

**DOMESTIC VIOLENCE DISCLOSURE SCHEME
HOME OFFICE CONSULTATION October 2011**

**SUBMISSION BY
THE CENTRE FOR CHILD AND FAMILY LAW REFORM**

Option 2: a “right to ask” national disclosure scheme which enables A to ask the police about B’s previous history of domestic violence or violent acts where the police would undertake full checks to inform a risk assessment and disclosure. A precedent upon which suitable adaptations could be made exists with the Child Sex Offender Disclosure Scheme

QUESTIONS

1) Should a formal system be put in place to enable A to ask the police for information about the previous violent behaviour of B?

- Yes. This would formalise the current position by creating a regularised framework for the disclosure of this type of information by the police.
- It would likely create greater consistency in the police processes for disclosure and would allow for a standardised marketing campaign so that general awareness could be heightened about the disclosure options available in domestic situations.
- In the Child Sex Offender Review (Public Disclosure Pilots) evaluation, police and offender managers interviewed perceived that the disclosure process formalised what they already thought should be good practice in child protection. It created greater clarity for staff by focusing on risk and permitting the sharing of information with members of the public.
- The police already have a discretion to disclose information relating to previous convictions or charges to A where there is a pressing need for disclosure of the information concerning B’s history to prevent a future crime. There can therefore be no real prejudice created in formalising these powers. It would merely be an extension of existing powers and controls.
- Article 8 ECHR does not guarantee an absolute right to privacy in respect of personal information (see eg *Leander v Sweden*, App. 9248/81, to the effect that the storing and the release of information in connection with public employment may amount to a justified interference when necessary to protect national security). Disclosure of information to third parties can engage a breach of Article 8, unless it is necessary in a democratic society, pursues a legitimate aim, and is proportionate to that aim (i.e. does not exceed what is necessary to achieve that aim). Whilst disclosure of

past domestic violence offences undoubtedly amounts to an interference with the perpetrator's right to privacy, the interference is not only desirable but responds to a "pressing social need", therefore meets the 'necessity' test in connection with interferences under the second paragraph of Articles 8-11 ECHR (see eg *Handyside v UK*, App. 5493/72). In fact, statistics reveal that the phenomenon of domestic violence is associated with a high risk of reoffending, insofar as most cases reveal a pattern of abusive behaviour rather than isolated incidents. This supports the view that preemptive action is imperative in order to reduce future crime. Moreover, legitimate interferences aimed at protecting "the rights of others" within the meaning of Art. 8 para. 2 arguably encompass measures intended to secure the right to life and the protection against ill-treatment of potential victims. This is particularly so since the legitimacy of any interference depends on the weight of the interest protected by the interference (see eg *White v Sweden*, App. 42435/02, where the Court found that, in allowing the publication by the media of allegations of the applicant's criminal activities, the domestic courts had struck a fair balance between the public interest and the applicant's private life). Furthermore, the State also has positive obligations under Articles 2 and 3 ECHR to protect individuals against attacks on their life perpetrated by third parties and against ill-treatment at the hands of third parties. Thus, the Strasbourg jurisprudence has established (see *Edwards v UK*, App. 46477/99, *Osman v UK*, App. 23452/94) that, where State authorities knew or ought to have known that there was a real and immediate threat to an individual's life emanating from another identified individual, and failed to take the necessary precautions, inaction amounts to a breach of Article 2 ECHR.

2) Do you agree that the Child Sex Offender Disclosure Scheme, with appropriate modifications, is an appropriate model to apply under this option?

- Yes. There are parallels between the Child Sex Offender Disclosure Scheme and what is being proposed for domestic violence.
- The disclosure process for the Sex Offender Disclosure Scheme (with its 5 different stages) allows for the person making the enquiry to be clear about exactly what information they are seeking and how it can be used.
- The suggestion in the consultation paper of having an Independent Domestic Violence Adviser present if disclosure is approved is a positive one and would help to manage the aftermath of any disclosure in a constructive way. This process also takes account of whether appropriate safety measures can be put in place for the Applicant when the police are considering making a disclosure.

3) What do you see as the potential risks and benefits of such a scheme? How might any risks be minimised?

- The benefits of such a scheme are largely outlined above. Having a formalised process for disclosure of this type of information would likely ‘sharpen up’ domestic violence work (as it has done through the Sex Offender Disclosure Scheme with child protection work) by tightening police procedures across the country and making explicit what the public can expect from such a scheme.
- Public awareness could be heightened about the scheme and how it could be used, which might encourage people to seek information about a partner that they might otherwise not have done. This in turn could prevent future crimes/ incidents of domestic violence.
- The potential risks are that the disclosure of this information could be abused. With internet outlets such as facebook and twitter, individuals could take it upon themselves to advertise information obtained from the police. Information as it changes hands can become less accurate and could severely impact upon person B’s Article 8 rights. However, any formalised system of disclosure would merely be an extension of existing controls and so this risk is live under the current common law powers of the police in any event. This risk could be minimised by the use of the Independent Domestic Violence Adviser and a discussion as part of the disclosure process about how disclosed information should be used.
- There is a potential risk to the person making the enquiry of their partner finding out about the enquiry. All enquiries would have to be treated with the strictest confidence and a detailed assessment should take place about whether there are appropriate safety measures in place to protect any Applicant before disclosure is made.
- Policy wise, there is a risk that formalising disclosure of past domestic violence following the Sex Offenders Disclosure Scheme could create a slippery slope for other types of disclosure not limited to someone’s previous convictions. For instance, disclosure of past alcohol or drug abuse could be championed and so again Article 8 rights need to be considered. The limits of the disclosure scheme will have to be clearly delineated so as to avoid the disclosure of potentially untested and damaging information into the public sphere.
- It is also important that any scheme of this nature goes hand in hand with rigorous police work. The ‘right to ask’ could risk making individuals seem too much responsible for their own safety when the police have a role in protecting this as well.
- Another risk inherent in the scheme – unless it has prospective effects exclusively – lies in the possible litigation for the alleged breach of the right of domestic violence perpetrators to protection against *post facto* laws under Article 7 ECHR. In fact, if the statute extends to acts committed before its entry into force, an individual may claim

that the disclosure of his or her record of domestic violence amounts to the imposition of a penalty not contemplated by the law at the time the act was committed, or otherwise a heavier penalty than the one existing at the relevant time. Nonetheless, the view that the legislator may opt for the retrospective application of the act finds support in Strasbourg authorities suggesting that placing a person's name on a register of offenders does not constitute a "heavier penalty" within the meaning of Article 7 ECHR, insofar as it has preventative rather than punitive aims (*Adamson v UK*, App. 42293/98).

4) What are your views about placing such a scheme on a statutory footing?

- Placing the scheme on a statutory footing would cement the powers of the police and would allow for greater clarity in the disclosure process and perhaps greater uniformity across the UK.
- The current discretionary powers of the police, with no clear statutory basis, to disclose information to third parties when they consider a situation to reveal a "pressing need for disclosure", are not satisfactory. The European Court of Human Rights has constantly stressed the importance of the accessibility of the law to the individuals and the foreseeability of measures open to the authorities so that an individual may adapt his/her conduct accordingly (*Malone v UK*, App. 8691/79). An important consequence of the Strasbourg understanding of the law as consistency with the rule of law is that, where the law allows for excessive discretion, with no safeguards against the risk of arbitrariness, the measure does not satisfy the requirement of being "in accordance with the law" within the meaning of Article 8 para. 2 ECHR (*Gillan and Quinton v UK*, App. 4158/05).

*

Option 3: a "right to know" national disclosure scheme where the police would proactively disclose information in prescribed circumstances to A relating to B's previous history of domestic violence or violent acts (as envisaged in the ACPO report of 2009).

QUESTIONS

- 1) Should a 'right to know' system be put in place to ensure that the police proactively share information to A about the previous violent behaviour of B?**

- No. This would go further than the common law position by creating not only a regularised framework for the disclosure of this type of information by the police but also by placing the onus on the police proactively to share the information with partners of people with violent pasts.
- In the Child Sex Offender Review (Public Disclosure Pilots) evaluation, police and offender managers interviewed perceived that the disclosure process formalised what they already thought should be good practice in child protection. It created greater clarity for staff by focusing on risk and permitting the sharing of information with members of the public. However, in the case of the Sex Offender Disclosure Scheme there was no proactive element to the disclosure. Such a practice has not been tested. Although the intention of a ‘right to know’ system is honourable; to prevent potential crimes, to implement this system would be an extension of existing powers too far.
- The right to know would pose difficulties in terms of implementation. The authorities would have to monitor the intimate life of former offenders and make qualitative judgments about their relationships, i.e. whether the latter constitute fleeting or sufficiently committed relationships to warrant the *ex officio* disclosure of information. Such a close monitoring would be too intrusive to be compatible with Article 8 ECHR, as it would fail the test of proportionality: it would in fact go beyond what is necessary to protect the rights of potential victims and would interfere with the right to privacy of former abusers to an unacceptable extent.

2) What do you see as the potential risks and benefits of such a scheme? How might any risks be minimised?

- The benefits of such a scheme are that it could prevent future crimes by warning potential victims of the dangers of their relationship before the onset of any/further domestic violence. If people are proactively told about their partners’ violent pasts, they can then make an informed decision about whether they wish or how they wish to continue their relationship with that person. It could save people from getting into situations of domestic violence and ultimately save lives. There have been situations reported by the media where, had victims known details of their partner’s previous convictions etc, those victims might not have been killed by their partners.
- In addition, having a formalised process for disclosure of this type of information may well ‘sharpen up’ domestic violence work by tightening police procedures across the country and making explicit what the public can expect from such a scheme. Public awareness could be heightened about the scheme and how it could be used, which might in itself act as a deterrent to domestic violence. However, the potential risks outweigh these benefits.

- Before the risks are even discussed there is first a practical issue about how exactly police would go about disclosing this information to potential victims of domestic violence, how they would find out who these people are and what impact this would have upon police resources. There is a danger of inconsistency from one police department to another as to how the disclosure scheme would be implemented depending on the number of staff and amount of resources available.
- Then there are the risks; first, that the disclosure of this information could be abused. With internet outlets such as Facebook and twitter, individuals could take it upon themselves to advertise information obtained from the police. Information as it changes hands can become less accurate and could severely impact upon the subject person's Article 8 rights.
- In addition, if the information to be disclosed is not limited to previous convictions but also includes reported allegations and civil injunctions for example, untested and potentially false allegations could be released into the public field in a way that severely infringes the subject's human rights. Our justice system reflects the reformed individual who remains innocent until proven guilty. This proposed scheme flies in the face of that system and could damage it irreparably.
- There is also a potential risk to the person either making the enquiry of their partner or being told by the police about their partner's violent past. Such disclosure could cause domestic violence situations if the partner finds out about the disclosure.
- Policy wise, there is a further risk that encouraging proactive disclosure could create a slippery slope for other types of disclosure not limited to someone's previous convictions. For instance, disclosure of past alcohol or drug abuse could be championed and so again Article 8 rights need to be considered. The limits of the disclosure scheme (whichever option is chosen) will have to be clearly delineated so as to avoid the leaking of potentially untested and damaging information into the public sphere.
- The draconian impact of such a scheme might lead to some perpetrators taking evasive measures such as changing their identities and thus frustrating the legitimate purpose of disclosure to those enquiring when they perceive a risk to themselves or others. Policing identity change in the relatively small numbers involved with sexual abuse has presented considerable problems. It would be much more difficult in the case of domestic violence. A less draconian scheme would be likely to lead to less evasion and an more effective use of the disclosure of information.

3) Should disclosure cover all violent behaviour by B or only those relating to domestic violence instances?

- There may well be merit in disclosure going beyond purely domestic violence instances. Convictions for other forms of violent behaviour, depending on the seriousness and scope of those convictions, might elucidate a propensity for violence in general which could extend to domestic situations. Under the Sex Offender Disclosure Scheme, disclosure can extend from specific convictions for child sex offences to other convictions relevant to the safeguarding of children (domestic violence or other violent or sexual offences for example). Similarly, offences of a violent or sexual nature could be relevant to protecting potential victims of domestic violence. Arguably, the risk to person B's human rights is less in extending disclosure beyond purely domestic violence offences than the risk to person A's human rights if future domestic violence were to occur.

4) Should disclosure of B's violent behaviour be extended beyond convictions to encompass intelligence?

- There are risks with disclosure being extended beyond convictions to encompass intelligence.
- A conviction is at least based on an allegation or allegations which have been investigated by the police and tested by the criminal standard of proof. Untested allegations on police files might be false and should not be advertised to members of the public. There is nothing to stop somebody making an allegation to the police, which might have no basis. If such allegations were disclosed, they may well be taken out of the context in which they came to be reported and could be severely damaging to person B.
- When it comes to civil injunctions, non-molestation orders and anti-harassment orders for example, often these are granted initially on an ex parte basis. Sometimes they are discharged the following week but a record would still be available of the original order. Although there are countless instances where non-molestation orders are based on wholly valid allegations and orders are rightly granted by the Judge ex parte, there are occasions when there has been no basis whatsoever for that order other than untrue or exaggerated allegations. The Judge has to make a quick decision to protect Applicants before allegations can be tested and a decision can be made about whether the order should remain in place. In fact, one or two courts habitually make non-molestation orders for a period of one year without listing a return date for the Respondent's case to be put. Similarly, even if the allegations are tested, in a civil court the burden of proof is the balance of probabilities rather than beyond reasonable doubt. There is surely a prejudice to someone's human rights in having this information disclosed to new partners.
- There are further concerns in respect of cautions; there have been a number of instances in the experience of the committee for the Centre for Child and Family Law

Reform of parties, men in particular, agreeing to such cautions, without a full understanding of the implications and impact on their future lives. These are very often administered without independent advice being given and, absent any proper judicial process; there is therefore concern about the potentially blighting effect which cautions might have.