

Criminal

Alberta legislation aimed at combating domestic violence problematic, say legal experts

By **Ian Burns**

(October 23, 2019, 12:10 PM EDT) -- A bill that would allow individuals to obtain the criminal records of their romantic partner is currently winding its way through the Alberta legislature, but some legal observers are raising concerns that it may lead to "victim blaming" and perhaps even run afoul of the Charter.

Bill 17, the *Disclosure to Protect Against Domestic Violence (Clare's Law) Act* was introduced Oct. 16. Modelled on legislation from the United Kingdom which was named for a young woman killed by an ex-boyfriend with a history of domestic violence, it would allow people at risk of domestic violence to find out if their intimate partner has a violent or abusive past and allow police to proactively inform someone of their partner's domestic violence history.

"We campaigned on a promise to take domestic violence in Alberta seriously. This legislation will be a critical new tool to help those at risk of experiencing domestic violence or facing abuse already by ensuring they have access to information about the violent history of their partners," said Alberta Premier Jason Kenney. "This is a first step, not the last. We are proud to be keeping our promise to protect vulnerable people in our province."

Alberta becomes the second province to introduce Clare's Law in Canada, with the government of Saskatchewan passing the *Interpersonal Violence Disclosure Protocol (Clare's Law) Act* in 2019. The Alberta government said there were 166 deaths in the province due to domestic and family violence from 2008 to 2017, with half of all young women and girls who were victims of domestic violence homicide in Canada murdered by someone with a prior conviction.

"Our government believes it is crucial for people to have access to this kind of information, particularly when lives are at stake," said provincial Minister of Community and Social Services Rajan Sawhney. "This law will allow people to make the best choices for their safety and be informed about the potential risks of a relationship."



Jennifer Koshan, University of Calgary

However, alarm bells are being raised about some of the aspects of the bill, in particular the fact that many of its details, such as defining what disclosure of information will look like and who is a person at risk are being left to the government to determine through regulation. Jennifer Koshan, a professor of constitutional law at the University of Calgary who researches equality and state responses to violence, said, "there is so much about the law that we just don't know."

"Generally speaking it is a problem to leave those kind of definitional issues to the regulations, because they don't have the same level of legislative debate and the same kind of scrutiny that opposition parties and people can provide," she said. "That's a real concern."

It is unknown whether the information disclosed will be restricted to criminal records or include information about police actions more broadly, said Koshan.

"That is a bit of a double-edged sword either way because we know that there is vast under-reporting of domestic violence, so if only information about domestic violence is provided then that is really going to be the tip of the iceberg in terms of women who may be at risk," she said. "But, on the other hand, if there is a broader definition of disclosure information that takes into account all interactions with police, it could capture some people who are true victims of domestic violence who may have had partners make calls to the police in a way that was malicious."

Koshan said she also has concerns the legislation has the potential for "victim blaming," in that women who either don't seek information about their partner, or do find out their partner has a history of violence but choose to stay with them, may face recrimination if they later engage the justice system for assistance.

"Some of the same sort of concerns have been raised about Clare's Law in England," she said. "It really does place a huge amount of responsibility on individual women to deal with violence, rather than treating domestic violence as a systemic issue and one that requires systemic remedies in order to be able to respond to."



Brian Vail, Field Law

Brian Vail, a civil and criminal litigator with Field Law in Edmonton, called the bill "disturbing in a number of ways," sharing Koshan's concerns about leaving many of the details to government regulation.

"The actual guts of it will never see the floor of the legislature or be debated," he said. "And I'm really opposed to that, especially when you have got legislation that is problematic from the point of view of the Charter."

One of the major concerns Vail said he had with the legislation is that it allows for authorities to provide information that could be contained in a Crown disclosure package in a criminal case. He said that would not "terribly offend him" except for the fact the legislation contains language which says that authorities are not compellable to give evidence or produce documentation in any

proceeding of a judicial nature concerning any information that comes into their knowledge under the Act.

"This seems to suggest that if something is in the Crown disclosure package and the police disclose it to the complainant under these statutes, then they don't have to show it to the defence, and they cannot be examined in court with respect to it," he said. "That is very problematic."

Vail said another issue he sees is that the legislation seems to presume that all complaints are genuine, and the subject of the complaint is always a "bad guy."

"I can tell you that not every complaint to police, or any complaint at all, is genuine. The suspect is innocent until proven guilty — that is a cornerstone of our democracy," he said. "It is troubling to me to think that anyone who merely files a police complaint that is not adjudicated gets the right to private police information about the suspect. I think that this may run afoul of presumption of innocence in the Charter."

The government plans to work with stakeholders on developing regulations in the bill. Ministry of Community and Social Services press secretary Cassandra Kitz said, as the new Act is among Canada's first domestic violence disclosure laws, the Ministry wants to ensure an "appropriate amount of future policy and implementation flexibility" to develop the law, which is why many of the particulars are being left to regulation.

"As enabling legislation, the Act provides policy direction," she said. "Regulations will be developed to identify definitions, provide direction and define parameters of implementation."

Kitz said the government believes co-ordinating support to alongside disclosure under the legislation are necessary for those who receive information and might not know where to turn for help.

"These supports will be an important part of the implementation and may include supports for domestic and sexual assault, housing and homelessness, health, mental health, and justice," she said. "Further details on supports will be identified in the regulations and plans for implementation once we complete the consultation phase."

Koshan said the bill has the potential to do a lot of good by helping people make decisions about their relationships and keep them safer, but it will take a significant amount of resources from the provincial government to implement properly.

"I think it may also be a good idea to consider whether police are the proper entity to be administering the law," she said. "It might be a good idea to have some sort of review body that considers requests for information but does so in a way that considers the kinds of concerns that I have been talking about from a more neutral or objective perspective."

The government said the bill will come into force upon proclamation in 2020.