹ it would certainly seem sensible for more guidance to be issued, to avoid disproportionate incursions into P’s private life.

One of the primary issues raised by victim’s organisations prior to the pilots was, of course, whether the Disclosure Scheme could ever be justified as necessary.¹⁵² Refuge, for example, challenged the assumption that once informed a potential victim would make the choice to

Yorkshire) v Secretary of State for the Home Department and Chief Constable of South Yorkshire, [2012]EWHC 2954 [8])

¹⁴⁷ (a) it must be reasonable to conclude that disclosure is necessary to protect the public from crime, specifically that disclosure to A is necessary to protect A from being the victim of domestic violence related crime; (b) there must be a pressing need for such disclosure; and (c) interfering with the Article 8 rights of the offender must be necessary and proportionate for the prevention of crime.

¹⁴⁸ A term used in *Thorpe*

¹⁴⁹ Pilot assessment page 19

¹⁵⁰ *Ibid*

¹⁵¹ Pilot assessment at p20

¹⁵² the issue here being not that the scheme would interfere with perpetrator’s rights but that it could not be justified as being necessary in a democratic society, because it would not protect victims

be 'safe' or indeed, would be able to safely escape the relationship.¹⁵³ Victims of domestic violence who responded to the pre-pilot consultation suggested that if they were told their new boyfriend had been violent to a previous girlfriend they would not believe it, they would think he would be different with them or that 'it's just a jealous ex.'¹⁵⁴ Whilst some recipients of information under the right to know scheme were dismissive, or refused to listen to disclosure, the assessment suggests that other recipients of disclosures considered the information had helped them to make a more informed choice about their relationship,¹⁵⁵ and they would keep a closer eye out for warning signs of domestic abuse in their relationship.'¹⁵⁶ The overall message from the pilot is that the scheme may assist the Government to meet its obligations under Articles 2, 3 and 8 (provided effective support is provided to victims to help them decide what action to take next).¹⁵⁷ To ensure, however, that the government also complies with its negative obligations under Article 8, further guidance about balancing the competing European Convention rights is arguably required.

Conclusion

The UK is required to act to prevent domestic violence and to protect victims. The introduction of the Disclosure Scheme and of DVPNs clearly demonstrate the Government's commitment to doing so.

The UK is, however, also subject to international obligations, which restrain it from interfering in private and family life, unless such interference is necessary and proportionate. Whilst the Government's guidance on the DVPNs, DVPOs and the Disclosure Scheme suggests some consideration has been given to effecting the appropriate balance between the rights of victims and perpetrators, it is unfortunate that such limited guidance is provided in relation to these rights that practitioners may struggle to effectively balance competing rights. That anticipated human rights challenges have not materialised cannot be relied upon to demonstrate rights to protection and privacy are being effectively balanced.

It is arguable that further evaluations of both initiatives are warranted to answer numerous outstanding questions: Who is receiving protection from DVPNs and DVPOs (has protection been afforded to victims of both physical and non-physical violence in line with the requirements of international law abuse)? Is the harm that may be caused to perpetrators and victims by making a DVPO being taken into account by courts?¹⁵⁸ Are victim's rights to privacy being considered? Are victims receiving the support they need to obtain maximum benefit from DVPNs and DVPOs – in other words are they being empowered to take decisions to protect themselves. Are DVPNs, DVPOs and the Disclosure Scheme protecting victims from violence? (If disclosures are not, in fact, resulting in women ending their relationships, if DVPOs are doing no more than stopping the violence for 28 days (for it to recur immediately thereafter) then questions must be asked about whether disclosures and DVPOs can be justified.)

¹⁵³ Comment from Refuge in Home Office, *Domestic Violence Disclosure Scheme – A Consultation, Summary of Responses* (2012) at p7

¹⁵⁴ Women's Aid, *Domestic Violence Disclosure Scheme Response to consultation from Women's Aid Federation of England (Women's Aid)* (2012) at p6

¹⁵⁵ NB the assessment suggests most respondents who received a disclosure considered the scheme beneficial; however, the assessment report, page 14, notes that only a small number of recipients provided views and findings might not be representative

¹⁵⁶ Pilot assessment at p4

¹⁵⁷ The need for effective support was raised pre-pilot (*Press statement: Re. Domestic Violence Disclosure Scheme pilot implementation*, 16 July 2012 <http://www.caada.org.uk/news/press-release-16-07-2012.htm>) and by police officers and support workers involved in the pilot (Pilot Assessment at p15)

¹⁵⁸ As would be expected when an OO application is made

In the meantime, two primary conclusions can be drawn in relation to these initiatives. First, support, and consideration for victim autonomy, is essential if these measures are to improve the protection afforded to domestic violence victims. If sufficient support is not made available the benefits of these new measures may be limited, and indeed their necessity might be questioned. The second, and perhaps most pressing issue if these schemes are to be considered human-rights compliant is guidance; practitioners need to be able to understand what rights are afforded to victims and perpetrators, and how they can be balanced.