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*Page 277*

# Protection of Children and Vulnerable Adults: Police Disclosure of Damaging Allegations

FRANCIS BENNION investigates police practice regarding the disclosure of damaging but unproven allegations

## Introductory

For the protection of children and vulnerable adults there has arisen in recent years a complex structure of statutory entities, rights and duties, international treaty provisions, government guidelines, and developments in the common law, the latest component of which is the Safeguarding Vulnerable Groups Act 2006. The requirements, restrictions etc. embedded in the national protective structure for children and vulnerable adults are well-intentioned, but may in some cases be found to collide with other protective rules and concepts such as data protection, the presumption of innocence, the protection of privacy, the rehabilitation of offenders, and the tort of defamation.

Central to the national protective structure for children and vulnerable adults is the role of the police in disclosing damaging information held by them about individuals. An obvious example is the disclosure of convictions for offences indicating a likelihood that the convicted person may constitute a danger to children or vulnerable adults. Another aspect, with which this article is principally concerned, relates to what the Home Office refers to as "allegation information", that is information which consists of damaging allegations that have not ended in a conviction.[1]

## The Police Preventive Duty

At the heart of the national protective structure for children and vulnerable adults is what may be called the police preventive duty, though this duty of course extends much more widely. The police force largely consists of persons who have been attested as constables. The latest version of the attestation form, laid down in the Police Reform Act 2002 s. 83, requires a constable to say

> 'I do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and *prevent all offences against people and property*; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law.'

The passage I have italicised refers to the police preventive duty, but they also have at common law a detection duty. In a circular the Home Office refer to disclosure under "police

[1] Letter dated 12 March 2009 sent to Mr Hugo Swire MP by Ms Meg Hillier, Parliamentary Under-Secretary of State at the Home Office, and copied to the author (hereinafter referred to as "Home Office letter").

common law powers, in the interest of the prevention or detection of crime".[2] The Home Office say that in pursuance of this duty

> "The police have always maintained local records of non-conviction information for operational reasons and in the interest of the prevention and detection of crime. Local information could, for example, include allegations that have been made about an individual by third parties, or details of cases where the Crown Prosecution Service has decided not to proceed, or which have resulted in an acquittal. Where disclosed, information of this nature is considered by the police to represent a factual record of previous events."[3]

Part 5 of the Police Act 1997 contains elaborate provisions for the issue by the Home Office, usually through the recently established Criminal Records Bureau (CRB), to any individual who applies for it, of a criminal record certificate relating to a named person. Section 115 provides for what it terms an "enhanced" criminal record certificate in certain cases. This sets out, in addition to information about convictions, any allegation information that may be relevant to applications for certain sensitive jobs, known as "soft information"[4]. It may involve information which is protected from disclosure by such rules and concepts as are mentioned above, for example the presumption of innocence, though the 1997 Act is careful not to authorise this expressly. The Home Office say:

> "All such occupations are of a sensitive nature - the great majority affording unsupervised access to children or vulnerable adults - and *all occasions where the applicant has broken the law* have the potential to be relevant to the employer's consideration of their suitability for the



> position in question."[5]

The words I have italicised are surprising, since an *allegation* of criminal behaviour ought not to be equated to *proof* of it. In many cases such allegations are malicious or otherwise unreliable.

## The *Northumbria* Case

A recent important case in this field is *W v Chief Constable of Northumbria* [2009] EWHC 747 (Admin), which I shall refer to as *Northumbria*. The male claimant for judicial review, referred to only as W, had the following information on his police records:

> **1987** W convicted of sexually assaulting a three-year old boy whom W (then aged 15) was babysitting. Sentence: 12-month supervision order.
>
> **2001** W accused by his stepson J of physically and sexually abusing him when he was 14. W denied this and was not prosecuted.
>
> **2001** W accused by J of sexually abusing his daughter R when she was 4. W denied this and was not prosecuted.
>
> **2007** In June W arrested for an alleged series of sexual assaults on R. In December told he would not be charged for these. However in care proceedings in February 2008 the county court judge found W had sexually abused R on many occasions.

W was employed as a driver delivering household goods to stores, and to private houses where children might be present. On 29 October 2007, in purported pursuance of their

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[2] Home Office circular 047/2003, para. 12.
[3] Home Office letter.
[4] Home Office circular 047/2003, para. 11.
[5] Home Office letter. Emphasis added.

preventive duty, the Northumbria police informed W's employer of the 1987 conviction and the June 2007 arrest, but not the other matters. On 5 November 2007 W was summarily dismissed by his employer, who said:

> "You have been arrested and put on police bail. The nature of the allegations against you are [*sic*] of such a serious nature that they may discredit the name of [the employer] and as such is deemed gross misconduct."[6]

Nicol J found that the police had been guilty of two errors. They had failed to comply with a Home Office circular, and they had contravened the Rehabilitation of Offenders Act 1974. Nicol J said:

> "In 2003 the Home Office drew up a circular in conjunction with the Association of Chief Police Officers regarding the disclosure of criminal convictions amongst other things – see Revised Arrangements for Police Checks HOC 047/2003. The circumstances contemplated by the Circular include disclosure under police common law powers for the prevention of crime – see paragraph 12. Paragraph 14 of the Circular provides 'Convictions which are spent under the Rehabilitation of Offenders Act 1974 should not be disclosed unless the matter in question is covered by the terms of the Exceptions Order made under the 1974 Act'. As I have said, it is common ground that this case was not covered by the Exceptions Order."[7]

The police had a duty to comply with the circular. In another case Laws LJ said "respondents to such a circular must (a) take it into account and (b) if they decide to depart from it, give clear reasons for doing so".[8] Nicol J held that there was no evidence that the police took any account of the circular or the 1974 Act.[9]

## The Presumption of Innocence

In *Northumbria* there is no evidence that the police took any account of the presumption of innocence either, even though it was indirectly mentioned in the Home Office circular.[10] Nor it seems did Nicol J take any account of the presumption of innocence, for it is not mentioned in his judgment. Yet it was relevant in relation to the police disclosure of the June 2007 arrest.

The presumption of innocence is a fundamental principle of the common law. It has been referred to in many judgments, one of the latest being that of Sir Anthony May, President of the Queen's Bench Division, who spoke of "the fundamental principle that a person is presumed innocent until he is proved guilty"[11]. As Salvatore Zappalà pointed out in his book *Human Rights in International Criminal Proceedings*[12], the presumption is one of the cornerstones of modern criminal procedure and as such has been enshrined in art. 11 of the Universal Declaration of Human Rights and art. 14(2) of the International Covenant on Civil and Political Rights.

Article 11 states that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial". Article 14(2) requires that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". There are many similar formulations.[13]

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[6] *Northumbria*, para. 2.
[7] *Northumbria*, para. 22.
[8] *R (Khatun) v Newham LBC* [2005] QB 37 CA at [47]. See *Northumbria*, para. 23.
[9] *Northumbria*, para. 24.
[10] See footnote 20.
[11] *Director of Public Prosecutions v Wright* [2009] EWHC 105 (Admin) at [41].
[12] Oxford University Press, 2003, p. 83.
[13] For example African Charter, art. 7; American Declaration of the Rights and Duties of Man, art. XXVI; Arab Charter on Human Rights, art. 7; Convention on the Rights of the Child, art. 40(2)(b)(i).

By article 6(2) of the European Convention on Human Rights (ECHR), "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".[14] This is a narrowed version of the common law presumption of innocence. The latter does not only apply where a person has actually been charged with a criminal offence. It applies *a fortiori* where no charge has been made, and there is a mere allegation of wrongdoing.[15]

Where a person A alleges to the police that an individual D has committed an offence, the law requires the police to investigate the allegation (though only if it is appropriate to do so, and if the allegation is not obviously false or misguided). Apart from that, the presumption of innocence means that the police are required to treat D as innocent of the offence unless and until D has admitted guilt or been proved guilty according to law. That presumption is apparently not applied by the police to allegation information.

*Page 279*

In *R (on the application of Harris) v Secretary of State for Justice* [2008] EWCA Civ 808 (*Harris*) Mr Tim Owen QC argued that an appellant whose conviction had been quashed was entitled to compensation because "once her conviction was quashed she reverts to the position of an unconvicted person who can rely on the presumption of innocence". For the state to voice any qualification to her innocence was, Mr Owen submitted, to infringe the appellant's rights under art. 6(2) of the ECHR. He continued:

> "To deny her compensation on the ground that she has not been demonstrated beyond reasonable doubt (or conclusively) to be innocent . . . is to voice such qualification and thus to infringe article 6(2)."[16]

In *Harris* Hughes LJ said this argument was founded upon decisions of the European Court of Human Rights (ECtHR) when considering particular national provisions for compensation payable to those who are acquitted at trial. In a series of cases beginning with *Sekanina v Austria* (1994) 17 EHRR 221 the ECtHR considered an Austrian statutory provision which enabled a person acquitted at trial to claim compensation if time had been spent in custody on remand but permitted the court to refuse it unless any suspicion that he had committed the offence had been dispelled. Compensation had been refused on the ground that "the jury took the view that the suspicion was not sufficient to reach a guilty verdict; there was, however, no question of the suspicion being dispelled". The ECtHR held that that amounted to voicing a suspicion which undermined the acquittal and thus constituted an infringement of the presumption of innocence enshrined in art. 6(2).[17]

The only possible reason the police have for keeping records of allegation information in relation to D is that they are regarded as demonstrating some degree of guilt by D, even though D has not admitted guilt or been proved guilty. That contravenes the presumption of innocence. Does the fact that they are "a factual record of previous events" make any difference? The Home Office argue that the police need to keep such records to aid the fight against crime, but the only reason they might be of help here is if they suggest that D is a wrongdoer who should be treated as a suspect in relation to a new offence D might have committed. Even keeping them contradicts the presumption of innocence, which is thereby downgraded. Disseminating them is a graver contravention of the presumption.

Then the Home Office pray in aid what may be called the Soham factor, recalling a notorious double murder case in 2002. In relation to occupations which are of a sensitive nature, for example those affording unsupervised access to children or vulnerable adults, precautions are

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[14] The ECHR is given effect in English law by the Human Rights Act 1998. Home Office circular 047/2003, para. 13, says that decisions as to the disclosure of information must have regard to this Act.
[15] See dictum noted at footnote 11.
[16] See *Harris*, para. 33.
[17] See *Harris*, para. 34. Hughes LJ cited other cases following *Sekanina* in identical circumstances, eg *Rushiti v Austria* (2001) 33 EHRR 56 and *Weixelbraun v Austria* (2003) 36 EHRR 45. For reasons that do not affect the present argument, the court held that these decisions did not apply in *Harris*.

obviously needed before a job appointment is made. There is no indication in the authorities that this justifies overriding the presumption of innocence by keeping or circulating allegation or soft information.

## Protection of Privacy

Article 8(1) of the ECHR, which, as supported by the Human Rights Act 1998, is the basis of the burgeoning UK law of privacy, says "Everyone has the right to respect for his private and family life, his home and his correspondence". This is curtailed by art. 8(2), the relevant portion of which reads: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society . . . for the prevention of disorder or crime . . ."

This requires that in the exercise of their preventive power the police shall make a damaging disclosure of soft information only if it is "necessary". In *Northumbria* Nicol J cited in this connection a dictum of Lord Woolf: "the overriding priority must remain to protect the public, particularly children and other vulnerable people".[18] However, said Lord Woolf:

> ". . . it must be remembered that the decision to which the police have to come as to whether or not to disclose the identity of paedophiles to members of the public, is a highly sensitive one. Disclosure should only be made when there is a pressing need for that disclosure".[19]

This is borne out by the Home Office circular, which says that decisions as to the disclosure of information must have regard to the Human Rights Act 1998.[20] It adds:

> "As regards the Human Rights Act, it is crucial to keep in mind that the disclosure of sensitive personal information represents an interference with the individual's right to respect for his or her private life. Any such interference must be in accordance with the law and proportionate - ie, necessary in the circumstances of the case and for the purpose of the detection or prevention of crime. Any information must be relevant to the matter in hand and, in the case of soft information, must also be capable of being substantiated if need be. Old, stale, convictions (or other information) should not be disclosed."[21]

## Data Protection

The Home Office circular says that decisions as to the disclosure of information must have regard to the Data Protection Act 1998.[22] The Home Office also say:

> "An individual is at liberty to dispute the accuracy or relevance of any information retained or disclosed by the police with the Chief Constable of the force concerned. However, under the Data Protection Act 1998, the Chief Constables of each police force are the Data Controllers of all information placed by that force onto the Police National Computer (PNC) or retained in local records. Only they can authorise the amendment or deletion of any record."[23]

Not much comfort there for D, who has let us say the untrue allegations of a malicious neighbour disfiguring his enhanced criminal record. He may ask the Chief Constable to



remove them, but is then at the mercy of that official. Another danger is that he may not know they are on his record.

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[18] *Northumbria*, para. 28.
[19] Ibid.
[20] Home Office circular 047/2003, para. 13.
[21] Home Office circular 047/2003, para. 16.
[22] Home Office circular 047/2003, para. 13.
[23] Home Office letter.

D may possibly get help from the Information Commissioner's Office (ICO). In 2008 it was reported that five police forces had been ordered to delete old criminal convictions from the Police National Computer. In dismissing appeals by Humberside, Northumbria, Staffordshire, Greater Manchester and West Midlands Police, the Information Tribunal on 21 July 2008 upheld the view of the ICO that the retention of the old convictions data was in breach of the Data Protection Act.[24] I am informed by the ICO that this decision is at present under consideration by the Court of Appeal. When their decision has been announced the ICO may seek to get stale allegation or soft information removed from police records. But should it be there at all?[24A]

## The Tort of Defamation

If the police pass to a third party false allegation information which is defamatory of D can D succeed in a libel action against the police or are they protected by privilege? Sir Percy Winfield said it is not a defence in a defamation action to say "I told the tale as 'twas told to me"[25]. Does that apply here, or does privilege rule it out?

The answer may depend on whether, as claimant in a libel action against the police, D would succeed in establishing the falsity of the defamatory allegation on a balance of probabilities (the civil standard of proof). If D would establish this, then privilege, which is based on the public interest, ought not to help the police. As Lord Hobhouse observed, with what Lord Bingham of Cornhill called characteristic pungency, "No public interest is served by publishing or communicating misinformation".[26]

However, we must consider the decision in *Westcott v Westcott* [2008] EWCA 818. The judgment of Ward LJ begins:

> 'The surprisingly novel issue in this appeal is whether a person who makes a complaint to the police, thereby instigating a police investigation which does not lead to a prosecution, can shelter behind the defence of absolute privilege if a claim is brought against her in defamation; or whether such a complaint should be protected by qualified privilege so that the defence will only be defeated if the claimant can establish malice.'[27]

Counsel for the defendant, a magistrate, dug up an 1883 dictum of Fry LJ to the effect that, if absolute privilege did not apply, numerous actions would be brought against persons who were merely discharging their duty.

> 'It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions.'[28]

Ward LJ said it was not clear what protection the law gives where the maker of the statement to the police is never required to reduce it to writing or to give evidence in a court of law. "It may be surprising", he said, "that the matter has not yet arisen for authoritative determination".[29] He referred to another case where Brooke LJ had said the matter would have to be decided on some other occasion. Ward LJ grimly added: "This is it".

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[24] Press Release, Information Commissioner's Office, 21 July 2008.

[24A] The Court of Appeal decision is reported as [2009] EWCA Civ 1079. The appeal from the Information Tribunal was allowed. The Court of Appeal held that it is necessary that police records be complete, and that old convictions should therefore be retained. (*Footnote added on 5 November 2009*).

[25] Sir Percy Winfield, *A Textbook of the Law of Tort*, (Sweet & Maxwell, 3rd edn. 1946), p. 261.

[26] *Jameel and others v Wall Street Journal Europe Sprl* [2006] UKHL 44 at [32].

[27] Para. 1.

[28] Para. 13.

[29] Para. 15.

And so it was. The elusive point of law has now been settled. No action for defamation lies in such cases. The informer enjoys absolute privilege. So of course do the police when the informer passes the false information to them and they pass it on.

## Conclusion

There are grounds for disquiet here. In passing on damaging information about the conviction of a person, it is established that the police may wrongfully ignore the duty imposed by the Rehabilitation of Offenders Act 1974 s. 4 that the person "shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction". The police may wrongfully ignore the terms of Home Office guidance which they were under a duty to read and act on. They may wrongfully fail to comply with relevant terms of the Human Rights Act 1998 or the Data Protection Act 1998. Furthermore the police, and any court dealing with the matter, may wrongfully ignore the presumption of innocence.

In *Northumbria* the facts known to the police relating to W may have suggested that he was guilty of frequent sexual offences against his own children. However he was not prosecuted for any of these. The court finding against him was subsequent to the police disclosure to his employers which deprived him of his job. It was most unlikely that in the course of that job he would have encountered unsupervised children whom he was likely to harm.

The system of enhanced police checks disclosing soft information puts the unoffending citizen at the mercy of malicious or unbalanced persons passing erroneous information to the police. While a series of instances of soft information provided by different informants may cumulatively arouse justified suspicion against a person, the system works equally against the innocent citizen subjected to an isolated allegation that is mistaken or dishonest.

There are those in certain occupations who often have malicious allegations made against them from which they are never able to recover. For example, I am told that allegations of sexual misconduct made against teachers, whilst not proven in a court, will be almost certainly mentioned by a Chief Constable in an enhanced CRB disclosure should the individual apply to teach (working with children and vulnerable adults). Where six candidates apply for the same job and one has an enhanced CRB certificate showing such "soft" information, it is difficult, says my informant, to imagine a scenario where a head teacher would take the risk and employ him or her.

*Note by Francis Bennion*

In relation to this article see *R (on the application of L) v Metropolitan Police Commissioner* [2009] UKSC 3, [2010] 1 All ER 113 which was decided after the article was published.