

**Clare's Law, or the national Domestic Violence Disclosure Scheme : the contested legalities of criminality information sharing**

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## **Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing**

### **Abstract**

Clare's Law has been a PR success for the police in England and Wales - the police have engaged directly with the media over the national roll-out of the Domestic Violence Disclosure Scheme. But the precise operation of the Scheme, at a doctrinal level, is unclear, and warrants further scrutiny (and, I would argue, reform) before a crisis of confidence in the Scheme is precipitated by a challenge by way of judicial review. Human rights case law concerning the procedural rights of (suspected) domestic violence perpetrators is the medium through which this piece explores the manner in which the Scheme currently operates on the basis of Home Office guidance and policy.

### **Keywords**

Domestic violence, human rights, criminal records, information law, policing

### **Introduction**

Clare's Law, known formally as the Domestic Violence Disclosure Scheme, has been a PR success for the police in England and Wales - the police have engaged directly with the media over the national roll-out of the Domestic Violence Disclosure Scheme<sup>1</sup>. But the precise operation of the Scheme, at a doctrinal level, is unclear, and warrants further scrutiny (and, I would argue, reform) before a crisis of confidence in the Scheme is precipitated by a challenge by way of judicial review.

The aim of the Domestic Violence Disclosure Scheme ('the Scheme', or 'the DVDS') is the prevention of the escalation or outbreak of sexual and/or physical violence in a relationship, through the sharing of public protection risk information.

The Scheme in an orthodox sense allows for the disclosure to current partners of past convictions of 'subjects' for domestic violence-related behaviour. There is also the broader legal difficulty that the Scheme allows for the disclosure of information including not just convictions but past allegations, arrests, charges and (failed) prosecutions. This difficulty with 'forgetting' the past of an individual deemed 'risky' by society was something under consideration in early-to-mid 2014 by the UK Supreme Court, in a manner discussed below.

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<sup>1</sup> See, for example, though, the conflation of a disclosure of information about a risk of domestic violence posed by a (potential) perpetrator with an ascertainable reduction or removal of that (presupposed) risk, in David Cowlshaw, 'Ending the fear: Clare's Law saves almost 280 people from domestic abuse in just TWO years', *Mancunian Matters*, from <http://www.mancunianmatters.co.uk/content/040970505-ending-fear-clares-law-saves-almost-280-people-domestic-abuse-just-two-years> (Accessed at 17.10.14) and Keiligh Baker, 'CRIME FILE: Domestic abuse scheme working', *South Wales Argus*, from [http://www.southwalesargus.co.uk/news/11492624.CRIME\\_FILE\\_Domestic\\_abuse\\_scheme\\_working/](http://www.southwalesargus.co.uk/news/11492624.CRIME_FILE_Domestic_abuse_scheme_working/) (Accessed at 17.10.14)

Furthermore, I argue here in this piece that the Scheme might not place enough emphasis on the human rights of (alleged) offenders to be consulted as part of a decision making process, or to be notified in the eventuality that consultation or other involvement is not practicable. This twin principle is well-developed in the courts and may form the grounds of a challenge to this (crucially, non-statutory) Scheme.

Overall, police authorities will need to become more confident and more adept in engaging in dialogue with those previously convicted of (partner) violent offences, or suspected of the same, if the Scheme is to withstand longer-term legal scrutiny. This will be a challenge for the police as a group of institutions, on the basis of the (lack of) evidence of offender 'consultation' in the evaluation of the pilot Scheme, discussed below.

### **A legal framework underpinning the Scheme**

Lord Reed has recently observed in *R (T and another) v Home Secretary and another* [2014] UKSC 35 (at para. 88) that:

The United Kingdom has never had a secret police or internal intelligence agency comparable to those that have existed in some other European countries, the East German Stasi being a well-known example. There has however been growing concern in recent times about surveillance and the collection and use of personal data by the state. Some might argue that the grounds for such concern are illustrated... by the information that about four million criminal record certificates are provided annually under Part V of the [Police Act 1997]. But such concern on this side of the Channel might be said to have arisen later, and to be less acutely felt, than in many other European countries, where for reasons of history there has been a more vigilant attitude towards [regulating] state surveillance. That concern and vigilance are reflected in the jurisprudence of the European Court of Human Rights in relation to the collection, storage and use by the state of personal data. The protection offered by the common law in this area has, by comparison, been of a limited nature.

Much of the recent legal debate over the 'Snowden revelations' turns on a given interpretation of the statutory language of the Regulation of Investigatory Powers Act 2000 and in turn the Human Rights Act 1998, or an interpretation of the Article 8 jurisprudence of the Strasbourg court, in relation to the pragmatics of the technological realities and actualities of communications interceptions. But with the arrival of Clare's Law, as it is known<sup>2</sup>, on the UK public protection policy landscape, the *common law* powers of the police to gather, collate and to share 'criminality information' must be further placed under scrutiny, it seems.

The Domestic Violence Disclosure Scheme ('the DVDS', or 'the Scheme'), which began national operation in early March 2014<sup>3</sup>, features a 'right to ask' for the public, who can request details of certain elements of the criminal history relating to

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<sup>2</sup> The Scheme is named for Clare Wood, sadly killed by her partner in Salford (Greater Manchester, UK) in 2009. See Strickland, P. (2013) (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme', London: House of Commons Library.

<sup>3</sup> See Strickland, P. (2013) (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme', London: House of Commons Library, and J. Grace (2014) Disclosing domestic violence, *Criminal Justice Matters*, 97:1, 18-19.

particular individuals, with whom they have formed or are forming a relationship<sup>4</sup>, from police organisations (in turn connected to wider public protection networks<sup>5</sup>). The police must consider the matter and choose whether to supply public protection risk information (if it exists), based on an actuarial judgment with regard to the particular risk of the requesting member of the public coming to harm through domestic violence<sup>6</sup>.

The other chief element of the Scheme is the 'right to know' strand: police or other organisations may refer a case or piece of 'intelligence' about a (suspected) domestic violence perpetrator to the same kind of decision-making panel for potential disclosure under the DVDS<sup>7</sup>. The emphasis of the Scheme is placed in this way on preventing the escalation or outbreak of sexual and/or physical violence in a relationship, through the multi-agency or inter-agency sharing of public protection risk information<sup>8</sup>.

The doctrinal approach underpinning this piece was prompted in part by the way that the Home Office assessment report detailing the evaluation of the pilot DVDS in four police force areas in England and Wales produced three salient findings.

Firstly, the assessment report showed that there were various operational, policing and multi-agency issues that could be anticipated in the 'roll out' of the Scheme as a nationally-operating one<sup>9</sup>. It has been noted elsewhere that:

"Police officers felt the process of decision-making was overly bureaucratic. Practitioners felt public awareness of the pilot Scheme was low. There was a perception that the Scheme overlapped with other disclosure processes under Multi-Agency Public Protection Arrangements and/or the parallel Child Sex Offender Disclosure Scheme, presumably introducing some confusion and complexity in that regard. There was a lack of consistency in the information given in disclosures, and in the type and nature of follow-up support proffered in situations where disclosures were not made following a refusal of an application under the 'right to ask' strand of the pilot Scheme. There were perceived difficulties with logistical support in timing and making proactive disclosures of public protection 'risk' information to individuals under the 'right to know' strand of the pilot

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<sup>4</sup> See Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office.

<sup>5</sup> See J. Grace, 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK', *International Journal of Law, Crime and Justice* 41 (2013) 303-321, Erving Goffman, *The Presentation of self in everyday life*. Garden City, N.Y., Doubleday, 1959 and Erving Goffman, *Stigma: Notes on the management of spoiled identity*. Penguin, London 1968.

<sup>6</sup> See Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office.

<sup>7</sup> See Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office.

<sup>8</sup> See Strickland, P. (2013) (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme', London: House of Commons Library, and J. Grace (2014) Disclosing domestic violence, *Criminal Justice Matters*, 97:1, 18-19.

<sup>9</sup> See Home Office (2013b) Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment, London: Home Office.

Scheme, given the enormous emotional pressures this would then potentially place on the individual deemed officially 'at risk' of harm. I write "officially 'at risk'" because the Scheme guidance stipulates that one of the three criteria that must be met for disclosure to be made under the Scheme, and to be lawful under the common law of England and Wales, is an identifiable 'pressing need' for that disclosure to be present in the situation concerned. It seems the participants in the practitioner workshops that were part of the study behind the Report felt the term 'pressing need' was unclear and overly subjective."<sup>10</sup>

Secondly, there was little evidence in the assessment report that individuals (as potential or actual victims of domestic violence) who received what can be broadly termed 'public protection information' from the police under the Scheme would go on to seek support from domestic violence support and prevention services<sup>11</sup>.

Thirdly, the assessment report showed that the piloting of the DVDs has produced no engagement with the procedural rights and expectations of the 'subjects' of the disclosures under the (pilot) Scheme: the alleged or actual domestic violence perpetrators themselves. None of these 111 'subjects' in the pilot Scheme were consulted about, or notified of, disclosures made to their partners concerning their criminal histories<sup>12</sup>. This is a concern given the nature of the relevant common law powers of criminality information sharing underpinning the Scheme.

Despite these findings in the Home Office report, the Domestic Violence Disclosure Scheme was not only rolled out nationally from the 8<sup>th</sup> March 2014 following a speech to Parliament, by the Home Secretary, but was rolled out on a national basis using policy guidance (the only detailed basis for the operation of the Scheme, since it relies on broader common law powers for legitimacy) which had not been updated since 5<sup>th</sup> March 2013<sup>13</sup>. In this way, an opportunity for the reform of the underpinning guidance to the Scheme, given the findings of the assessment report from November 2013, has been ignored. This has been a regulatory failing on the part of the Home Office, I would argue.

As Sethi and Laurie have observed in the context of health information governance, an attempt to create a principled, proportionate governance system can always potentially suffer from the following factors: a culture of over-caution; a failure to make use of flexibilities; a failure to incorporate iterative intelligent design (as with the example of the roll-out of the Scheme, above); and the ultimate limits of law, or the legal system in which the regulatory system of governance must operate.<sup>14</sup> With

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<sup>10</sup> See J. Grace (2014) Disclosing domestic violence, *Criminal Justice Matters*, 97:1, 18-19.

<sup>11</sup> The evaluation methods (a questionnaire) used in the Home Office assessment report could identify only four recipients relating to 111 disclosures who indicated they had contacted support services following the disclosure to them of the relevant public protection information. *Op. cit.* n.8.

<sup>12</sup> *Op. cit.* n.8.

<sup>13</sup> See Home Office (2013a) *Domestic Violence Disclosure Scheme pilot: guidance* (Revised March 2013), London: Home Office.

<sup>14</sup> See Sethi, Nayha, and Graeme T. Laurie. "Delivering proportionate governance in the era of eHealth: Making linkage and privacy work together." *Medical law international* (2013): 0968533213508974.

regard to the latter, the guidance underpinning the Domestic Violence Disclosure Scheme, for example had been updated in March 2013, after initial publication in 2012, due to the success of a claimant in judicial review proceedings, who had challenged the unlawful failure of the guidance regulating the operation of the parallel Child Sex Offender Disclosure Scheme to properly account for the procedural rights to consultation/notification that the 'subjects' of such Schemes enjoy<sup>15</sup>. This represented an interference in the regulatory system of the management of risk in the form of the public protection routine by the law; and what Julia Black would call an 'external factor affecting the deployment of resources' or the precise operation of the Scheme concerned<sup>16</sup>.

### *The relevant common law powers of criminality information sharing underpinning the Scheme*

As per the published Home Office Guidance on the operation and regulation of the DVDS<sup>17</sup>, information is shared with a member of the public by the police, using common law powers that have been thoroughly and consistently recognised by the courts, so long as thresholds of *relevancy* (in relation to the nature of the past 'criminality information' describing the 'subject' concerned), *necessity* (in terms of any possible disclosure meeting a 'pressing' public protection need) and *proportionality* (which, according to the relevant case law and wider legal commentary should include recognition of a subject's right to consultation or notification where this is practicable<sup>18</sup>) are reached.

There is a particular difficulty that the Scheme allows for the disclosure of information including not just convictions but past allegations, arrests, charges and (failed) prosecutions. This difficulty with 'forgetting' the past of an individual deemed 'risky' by society was something under consideration in the first half of 2014 by the UK

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<sup>15</sup> See *R (X) v Chief Constable of South Yorkshire* [2012] EWHC 2954 (Admin); discussed in Grace, J. "Too well-travelled", not well-formed? The reform of 'criminality information sharing' in England and Wales', *Pol. J.* (2013) Vol. 86 29-52 and J. Grace, 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK', *International Journal of Law, Crime and Justice* 41 (2013) 303-321.

<sup>16</sup> See Black, Julia. "Enrolling actors in regulatory systems: Examples from UK financial services regulation." *Public Law* 2003.Spring (2003): 63-91.

<sup>17</sup> See Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office.

<sup>18</sup> See commentary and analysis of the grounds for the successful challenge in *X v Chief Constable of South Yorkshire* [2012] EWHC 2954 (Admin) to the parallel (though statutory) Child Sex Offender Disclosure Scheme, in both J. Grace, "Too well-travelled", not well-formed? The reform of 'criminality information sharing' in England and Wales', *Pol. J.* (2013) Vol. 86 29-52 and J. Grace & M. Taylor, 'Disclosure of confidential patient information and the duty to consult: The role of the Health and Social Care Information Centre', *Med Law Rev* (Summer 2013) 21 (3): 415-447.

Supreme Court<sup>19</sup>, in the context of the construction and sharing of particular Enhanced Criminal Record Certificates for employment vetting purposes.

Lord Reed, in *R (T and another) v Home Secretary and another* [2014] UKSC 35, and in finding that the interference with T's Article 8 rights had been unnecessary in that case, noted (at para. 142):

I cannot however see any rational connection between minor dishonesty as a child and the question whether, as an adult, the person might pose a threat to the safety of children with whom he came into contact. There is therefore no rational connection between the interference with article 8 rights which results from the requirement that a person disclose warnings received for minor dishonesty as a child, and the aim of ensuring the suitability of such a person, as an adult, for positions involving contact with children, let alone his suitability, for the remainder of his life, for the entire range of activities [deemed sensitive in public protection terms].

But with the Scheme under consideration in this article, we are not talking of such offending behaviour as 'minor dishonesty as a child', though there are, in relation to the decision-making process of determining potential disclosures under the Scheme, issues of 'relevancy decreasing over time' that must be balanced with a notion of 'seriousness of harm or risk of harm' - in terms of a potential, proportionate disclosure of information under the Scheme.

In addressing the state of the law in relation to the retention of different types of criminality information, and different resulting 'labels' for individual (alleged) offenders, Lord Wilson also noted recently in *R (T and another) v Home Secretary and another* [2014] UKSC 35 (at para. 21) that there was engagement of Article 8 ECHR in differing degrees of granularity or seriousness of interference with that right in the context of such criminality information retention:

It is... at least arguable that the state's *retention* of data about cautions (and spent convictions), even prior to their disclosure in a CRC or an ECRC, amounts to interference with Article 8 rights which thus requires justification. In *S v United Kingdom* (2009) 48 EHRR 1169 the Grand Chamber of the ECtHR held that the retention by the police, save in exceptional circumstances, of DNA samples and fingerprints taken from persons suspected, but never convicted, of a criminal offence represented an interference with their rights under Article 8: paras 77 and 86. It rejected the UK's argument that there was no interference until use was made of the retained material (para 70) and it held - persuasively - that the applicants' reasonable concern about its possible future use was relevant to whether an interference had already arisen (para 71). It is true that the Grand Chamber stressed the highly personal and sensitive nature of the material (para 72) and one could argue that a record of cautions and of spent convictions is not in that league. On the other hand, in *Bouchacourt v France*, Application No.5335/06, (unreported) 17 December 2009, which concerned material on a sex offenders' register, the ECtHR seemed to declare categorically that retention of data relating to private life by itself represented interference irrespective of its sensitivity (para 57). This court can leave open whether it should go as far as that.

One observation we must make is that current Home Office guidance to the operation of the Scheme does not make much distinction as to the relevant degree of certainty one must attach to the spectrum of provenance in relation to records of arrest, cautions, charges, cases where 'no further action' is taken, actual

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<sup>19</sup> See J. Grace, 'Old convictions never die, they just fade away: The permanency of convictions and cautions for criminal offences in the UK', *J. Crim. L.* 2014, 78(2), 121-135.

prosecutions, and acquittals. The Scheme guidance requires that information is disclosed in a proportionate manner (see my fuller discussion of this below), but only notes on this issue that the proportionality test relevant (according to the Scheme guidance itself at least) at the stage of considering a potential disclosure under the Scheme requires that consideration is given to:

the extent of the information which needs to be disclosed - e.g. it may not be necessary to tell the applicant the precise details of the offence for the applicant to take steps to protect [themselves or a potential victim].<sup>20</sup>

It has been argued in a piece for the *Journal of Criminal Law* that regard for 'provenance' or 'certainty' in relation to the potential sharing of a piece of public protection information is crucial, in the context of a correct proportionality test to be applied in an instance of criminality information sharing, and that as such the relevant configuration of the proportionality test should be constructed in the following way:

In order that an item of criminality information is shared for the purposes of public protection [in a way that is lawful] it is suggested that the following question should be answered in the affirmative: Objectively speaking, is the information indicative of the (alleged) commission of a *sufficiently serious* offence which it is *reasonably certain* was committed by the individual concerned, that is *currently relevant* to the purpose for requiring [a disclosure for] the purpose of public protection, and which the individual [subject] concerned has had an opportunity to *comment meaningfully* upon ([particularly] where the information is of an allegation, caution, arrest, charge, or prosecution not resulting in a conviction [rather than a conviction itself]) [my emphasis]?<sup>21</sup>

Furthermore, in relation to that last *procedural* element of what I see as the correct proportionality test as relevant in this context, as this piece tries to show (below), the actual operation of the Scheme seemingly does not place enough emphasis on the human rights of (alleged) offenders to be consulted as part of a decision making process<sup>22</sup>, or to be notified in the eventuality that consultation or another manner of making representations is not practicable<sup>23</sup>. That is to say, at least so far as we can tell, given the data presented in the Home Office assessment report on the pilot Scheme, as discussed above<sup>24</sup>.

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<sup>20</sup> Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office, p.24.

<sup>21</sup> See J. Grace, 'Old convictions never die, they just fade away: The permanency of convictions and cautions for criminal offences in the UK', J. Crim. L. 2014, 78(2), 121-135.

<sup>22</sup> See also J. Grace (2014) Disclosing domestic violence, *Criminal Justice Matters*, 97:1, 18-19.

<sup>23</sup> See J. Grace, "'Too well-travelled', not well-formed? The reform of 'criminality information sharing' in England and Wales", *Pol. J.* (2013) Vol. 86 29-52 and J. Grace, 'Old convictions never die, they just fade away: The permanency of convictions and cautions for criminal offences in the UK', J. Crim. L. 2014, 78(2), 121-135.

<sup>24</sup> For reasons of space available in this piece, in terms of the rights of (alleged) perpetrators of domestic violence, I do not explore the legal issues of the regulation and governance of the Domestic Violence Disclosure Scheme by the regime found in the Data Protection Act 1998 and supplementary, statutory (and other) guidance as issued by the Information Commissioner's Office (ICO). For details on the relevant ICO Code of Practice on Data Sharing, and guidance as to 'data sharing checklists', see:

[http://ico.org.uk/for\\_organisations/data\\_protection/topic\\_guides/data\\_sharing](http://ico.org.uk/for_organisations/data_protection/topic_guides/data_sharing) (Accessed at 29/05/14).



That the Scheme would and does engage the Article 8 right to respect for private and family life of (alleged) perpetrators of domestic violence almost goes without saying.

Lord Reed (in *R (T and another) v Home Secretary and another* [2014] UKSC 35 at para. 119) has noted that the European Court of Human Rights determined that the sharing of 'police intelligence' and criminality information for public protection purposes engages Article 8 rights of (alleged) offenders, and can be unlawful, if little enough attention is paid to the factors of the passage of time, relevance in a particular context, and contextual notions of procedural fairness. Lord Reed has observed that:

In the light of the judgment in *MM v United Kingdom* [2012], it is plain that the disclosure of the data relating to the respondents' cautions is an interference with the right protected by article 8(1)... That judgment establishes, in my opinion persuasively, that the legislation fails to meet the requirements for disclosure to constitute an interference "in accordance with the law". That is so, as the court explained in *MM*, because of the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the [then] absence of any mechanism for independent review of a decision to disclose data under section 113A [Police Act 1997].

### **The correct approach to a proportionality assessment**

A correct approach to the structure and granularity of a proportionality assessment in relation to the sharing of criminality information under the Scheme can be laid out as follows (even if it is lacking from current Home Office guidance on the operation of the Scheme).

Police authorities, in considering a proportionate disclosure under the Scheme, should look to establish:

- (a) a sufficient importance, in terms of a 'pressing need' (or 'necessity') to justify interfering with the rights of a 'subject' as an (alleged) perpetrator of domestic violence, under the Scheme, and
- (b) a rational connection between the purpose of the proposed sharing of information with the purpose of the (common law) powers of the police to disclose information, and
- (c) a minimalised interference with the rights of the subject where practicable, and lastly,
- (d) evidence of a balancing exercise being conducted, weighing the rights of the 'subject' and the rights of the (potential) victim.

This four-part proportionality test I present here is adapted from the formulation of proportionality as a requirement of the common law developed through Article 8 ECHR jurisprudence as outlined by Wilson LJ in *R. (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 45.

If this seems a great level of scrutiny, or granularity, in looking for proportionate decision-making, it is for this reason that Munby LJ in *R. (on the application of Bibi) v Secretary of State for the Home Department* [2013] EWCA Civ 322 declared the assessment of proportionality in decision-making in 'private life' and 'family life' cases the "real Article 8 [ECHR] battleground". Procedural rights of the 'subject' under the operation of the Scheme stem in this analysis from the need to take offender views into account in order to best calibrate the correct balancing exercise of rights as highlighted under part (d) of the proportionality test laid out above, and as highlighted in the case of *H & L v A City Council* [2011] EWCA Civ 403.

A principle of 'subject *notification* if not *consultation*, where *practicable*' is thus well-developed in the case law, if only because it would be a requirement of complying with all four parts of a proportionality assessment exercise, as above, and may soon form the grounds of a challenge to this (crucially, non-statutory) Scheme<sup>25</sup>.

### *The appropriate construction and interpretation of procedural rights of 'subjects' in the Scheme guidance*

Generally, while the Scheme guidance notes that "Due consideration must be given on whether the disclosure [that is notification of potential or actual disclosure of criminality information to the applicant, A] to B [the perpetrator-subject] would have potential to escalate the risk of harm to A", and then that if "this were to be the case, no disclosure must be given to B"<sup>26</sup>, there is likely to be patchy record-keeping (to date) by police authorities as to how they deliberate and apply this rationale, given the zero number of cases reported in the evaluation study of the Scheme, as discussed above, with regard to this concept of perpetrator consultation or notification etc.

This does suggest that there may be widespread minimalistic adherence to the procedural rights protections and expectations laid down in the guidance as a guard against any legal challenge to the operation of the Scheme on the grounds that it represents a necessary and legitimate, but *disproportionate*, interference with the right to respect for private and family life of the subject as encapsulated under Article 8 of the European Convention on Human Rights.

The published Scheme guidance after all notes that:

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<sup>25</sup> See J. Grace, 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK', *International Journal of Law, Crime and Justice* 41 (2013) 303-321. This developed line in the jurisprudence stems from, amongst other sources in the common law in this area, a number of observations by Munby LJ about the procedural nature of Article 8 ECHR as it is engaged in public protection-type cases. "So procedural fairness is something mandated not merely by Article 6, but also by Article 8", per Munby J (as he then was), *Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 (Fam) [34]. "[There are] standards of procedural fairness mandated in [certain circumstances] both by the common law and by Article 8", per Munby LJ in *R (on the application of H) v A City Council* [2011] EWCA Civ 403, [50–52]. "Article 8... has an important procedural component", per Munby LJ in *R (on the application of H) v A City Council* [2011] EWCA Civ 403, [50–52].

<sup>26</sup> Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office, p.24.

"the police must consider if representations should be sought from B to ensure that the police have all necessary information to make a decision in relation to disclosure. As part of this consideration, the police must also consider whether there are good reasons not to seek a representation, such as the need to disclose information in an emergency or seeking the representation might put A at risk."<sup>27</sup>

This notion of consultation/notification putting 'A' at risk has clearly been over-relied upon if none of the 'subjects' under the pilot Scheme, as indicated, again, by the Home Office study, were offered any opportunity to exercise their procedural rights to make 'representations' under the Scheme guidance, as highlighted here. As for the application of the *proportionality* test as to the potential disclosure of criminality information under the Scheme, the guidance *does* also note that a proportionality assessment:

"...involves considering... whether B should be asked he or she wishes to make representations, so as to ensure that the police have all the necessary information at their disposal to conduct the article 8 [ECHR] balancing exercise."<sup>28</sup>

### **The right to a fair hearing**

The disclosure of public protection information under the Scheme also engages not just Article 8 of the ECHR, but arguably also Article 6(1) of the ECHR - the right of the 'subject' to a fair hearing in the determination of their *civil rights*, and/or the *determination of criminal charges* against them<sup>29</sup>. Engaging and interfering with the right, under Article 8 ECHR, to respect for private and family life of the 'subject' ensures that the requirement of the determination of the *civil rights* of the 'subject' is met in terms of subsequently engaging Article 6, while some would argue that in a manner, the 'criminality' nature of the information being shared, and respect for the presumption of innocence required in typical criminal justice proceedings, could also see the UK judiciary determine that the full array of rights in Article 6 ECHR - including, loosely, and in a minimal, but vital, sense, the right to be informed of and to respond to accusations against them, found in Article 6(3) ECHR.

This latter factor is particularly crucial, I would argue, where the 'provenance' or 'certainty' of the public protection information to be shared is in greater doubt: that is, in relation to a situation where the information is of an allegation, caution, arrest, charge, or prosecution not resulting in a conviction (rather than a conviction itself), as discussed above<sup>30</sup>.

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<sup>27</sup> Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office, p.22.

<sup>28</sup> Home Office (2013a) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office, p.24.

<sup>29</sup> See, on this point, *R (MXA) v Harrow LBC & Others* - Queen's Bench Division - 04 June 2014 - Unreported

<sup>30</sup> For a deeper discussion of the relevance of the presumption of innocence in issues of determining and apportioning criminality 'around the fringes' of the core of normal criminal process, see Campbell, L. 'Criminal

### *The rights of (potential) victims of domestic violence*

The rights of the (potential) victim that must be balanced with those of the 'subject', in any analysis of the legitimacy or lawfulness of a disclosure of public protection information under the Scheme, include the right to life under Article 2(1) ECHR, which arguably places a positive obligation on the state (here, the UK government and the police force concerned) to consider the potential ramifications of not disclosing information in the most high-risk cases<sup>31</sup>, as well as the right to freedom from inhuman or degrading treatment under Article 3 ECHR<sup>32</sup>, which arguably imposes a similar positive obligation, to share potentially harm-averting public protection information, on the authorities engaged in the risk-management 'dramaturgical routine' of multi-agency working on the 'frontstage'<sup>33</sup>. This is also accompanied by a consideration from the European Court of Human Rights that issues surrounding the need to prevent domestic violence can produce a positive obligation to uphold the relevant right to respect for private and family life of a (potential) victim<sup>34</sup>.

### *A balancing of rights*

Ultimately then, the right of the 'subject' to a fair hearing should be a flexible, elastic factor to be taken into account when determining whether or not to consult with, or notify, a 'subject' of the Domestic Violence Disclosure Scheme, where practicable, as part of the disclosure decision-making process. As Hale LJ noted in *W (Children)* [2010] UKSC 12 (at paras. 23 and 24):

"The object of the proceedings is to achieve a fair trial in the determination of the rights of all the people involved... A fair trial is a trial which is fair in the light of the issues which have to be decided."

### *Legitimate expectations and issues of fettering discretion*

On a last, separate observation in this doctrinal analysis of the operation of the Scheme, a 'subject' would, I would note, have the 'legitimate expectation', enforceable in the courts, that police forces in England and Wales, in configuring and

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Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76 MLR 681. This area of discussion is, however, largely beyond the scope of this current piece.

<sup>31</sup> For an example from the Strasbourg case law on positive obligations in the context of domestic violence, see *Irene Wilson v. The United Kingdom* [2012] (Application no. 10601/09).

<sup>32</sup> It is an important observation to make, we feel, that this right is one to be free of domestic violence or domestic abuse where this is preventable by the state, as it can otherwise be defined as inhuman or degrading treatment given enough evidence of a failure to prevent this harm on the part of the state.

<sup>33</sup> See J. Grace, 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK', *International Journal of Law, Crime and Justice* 41 (2013) 303-321.

<sup>34</sup> Although this might not extend to a requirement on the criminal courts to consider the need to prevent the risk of domestic violence, in determining whether an offender requires a custodial sentence, as a possible perpetrator of domestic violence. Again, see *Irene Wilson v. The United Kingdom* [2012] (Application no. 10601/09).

conducting the decision making process to be followed by local DVDS panels or forums, would have due regard to the Home Office guidance on the procedural rights of those 'subjects' themselves, as above, as those elements of the guidance relate to 'subject' notification if not consultation, where practicable, in the event of a disclosure under the Scheme<sup>35</sup>. It makes little difference if the 'subject' is aware of their procedural rights or not - the 'legitimate expectation' exists as a ground for judicial review of police decision-making in the operation of the Scheme regardless of the 'subject's' own level of knowledge about the Scheme itself<sup>36</sup>.

Furthermore, police forces in England and Wales should not construct local policy approaches, set in a rigid, inflexible manner to the procedural rights of 'subject', that clashes with and undermines the emphasis that the Home Office guidance on the Scheme purports to place on those procedural rights<sup>37</sup>. This formation of a policy as a manifestation of the notion of a 'fettering of discretion' in broader public law terms could then be deemed as unlawful as might be a breach of legitimate, procedural expectations.

### **A final point about the politics of public protection and Clare's Law**

This piece has mainly focused on outlining the procedural rights of the 'subjects' of the Domestic Violence Disclosure Scheme: Clare's Law. If police authorities make such procedural errors in the administration of the DVDs that it is ultimately successfully challenged in the courts, say, through judicial review proceedings, then the Scheme will suffer a reputational loss and the police can be blamed for a systemic failing to uphold the rights of their 'subjects'. But there is an important point to make about the 'blaming game' in relation to victims of domestic violence. Defining the 'parameters of blame' is a constant motif of the 'politics of public protection'<sup>38</sup>. And the adoption and roll-out of the Domestic Violence Disclosure Scheme has created a new avenue of blame within this politics: the 'Right to Know' strand of the Scheme, which allows for actors in the wider public protection routine to recommend to the police actors overseeing the operation of the Scheme in their force area, that those police actors might look to disclose criminality information to a potential victim of domestic violence to allow them to make 'better-informed choices'<sup>39</sup>. Not alerting the police to a potential use of the Right to Know strand of the Scheme could come to be seen as a default, blameworthy error on the part of another individual actor,

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<sup>35</sup> See Ahmed, F. and Perry, A., 'The coherence of the doctrine of legitimate expectations', *The Cambridge Law Journal*, 73, pp 61-85.

<sup>36</sup> By way of analogy, see the asylum claim policy case of *R (Rashid) v Home Secretary* [2005] EWCA Civ 744.

<sup>37</sup> See the classic 'fettering discretion' case, on the lawful processes of using and setting limits on discretionary powers, of *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610.

<sup>38</sup> See Nash, Mike. "The politics of public protection." *Handbook of Public Protection* (2010): 60.

<sup>39</sup> See generally Home Office (2013b) *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment*, London: Home Office.

organisation or regulator. Of course, the next step in 'blaming' in this public protection routine, sadly, could eventually become the blaming of victims themselves: if the recipient of criminality information, disclosed to them by the police to further their own public protection ends under the Domestic Violence Disclosure Scheme, does not make a 'better-informed choice' to leave their partner, perhaps, and became, eventually, a victim of domestic violence - who do we blame? Only the perpetrator of that violence, one would hope, but Marian Duggan, for one, has already warned against the potential blaming outcomes of this 'responsibilisation' of the (potential) victim due to this feature of the operation of the Domestic Violence Disclosure Scheme<sup>40</sup>.

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<sup>40</sup> See Duggan, M. (2012) 'Using Victims' Voices to Prevent Violence Against Women: A Critique', *British Journal of Community Justice*, Vol. 10(2): 25-37