



**domestic  
abuse  
commissioner**

## **Government consultation on the Domestic Violence Disclosure Scheme Statutory Guidance: Written submission from the Domestic Abuse Commissioner for England and Wales**

### **Role of the Domestic Abuse Commissioner**

The Domestic Abuse Act establishes in law the Office of the Domestic Abuse Commissioner for the purpose of providing public leadership on domestic abuse issues and to play a key role in overseeing and monitoring the provision of domestic abuse services in England and Wales. The role of the Commissioner is to encourage good practice in preventing domestic abuse; identifying adult and child victims and survivors, as well as perpetrators of domestic abuse; and improving the protection and provision of support to people affected by domestic abuse from agencies and government.

As the Domestic Abuse Commissioner for England and Wales, I welcome the opportunity to feedback on the Extraction of Information from Electronic Devices Code of Practice and would be pleased to discuss the contents of this response further, if requested to do so.

### **Scope of response**

My response to this consultation is limited to the aspects of the Code of Practice which I believe to be the most relevant to my office's work and would have the biggest impact on victims and survivors of domestic abuse.

I was kindly given sight of the submission to this consultation made by the Office of the Victims' Commissioner and the joint response by the Centre for Women's Justice, Rape Crisis England and Wales, End Violence Against Women and other Non-Governmental Organisations (the "Joint NGO Response"). This submission draws upon the extensive work which they have carried out in this area to inform my submission.

### **Response**

#### **General comments and recommendations**

*Lack of clear guidance and worked examples*

**The draft Code of Practice would benefit from specific guidance and worked examples as to how it should be applied in practice.** Whilst the guidance sets out

the scope of the legislation clearly, the way in which this may be exercised is set out in vague terms across the document and could in turn be interpreted subjectively. I echo the Victims' Commissioner's submission that greater detail is required in the Code of Practice as to what constitutes agreement by an individual, as well as greater clarity on what constitutes necessary and proportionate action, as the current guidance is broad and could be misinterpreted. **The Code of Practice should be amended to provide more detail on how the legislation is to be applied, including practical advice and worked examples to ensure that it is applied consistently by all police forces.**

#### *Victim support and advice*

**Alongside the Victims' Commissioner, I also recommend that victims and survivors should be offered free, independent legal advice where such powers are requested to be exercised by the police.** The law in this area is complex and could leave many victims and survivors confused as to their rights. It is therefore important to ensure that they have access to free legal advice to ensure that they can make informed decisions as to whether they consent to providing their devices and the wider ramifications involved once the data has been extracted.

#### *Review Mechanism*

**I share the view set out in the Joint NGO Response that the Code of Practice would benefit from the creation of an independent review mechanism where an individual is concerned that an information request is unreasonable or excessive.** Having an independent reviewer would ensure that the necessity and proportionality test is being applied properly and could help to improve victim confidence in the criminal justice process. **Data should be made available on the number of reviews which are requested and how many of these requests result in a finding of disproportionality. This data should be used to help improve transparency as well as a way of encouraging sharing of training and best practice as to how these powers are used.**

#### **Consultation Questions**

**Q2. To what extent do you agree or disagree with the guidance that the code of practice provides on the exercise of the powers in accordance with data protection and human rights legislation?**

- a) for Section 37?**
- b) for Section 41?**

Agree.

This section is effective in setting out the rights conferred to individuals by the listed legislation and regimes.

However, it would benefit from some further clarification as to how Article 6 interacts with the Code of Practice. At present, the impact which disclosures could have on legal proceedings involving victims and survivors is not explored, even though

extracted data could be used as evidence in Court, even where this may be detrimental to them.

**Q3. To what extent do you agree or disagree with the guidance offered in the code on assessing necessity, proportionality, relevance to reasonable line of enquiry or reasonable belief when determining when the powers in sections 37 and 41 should be used?**

**a) for Section 37?**

Disagree.

I support the Victims' Commissioner's response to this question and support the recommendations made as to the same. I would further add the following recommendations as set out below.

Paragraph [32] requires clearer guidance as to how to ensure that information is truly volunteered and not provided by a victim or witness due to feeling unduly pressured by someone in a position of authority. At present, there is no explanation as to how best to safeguard against this.

Paragraph [33] should clarify whether, where a device has multiple users, consent must be sought from all users or just one of the users. Further, where there are multiple users, guidance is required as to whether the other users are informed that the device has been provided for the purposes of data extraction.

Paragraph [43] should add that it should also be considered whether the extraction would be able to provide information that cannot be obtained through other channels or intelligence sources. Essentially, where alternative forms of intelligence gathering, which are not as intrusive, can take place this should be explored.

Paragraph [48] should be supplemented with further guidance as to how the authorised person should make the decision as to the value of the information in relation to the entire investigation. The language around the amount of information which is to be extracted should be stronger to highlight that it is crucial to ensure that the least amount of information possible is extracted, rather than suggesting that this is merely desirable. As noted in the Joint NGO Response, this is a legal requirement under the Data Protection Act 2018 and the Code of Practice should reflect this.

The example in paragraph [62] should be more sensitive to the type of information which victims and survivors of domestic abuse and sexual abuse may be concerned about being obtained, such as correspondence with therapists, counsellors, an Independent Domestic Violence Advocate (IDVA). Rather, more extensive and comparable case studies should be provided in order to provide a better understanding of where the balance of risk lies.

Paragraph [63] should add that the authorised person should endeavour to clearly explain what constitutes confidential information. I support the Victims' Commissioner's submission that clarification should be provided by the provision of an independent legal advisor.

Paragraph [79] I further recommend that records of information extraction be audited on a regular basis to ensure that such powers are being used consistently across a police force and not used excessively.

**Q4. To what extent do you agree or disagree with the guidance the code of practice provides on how authorities meet the requirements stated in section 37(1) in the Act, to ensure a person has voluntarily provided their device and agreed to the extraction of information from it?**

Disagree.

The Victims' Commissioner has provided an extensive response to this question, the contents and recommendations of which I wholly agree. I reiterate support for the recommendation as to the importance of providing free legal advice to individuals from whom information is sought.

I further note submission 1) in the Joint NGO Response, which states that the draft Code of Practice does not sufficiently describe what should be contained in the Written Agreement and how to record it. I would echo this submission. This lack of guidance could result in a lack of consistency in the types of Written Agreements being provided to victims and survivors by police forces and contribute to the postcode lottery which victims and survivors experience in relation to access to services. In order to ensure that all police forces are providing detailed Written Agreements which clearly set out what individuals are consenting to and the impact of the request on their right to privacy, I also recommend that the Code must provide either an outline of the format of the Written Agreement and the information it should include, or provide a draft Written Agreement template which can be used by police forces.

I would further add the following recommendations as set out below.

Paragraph [84] should recognise that victims and survivors of domestic abuse from marginalised communities may feel more apprehensive about submitting their electronic devices, but equally may face greater pressure to do so due to being concerned about being deemed as being uncooperative.

The 'Written Notice' section should add that the written notice and the written agreement should also be provided in a range of languages, including braille, sign language, Easy Read, in addition to the forms set out by the Victims' Commissioner's submission. I wholly support and reiterate the recommendation made in the Joint NGO Response that the Code must be clear that if language is a barrier to an individual understanding any aspect of the digital extraction request, an interpreter or communications support must be made available, otherwise an individual cannot be deemed to making an agreement.

**Q5. To what extent do you agree or disagree with the guidance that the code of practice provides on how to recognise when a person is vulnerable?**

Disagree.

The guidance at present does not sufficiently set out how trauma may impact a victim or survivor of abuse and the way in which they may interact with proceedings or figures in powers of authority.

Whilst the guidance sets out the types of crimes which may make an individual vulnerable, it does not adequately explain the ways in which being victims and survivors of these crimes may impact them. Clear guidance should be provided on the impact of trauma to ensure that victims and survivors do not suffer a further detriment as a result of the trauma which they have incurred.

It is recommended that this section be re-drafted, with input from domestic abuse organisations who can provide key learnings on trauma-informed approaches. Further, worked examples should be provided in the guidance as to help inform best practice in this area.

**Q6. To what extent do you agree or disagree with the guidance that the code of practice provides on how a vulnerable person should be supported?**

I support the extensive response made by the Victims' Commissioner to this question.

I would further add that where the individual is a victim and survivor of domestic abuse, it should be explicitly stated that they should be offered to be referred to an organisation which can provide an IDVA or other advocacy support. Where a victim or survivor is from a minoritized community, they should also be offered to be referred to a specialist organisation run by and for that minoritized community. We know that accessing specialist support not only helps victims and survivors to cope and recover from the abuse, but also means they are more likely to feel supported to continue supporting a criminal justice process.

I share the concerns raised by the Victims' Commissioner as to paragraph [131]. I am concerned that using other powers to coerce a victim and survivor of domestic abuse to provide their devices could result in them disengaging from the process and in turn, increase levels of victim attrition. The guidance should be clear that this should be a measure of absolute last resort.

**Q8. To what extent do you agree or disagree with the guidance the code of practice provides on who is considered an adult without capacity, how authorities must where possible involve and support them, and who can make decisions on their behalf?**

I wholly support the submission made by the Victims' Commissioner as to this question, which provides detailed feedback from Stay Safe East. I echo the recommendation that this section should be more extensively consulted on with specialist by-and-for services who work closely with disabled victims and survivors of domestic abuse to ensure that the guidance is comprehensively clear with how best to engage with these survivors.

