

The nature of spent convictions and the common law basis of the Domestic Violence Disclosure Scheme: limiting the effectiveness of Clare's Law?

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The nature of spent convictions and the common law basis of the Domestic Violence Disclosure

Scheme: Limiting the effectiveness of Clare's Law?

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Abstract

The current Home Office guidance on the operation of the Domestic Violence Disclosure Scheme, known as 'Clare's Law', has the illogical and (in some ways) unfair effect of preventing the disclosure of *spent* convictions or cautions, and any information relating to those offences - but not the disclosure of allegations, arrests or charges which did not lead to a conviction (or caution) at any point. This has the result of limiting the real effectiveness of the Domestic Violence Disclosure Scheme, because the criminal convictions of some individuals cannot be shared with a vulnerable member of the public who might be seeking to learn of them, and also creates an imbalance in the fairness of its operation, since those with 'criminality information' categorised by only a lower level of legal certainty or standard of proof, of sorts, might see their right to respect for private and family life more easily and readily infringed. This piece seeks to outline some reasons as to why the doctrinal assumptions made about the inability of disclosure of spent convictions under the Scheme may be said to be flawed. The case is made, in this way, for placing the Scheme on a statutory footing to resolve this illogicality resulting from a particular doctrinal ambiguity which has limited the effectiveness of the Scheme in its first year of national operation.

Introduction

'Clare's Law' is a Home Office policy, rather than a 'law' per se, which allows for members of the public to seek a disclosure, from the police, of any information which might confirm a suspicion that their partner, a somehow threatening or violent person, has some kind of 'history' retained by the police in relation to offences relating to domestic violence¹. This is the 'right to ask' element of the

¹See Jamie Grace (2015), 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* February 2015 Vol. 79 No. 1 36-45.

policy, which is formally known as the Domestic Violence Disclosure Scheme ('the Scheme')². The 'right to know' element of the Scheme is able to be drawn upon by social workers, probation officers, health professionals, and other responsible individuals who work as part of the 'public protection routine', and who might want the police to consider a disclosure to a person they feel might be at risk of domestic violence from a 'subject', or domestic violence perpetrator³. In this way, the Scheme operates on a 'multi-agency' basis⁴, and so operates in a broadly parallel fashion to other public protection information disclosure processes, such as the Child Sex Offender Disclosure Scheme⁵ or Multi-Agency Public Protection Arrangements (MAPPA)⁶.

By the 8th of March 2015, the national operation of the Domestic Violence Disclosure Scheme (the Scheme) had been in place for one year. In that time, I authored an article for the *Journal of Criminal Law* which dwelt upon the way that the Scheme appears to be based upon Home Office guidance which does not sufficiently emphasise the procedural rights of 'subjects', or alleged/actual perpetrators of domestic violence; or indeed, outline a sufficiently nuanced proportionality test for disclosure in that regard⁷.

Furthermore, and more recently, the BBC and other media sources have commented on the freedom-of-information figures obtained and publicised by the Press Association, which demonstrate that following the onset of the Scheme in England and Wales more than 3,000 requests had been made in around ten months. While it was revealed that in that period more than 1, 300 disclosures were made, it is also the case that different forces nationally have been applying the Scheme guidance differently, to the extent that the rate of disclosure based on the assessment of

²See Paul Strickland, (2013) (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme', London: House of Commons Library.

³See Paul Strickland, (2013) (House of Commons Library Standard Note), 'Clare's Law: The Domestic Violence Disclosure Scheme', London: House of Commons Library.

⁴See Jamie Grace (2015), 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* February 2015 Vol. 79 No. 1 36-45.

⁵See Jamie Grace (2014), 'Old convictions never die, they just fade away: The permanency of convictions and cautions for criminal offences in the UK', *Journal of Criminal Law* April 2014 Vol. 78 No. 2 121-135.

⁶See Jamie Grace (2013), '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.

⁷See Jamie Grace (2015), 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* February 2015 Vol. 79 No. 1 36-45.

the required 'pressing need' following an either a 'right to ask' or a 'right to know' application has varied greatly, force by force⁸.

I want to offer up a supplementary analysis and criticism of the current operation of the Scheme, which is, in this instance, much more about the (unnecessary) limitation of the Scheme as an effective operational policy. This limitation of the Scheme's effectiveness comes about because of the way that the Scheme guidance precludes the police from using the processes of the Scheme to disclose any information at all to a concerned member of the public that relates to a *spent* conviction for a domestic violence-related matter or offence⁹. But this limitation, arguably, need not be in place - and because it is in place, as I highlight below, it has the perverse effect of placing at a distinct disadvantage those who are never convicted for domestic violence related offences (following allegations, arrests or charges in relation to the same), compared to those who are indeed convicted, and over time see their relevant convictions become spent (if that is possible, given the seriousness of the offence concerned).

The framework provided for 'rehabilitation' and 'spent' convictions under the Rehabilitation of Offenders Act 1974

People convicted of criminal offences and/or subject to other varieties of criminal sanctions are deemed to be legally 'rehabilitated' and their conviction(s) or other sanction(s) to be 'spent' when a period of time has passed without further re-offending - as long as that offence, or the sentence imposed, does not pass a particular threshold of seriousness in the context of the offence concerned¹⁰.

Recent guidance from the Ministry of Justice, issued following the 2014 reform of the legal framework under the Rehabilitation of Offenders Act 1974, describes how the periods of time taken for convictions and other sanctions to become spent can vary:

⁸ See BBC, 'Clare's Law: 1,300 domestic abuse disclosures made', at <http://www.bbc.co.uk/news/uk-30977759> (Accessed on 07/02/15)

⁹ See throughout Home Office (2013) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office.

¹⁰ See Ministry of Justice, 'New Guidance on the Rehabilitation of Offenders Act 1974', from <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974> (Accessed at 14/02/2015)

"The rehabilitation period (the length of time before a caution or conviction becomes spent) is determined by the type of disposal administered or the length of the sentence imposed. Rehabilitation periods that run beyond the end of a sentence are made up of the total sentence length plus an additional period that runs from the end of the sentence, which we have called the 'buffer period'. Other rehabilitation periods start from the date of conviction or the date the penalty was imposed...The 'buffer periods' are halved for those who are under 18 at date of conviction (save for custodial sentences of six months or less where the 'buffer period' is 18 months)."¹¹

On this issue, the Ministry of Justice guidance sets out a useful table (adapted for this piece as follows):¹²

Sentence/disposal	Buffer period for adults (18 and over at the time of conviction or the time the disposal is administered). This applies from the <u>end date</u> of the sentence (including the licence period).	Buffer period for young people (under 18 at the time of conviction or the time the disposal is administered). This applies from the <u>end date</u> of the sentence (including the licence period).
Custodial sentence of over 4 years, or a public protection sentence	Never spent	Never spent
Custodial sentence of over 30 months (2 ½ years) and up to and including 48 months (4 years)	7 years	3½ years
Custodial sentence of over 6 months and up to and including 30 months (2 ½ years)	4 years	2 years
Custodial sentence of 6 months or less	2 years	18 months
Community order or youth rehabilitation order	1 year	6 months

The effect of a conviction or caution becoming spent is then broadly outlined in the guidance concerned as follows:

"For most purposes the 1974 Act treats a rehabilitated person as if he or she had never committed, or been charged with charged or prosecuted for or convicted of or sentenced for the offence and, as such, they are not required to declare their spent caution(s) or conviction(s), for example, when

¹¹*Ibid.*

¹²See Ministry of Justice, 'New Guidance on the Rehabilitation of Offenders Act 1974', from <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974> (Accessed at 14/02/2015).

applying for most jobs or insurance, some educational courses and housing applications... [while] ...All cautions and convictions may eventually become spent, with the exception of prison sentences, or sentences of detention for young offenders, of over four years and all public protection sentences regardless of the length of sentence... Once a caution or conviction has become spent under the 1974 Act, a person does not have to reveal it or admit its existence in most circumstances. Unless an exception applies [emphasis in the original]... spent cautions and convictions need not be disclosed when filling in a form, or at a job interview. An employer cannot refuse to employ someone (or dismiss someone) because he or she has a spent caution or conviction unless an exception applies."¹³

The issues of illogicality and perversity outlined in the Introduction above, come about as a result of how the Home Office guidance on the operation of the Domestic Violence Disclosure Scheme align the framework of the rehabilitation of Offenders Act 1974 with the aims and processes of the Scheme, in, I would argue, an overly cautious fashion, doctrinally-speaking.

The (non-)operation of the Domestic Violence Disclosure Scheme with regard to spent convictions and related information

The Domestic Violence Disclosure Scheme guidance, produced by the Home Office and followed by police forces in England and Wales at the time of writing, determines that:

"Information disclosed [under the Scheme] may include:

"i. un-spent convictions held by B on any offence related to domestic violence (see annex A for guidance on offences that may be disclosed);

"ii. information where, even if B does not possess any convictions, it indicates that B poses a risk of harm to A."¹⁴¹⁵

¹³ See Ministry of Justice, 'New Guidance on the Rehabilitation of Offenders Act 1974', from <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974> (Accessed at 14/02/2015)

¹⁴ Home Office (2013) Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office. p.12

¹⁵ Additionally, due to the current effect of S.4(3)(a) of the 1974 Act, it is also the case that under S.4(5) of the 1974 Act further, related information connected to that conviction should not be disclosed either - meaning no disclosure of the conduct concerned, or any allegation, arrest(s), or the charge which led to that conviction, now spent.

Because of the operational limitation of the Scheme described in this way in the Home Office guidance, we might assume that that the author(s) of that guidance had in mind the language of S.4(3)(a) of the Rehabilitation of Offenders Act 1974 in creating this limitation. In S.4(3)(a) the Act provides that:

"any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's);".

The relevant 'obligation' in the context of the Scheme has clearly been viewed as the Scheme itself: that is, the Scheme is an 'arrangement' that applies to the work of the police, to be relied upon by those who now enjoy the 'right to ask', or who are professionally drawing upon the 'right to know'. But the Scheme does not, I would argue, create an *obligation* to disclose any information relating to a 'subject' under the Scheme - I would argue instead that the Scheme creates a framework for the exercise of *discretion* with regard to potentially disclosing the same information - according to the presence, as articulated in the Scheme guidance, of a 'pressing need' for that disclosure, and on a basis that is otherwise lawful and proportionate. Taking this view as to the Scheme operating on the basis of *policed discretion* in decision-making, rather than an obligation as such, opens up the doctrinal possibility that the provisions of the 1974 do not apply strictly to the common law-based Scheme.

Even if there was a sense that trying to determine the extent to which the operation of the Scheme is based on an *obligation* (resulting from the common law duty on the police to protect the public, as revisited below) or a *discretion* to do so by disclosing criminal records information is a moot point only, there is another issue as to distinctions on the meaning of the term 'obligation', as in S.4(3)(a) of the Rehabilitation of Offenders Act 1974. This is the idea that the Human Rights Act 1998, and more to point the 'positive obligation' placed on the police to uphold the rights (meaning the safety from harm) of potential victims of domestic violence, which results from European Court of Human Rights jurisprudence¹⁶ as well as the common law of England and Wales,¹⁷ might mean that in the

¹⁶Though this argument can hardly be conclusive. *Irene Wilson v UK* (App. No. 10601/09, 23 October 2012) saw the Strasbourg court deem inadmissible the claim that the right to respect for private and family life had been engaged in the particular handling of a case of serious domestic violence, since the police had actively involved themselves in the investigation and prosecution of the offence, leading to an eventual conviction. In the heavily-

context of the operation of the Scheme, the strict language of S.4(3)(a) of the 1974 Act should be 'read down', as it were, from the police perspective, in terms of their common law powers to share information (even relating to spent convictions) .

In any event, the very need to speculate or hypothesise as to this doctrinal issue highlights a weakness of the Scheme itself, since this is where the basis of the Scheme on police common law powers, construed narrowly in a way which effectively precludes one category of 'risk' information sharing, is a distinct flaw of the Scheme. If the Scheme was placed on a statutory footing, then the language of the 1974 Act would in turn be impliedly amended or more clearly construed - as it is in the context of other avenues of the sharing of criminal records or 'criminality information' which are on that self-same statutory footing.

Statutory avenues of sharing and disclosing spent convictions or cautions and related criminality information

Commonly, an Act of Parliament which creates a means of public protection information sharing, such as the examples I offer here, below, will be construed as impliedly amending the scope and effect of the Rehabilitation of Offenders Act 1974.

Enhanced Criminal Record Certificates (ECRCs) are created using a process, and related statutory police powers under S.113B of the Police Act 1997 as amended, to disclose even spent convictions and related information to the Disclosure and Barring Service. These ECRCs are used by employers to vet their potential recruits in sensitive positions and so protect the public, particularly children and vulnerable adults, from potential harms posed by 'risky' individuals.¹⁸ In another example, Multi-Agency Public Protection Arrangements (MAPPA) that are based on a statutory mechanism

cited *Osman v UK* - 23452/94 [1998] ECHR 101 (28 October 1998) it was deemed that there had been no infringement of positive obligations to prevent the loss of life under Article 2 ECHR or the infringement of the right to respect for family life- although the failure of the police to take effective steps to prevent the loss of life in that case is striking. Overall, we can only conclude that the facts of cases involving 'positive obligations' to act or to make public protection decisions in the context of policing in the UK are very much factually dependent on the scale of the potential breach of rights.

¹⁷ In *E (A Child) v Chief Constable of Ulster* [2008] UKHL 66 the police in Northern Ireland had not failed in regard to their positive obligation to uphold the rights of families suffering from sectarian intimidation and abuse when they, the police, had not acted more proactively to subdue and arrest the perpetrators concerned, in a heated public order situation. However, in this case before the House of Lords, Hoffman LJ (at para. 10) noted that "there is a duty to do what is reasonable in all the circumstances to protect people from a real and immediate risk of harm". But as Carswell LJ noted at para. 48 in this judgment, this duty cannot be seen to amount to an "intolerable burden on the state" to prevent harm or death.

¹⁸See Jamie Grace (2013), "'Too well-travelled", not well-formed? The reform of 'criminality information sharing' in England and Wales', Pol. J. (2013) Vol. 86 29-52.

underpinned by provisions of the Criminal Justice Act 2003 can involve the disclosure to members of the public particular information relating to the 'offence histories' of those offenders who pose a high risk to them or persons in their care.¹⁹ Furthermore, the Child Sex Offender Disclosure Scheme (known as 'Sarah's Law') is not only a kind of policy forerunner to the Domestic Violence Disclosure Scheme, being similar in operation if different in the type of offence it is aimed at preventing, but is actually based upon S.327A of the Criminal Justice Act 2003 - and not common law powers, as with the Domestic Violence Disclosure Scheme. There is then considerable policy precedent, as it were, for the re-creation of the Domestic Violence Disclosure Scheme on a statutory footing.

But, I would argue, there may not even be the need for new legislation in that way: a broader and more encompassing view of the scope of police common law powers to disclosure criminality information, as well as the positive obligations on the police to take measures to protect the public, may allow for simply the re-writing of the Home Office guidance on the operation of the Domestic Violence Disclosure Scheme, and the inclusion of the sharing of spent convictions and related information in its scope.

The common law basis of disclosures under the Domestic Violence Disclosure Scheme

Hale LJ recently observed in the Supreme Court judgment in *Michael v Chief Constable of South Wales* [2015] UKSC 2 (at para. 195) that:

""There is no doubt that the police owe a positive duty in public law to protect members of the public from harm caused by third parties. In *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270, the House of Lords held that the police have a duty to take all steps which appear necessary for keeping the peace, for preventing crime and for protecting from criminal injury. The House also approved a statement by Pickford LJ in *Glamorgan Coal Co Ltd v Glamorganshire Standing Joint Committee* [1916] 2 KB 206, 229, that a party threatened with violence from another is entitled to protection, whatever the rights and wrong of their dispute."

Considerably more recently, in *X v Commissioner of Police of the Metropolis* [1985] 1 W.L.R. 420 Whitford J (at 421) outlined the notion that with regard to Section 4 of the Rehabilitation of

¹⁹See ACPO (Association of Chief Police Officers) (2010a) *Guidance on Protecting the Public*, 2nd edn. London: National Policing Improvement Agency and ACPO (2010b) *Guidance on the Management of Police Information*, 2nd edn. London: National Policing Improvement Agency.

Offenders Act 1974 it could be agreed that "there is no positive duty imposed in general terms upon persons not to disclose what are conveniently referred to as "spent convictions"".

So there are still common law powers of the police to share criminal records information, I would argue, that both pre-date the Rehabilitation of Offenders Act 1974, and have continued to prove a lawful basis for the operation of the Domestic Violence Disclosure Scheme, as the Scheme guidance acknowledges. But this is now an era where the police owe duties as 'positive obligations' under the Human Rights Act 1998 to potential victims of domestic violence - to protect them from risk of harm - with one way of so doing potentially being the disclosure to them of even spent convictions and related information under the Scheme.²⁰

There is also a jarring inconsistency that comes about as a result of the supposed relationship between the Scheme guidance and the Rehabilitation of Offenders Act 1974. This stems from the issue that matters of criminal 'process' such as a recorded allegation, an arrest or charge, for example, that did *not* lead to a conviction can then logically never relate to a *spent* conviction, and so could *theoretically* always be disclosed as an item of information under the Scheme (though the correctly-applied proportionality test or principle might preclude the disclosure of rather old, or very old, 'criminality information'). This is while the same 'conduct' or 'process' information (such as an allegation, arrest, or charge) in relation to a person for whom this *did* relate to a now-spent conviction is actually excluded from disclosure under the ambit of the Scheme according to the current Home Office guidance.

There is then the issue that the application of rules in the Scheme guidance about non-disclosure of 'process' and 'conduct' information that stems from a conviction being spent for the purposes of the Rehabilitation of Offenders Act 1974 might be said to *further* frustrate the ability of the police to comply with wider legal safeguarding duties created not just by government policy but by the common law, for example, of England and Wales. In short, the Scheme is all the less effective for the fact that warnings cannot be given to members of the public about previous violent behaviour of a person's partner, full stop - let alone the supposed bar on any disclosure of an actual (spent) conviction.

²⁰ As guidance to the police on 'protecting the public' through disclosures of information now indicates: see ACPO (2010) *Guidance on Protecting the Public*, 2nd edn. London: National Policing Improvement Agency and ACPO (2010) *Guidance on the Management of Police Information*, 2nd edn. London: National Policing Improvement Agency.

Discussion

Overall, I am not sure it would be certainly unlawful in all cases to purportedly breach the rules of the Scheme guidance, or indeed, the provisions of the 1974 Act as they supposedly apply to the Scheme, by disclosing spent convictions using common law powers with the aims (and duties) of public protection, since the Human Rights Act 1998 and the European Convention on Human Rights place positive obligations to protect life or to take steps to prevent 'inhuman or degrading treatment' arising from domestic violence. This is a context which could include disclosing information (and maybe spent convictions) in *potential* domestic violence contexts, I would argue. In some ways then, by purporting to completely preclude the disclosure of all spent convictions and related information, the Scheme guidance could be said to be overly inflexible on this front. This is ultimately however, a matter of statutory interpretation, and how one might construe and define common law powers. But I feel it is a point worth making that the duties owed by the police to potential victims of domestic violence, due to 'positive obligations' in human rights law, are something that can be the basis of a valid criticism of the current operation of the Scheme, in relation to a purported restriction of the Scheme to only disclosures of unspent convictions and related information; just as there can at the same time be a valid criticism of the current operation of the Scheme based on the erosion of the (procedural and) privacy rights or right to a private and family life of (former) domestic violence perpetrators²¹.

I cannot, for one, believe that the courts, or the drafters of the Rehabilitation of Offenders Act 1974, would be expected to take a strictly literal approach to defining whether a 'positive obligation' to protect and uphold the rights of (potential) victims of domestic violence, including their right to life under Article 2 ECHR even, is the kind of obligation addressed by the broad language of S.4(3)(a) of the 1974 Act (even if the current Scheme guidance is based on this assumption).

This is really a discussion about two competing sets of obligations that would perhaps be hard to choose between in the most serious cases of risk, where a disclosure of a spent conviction or other information relating to it might be preferable - one from the 1974 Act, which is about seeking to uphold the privacy rights of the rehabilitated, given Article 8 of the ECHR, and one which is about

²¹ See Jamie Grace (2015), 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* February 2015 Vol. 79 No. 1 36-45.

seeking to protect vulnerable members of society at the most grave risk of potentially lethal domestic violence. As the wording of the relevant Authorised Professional Practice guidance, produced by the College of Policing and under consultation in early 2015 indicates, and rightly so: "All decisions should be made ethically, in accordance with the laws and powers that apply and driven by a selfless intention to make potential victims as safe as possible."²²

As such, over time we might expect to see the Home Office guidance on the Scheme re-drafted in more detail with an emphasis on the 'positive obligation' issue in relation to protecting victims' human rights through information disclosures.

²²See College of Policing (2014) [Internet]. <https://www.app.college.police.uk/consultation/domestic-abuse-consultation/> [Accessed 14 February 2015]