

---

## **Lawful, Proportionate and Necessary? A Critical Examination of the Domestic Abuse Disclosure Scheme for Scotland**

**Lesley McMillan\* and Andrew Tickell\*\***

### **Abstract**

This article critically examines Police Scotland’s Disclosure Scheme for Domestic Abuse Scotland (DSDAS). The scheme establishes a “right to ask” and a “power to tell” individuals about their partner or ex-partner’s known history of abusive behaviour. In this article, we focus on four key aspects of DSDAS: its accessibility, its legal basis, its understanding of “domestic abuse”, and its approach to defining the kinds of relationships where disclosures can be made under the policy. We identify ambiguities in all four aspects of the scheme, which we show departs in significant ways from the understandings of domestic abuse and qualifying relationships written into Scots law and policy. In contrast with the approach taken in England and Wales, we show the Scottish scheme does not currently permit police disclosures to be made after the “end” of a relationship – a concept which is itself significantly underdefined in the scheme guidance. We conclude with three practical recommendations for how these elements of the DSDAS scheme can be improved to enhance the accessibility, clarity, and coherence of the disclosure policy.

### **Introduction**

This article critically examines the Domestic Abuse Disclosure Scheme for Scotland (DSDAS) which gives individuals a “right to ask” about their partner’s abusive past and affords the police the “power to tell” individuals information about a partner if they consider they are at risk from domestic abuse. Domestic abuse disclosure schemes have been established in a number of common law jurisdictions, and their appropriateness and efficacy have been questioned by a number of scholars (see e.g. Duggan

---

\* Professor, Glasgow Caledonian University, Scotland. Email [Lesley.McMillan@gcu.ac.uk](mailto:Lesley.McMillan@gcu.ac.uk).

\*\* Lecturer, Glasgow Caledonian University, Scotland. Email [Andrew.Tickell@gcu.ac.uk](mailto:Andrew.Tickell@gcu.ac.uk). This research was funded by the Scottish Institute for Policing Research (SIPR). We are indebted to the two anonymous reviewers for their constructive comments on the first draft of this work, and to Professor Adam Tomkins, Professor Aileen McHarg, Dr Chris McCorkindale and Scott Wortley for their helpful comments on the underpinning legal framework.

---

2018; Fitz-Gibbon & Walklate 2017; Grace 2021). A relatively new intervention aimed at domestic abuse prevention in Scotland, DSDAS has not yet received scholarly attention. In this paper we offer a critique of four key elements of the Scottish scheme including (a) its accessibility and transparency, (b) Police Scotland’s understanding of the legal basis for making disclosures under it, and the Scottish scheme’s approach to defining (c) what constitutes “domestic abuse” and (d) qualifying relationships where information may be requested and shared.

This study reveals a lack of accessibility and transparency in the operation of the Scottish disclosure scheme. We also identify a degree of ambiguity in the guidance documentation about the legal basis for Police Scotland’s powers to disclose information about individuals who may pose a risk to their current or former partners. Both of these findings raise important questions about the lawfulness of the disclosure scheme as currently realised in Scotland. Our analysis of the scheme also suggests a degree of under-regulation – not only of what counts as a relationship qualifying for disclosure under DSDAS – but also about what kinds of behaviour Police Scotland regards as susceptible to disclosure under it.

We conclude this article with three practical suggestions for how Police Scotland can address these issues to increase the transparency and accessibility of the DSDAS scheme, reduce the risks that the lawfulness of this policy will be challenged in court, and better align DSDAS with prevailing understandings of domestic abuse articulated in Scots law and policy and the diversity of modern relationships.

### **The Domestic Abuse Disclosure Scheme for Scotland (DSDAS)**

The Disclosure Scheme for Domestic Abuse in Scotland was introduced on 1 October 2015. The scheme is part of Police Scotland’s commitment to tackling domestic abuse and it aims to act as a form of primary prevention, by allowing those with concerns about someone’s conduct to make a request for information to be disclosed about any history of domestic abuse. In Police Scotland’s guidance, the scheme is described as providing:

a formal way of sharing information about a partner’s abusive past, with a potential victim. In making a disclosure, the scheme provides those individuals with information they may have previously been unaware of, giving them the power to review their situation, decide what is best for them, and whether to continue their relationship. (Police Scotland 2021b, 4)

---

If police checks show that the individual has a record of abusive behaviour, or there is other information to indicate the person is at risk, Police Scotland will consider sharing this information with the person(s) best placed to protect the potential victim. This may be the victim themselves, or another person or agency.

The scheme operates in two ways: the “right to ask” and the “power to tell”. Under the “right to ask” route, members of the public – “the applicant” – can make a request for information about Person B (the potentially abusive partner) to be disclosed to Person A (the potential victim) or another person best placed to protect them. The applicant can be Person A themselves, or another concerned person such as a parent, relative, neighbour or friend, referred to as Person C. Under the “power to tell” route, if Police Scotland or other partner agencies, including statutory or third sector, gather or receive information that suggests a person is at risk of domestic abuse, they may disclose that information to the person who is at risk, or another person best placed to protect them. This latter route means individuals can receive a disclosure they have not requested themselves.

The disclosure scheme involves a number of steps if someone uses the “right to ask”. The application can be made online, by visiting a police office, through the non-emergency number 101, or by approaching an officer in the street. The police will then take details of what prompted the enquiry and the nature of the person’s relationship with their partner, and then conduct initial checks to establish any immediate risk. The third stage involves a face-to-face meeting with an officer or staff member to establish details of the application, further details about the nature of the relationship and the risk of domestic abuse, and for the applicant to provide proof of identity – one form of photo ID, and one other form of ID. Following police checks of relevant police and crime databases and information held by partner agencies, if there is information to consider disclosing, the next stage is a multi-agency decision-making forum meeting to consider whether a disclosure is appropriate. The decision to disclose must be lawful, necessary and proportionate to protect an individual from domestic abuse. If a disclosure is made, the police will disclose information to the person at risk or a person best placed to protect them. If no disclosure is made, the police will explain why. Under the “power to tell”, a similar process unfolds. However, a police officer or other agency staff member in receipt of information that a person may be at risk completes an application form. According to the scheme guidance, the process should take no longer than 45 days.

In the first two years of DSDAS’s operation, 2,144 applications were made to Police Scotland. Of these, 927 (43%) resulted in information about abusive behaviour of the person in question being shared (BBC News 2017). Further data on the scheme use was published by Police Scotland in October 2020,

which showed that in the five years since it had operated, more than 5,508 applications were lodged and 2,902 disclosures were made, representing a 52% disclosure rate (Police Scotland 2021a).

### **Research on disclosure schemes**

There has been no empirical research conducted on DSDAS to date, though Grace (2021) offers some comparative insight in his policy analysis of disclosure schemes across the globe. As disclosure schemes become increasingly prevalent in common law jurisdictions, they are an emerging area of interest for operational, policy and legal analysis (Grace 2021). Research on schemes in other jurisdictions is limited, but growing, and the majority consider the English and Welsh Domestic Violence Disclosure Scheme (DVDS). While the DSDAS has notable differences to the DVDS – for example in its definitions of domestic abuse/violence, and what constitutes a relationship – the drafting of the Scottish Scheme suggests inspiration was drawn from the DVDS – or “Clare’s Law” as it is often colloquially described.

The small body of work on DVDS offers some insight into its operation. Grace (2015) has examined the contested legalities of criminality information sharing within DVDS, and Duggan’s (2018) work has considered victim hierarchies within the scheme. In addition, Fitz-Gibbon and Walklate (2017) have examined the efficacy of the DVDS scheme as an aspect of law reform and Hadjimatheou and Grace (2020) offer insight into police officer decision making within the DVDS. More recently Grace (2021) has provided an analysis of disclosure schemes that considers their legal coherence, capacity to address victim vulnerability and regulatory responsibilities for preventing domestic abuse/violence. A range of criticisms have been levelled at disclosure schemes in general and the DVDS in particular, questioning the extent to which disclosure schemes offer any possibility for safeguarding or the prevention of domestic abuse (see Fitz-Gibbon & Walklate 2017; Grace 2021; Hadjimatheou & Grace 2020).

The Scottish scheme has been less well interrogated in every respect: its efficacy, how it is justified in law, how it is framed, its inclusion and exclusion criteria in defining relationships and domestic abuse, how it operates in practice, how national level policy is implemented at the local level – and how it is experienced by those who make applications, those who process them, and those who receive disclosures. This paper presents findings from a Scottish Institute for Policing Research (SIPR) funded study that seeks to address these research gaps in relation to DSDAS. Specifically, this paper addresses four of these issues, examining accessibility of the Scottish disclosure scheme, its legal basis, and two

---

---

critical design features of DSDAS: its definition of “domestic abuse” and approach to qualifying relationships for disclosures to be made by Police Scotland.

## Methodology

Our analysis is based on two key sources of data:

- the formal guidance Police Scotland produce for officers and staff operationalising DSDAS; and
- the publicly available information on the Police Scotland website aimed at articulating the thresholds, goals and standards of DSDAS to the general public.

Police Scotland’s latest operational documentation on the scheme – the *Disclosure Scheme for Domestic Abuse in Scotland (DSDAS) Guidance* – was adopted in August 2021 (Police Scotland 2021b). The latter are publicly available pages on Police Scotland’s website designed for members of the public to access information about the scheme and details of the process (Police Scotland 2021c, d, e), and access to the application form (Police Scotland 2022).

In analysing DSDAS, we were interested to understand whether the main features of the scheme are accessible, transparent and intelligible for the general public who may make a request and/or receive a disclosure, or those who have a disclosure made about them. We were also interested in the clarity of the scheme from the perspective of police officers and staff who administer it, and the extent to which this might impact on the consistency of how applications are processed, and decisions made. Transparency and clarity are important in terms of accessibility and enabling informed choice regarding whether individuals engage with the scheme, but also in terms of scope to seek legal redress if they believe decisions have been taken in a procedurally unfair or potentially unlawful way. As the UK Supreme Court recently held in respect of another criminal disclosure scheme in the UK:

if placed in the public domain, policies can help individuals to understand how discretionary powers are likely to be exercised in their situations and can provide standards against which public authorities can be held to account.<sup>1</sup>

In this article, we consider a number of important questions. Is the legal basis for the operation of the Scottish scheme clear? Are fundamental rights issues adequately considered in how the DSDAS is framed? How is the concept of domestic abuse understood under the scheme? What kinds of

---

<sup>1</sup> *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37 [2].

---

relationships does the DSDAS apply to? Are these subject to clear definitions and understandings? Are these definitions consistently communicated to applicants under the scheme? This article considers each of these themes in turn.

### **Accessibility and transparency of scheme guidance**

Our first observation about the accessibility and transparency of DSDAS is that the policy guidance for the scheme is not in the public domain and is therefore inaccessible to members of the public who may request and/or receive a disclosure, or those who have a disclosure made about them. While publicly available webpages hosted by Police Scotland provide some more limited information, the key document outlining the rules of the scheme, the definitions used in it, and how decision-making is undertaken and by whom is not publicly accessible. This contrasts with the DVDS in England and Wales, where the Home Office has consistently published the evolving guidance police forces use when processing applications for disclosure (Home Office 2016; Home Office 2023). Applicants to the Scottish scheme currently do not enjoy equality of access to a detailed account of the procedures, definitions and rules used by Police Scotland in reaching decisions under it.

This prompts questions about whether citizens fully understand what we can ask, why we can ask it, and what will happen if we do – and, what will happen if we are the person asked about, how decisions will be made and by whom. Police Scotland’s decision not to place this guidance in the public domain has important implications in terms of whether the public – which may include individuals and statutory and non-statutory organisations – are able to fully understand, and indeed challenge, the operationalisation of the scheme, the processing of applications, and the decision-making processes of Police Scotland, as well as their own rights and responsibilities under the scheme.

As researchers we initially struggled to access the guidance being used by Police Scotland, and obtaining a copy required some persistence and discussion. On initially requesting a copy of the scheme guidance, we were informed by Police Scotland that the document was not in the public domain. Following further discussion with Police Scotland about the necessity to have sight of the guidance document in order fully to understand the operation of the scheme and place other research findings in context, a copy was provided to the Principal Investigator (PI) only. We were informed the document was not in the public domain, and it was being provided only for the purpose of supporting the research, and it should not be shared or disseminated further (including among the research team) without reference to Police Scotland. We subsequently discovered that Grace (2021) had received a copy of a previous version of the document published in 2017 through a freedom of information (FOI)

---

request. While Grace states this FOI put the document in the public domain for the first time, providing a copy to a private individual only puts it in the public domain in a very limited sense. We revisited the matter with Police Scotland who subsequently agreed to provide a partially redacted copy of the guidance to the authors, from which we are able to cite (Police Scotland 2021b).

### **Potential legal implications of this lack of accessibility and transparency**

The limited accessibility and transparency of the DSDAS scheme is not only significant from the perspective of researchers, applicants and subjects of disclosure under the scheme, it also raises important questions about the legal basis for its operation. As a decision-making scheme operated by a public authority, DSDAS is subject to the supervisory jurisdiction of the Court of Session, including common law requirements that decisions made under it should be rational, consistent with the rules of the scheme, and taken in a procedurally fair way.<sup>2</sup> Failure to do so could give rise – as Police Scotland’s internal guidance documentation recognises – to proceedings in judicial review. In practice, however, how can an individual dissatisfied with the decision-making process challenge a decision to disclose or not to disclose when the definitions, tests and procedure used by officers in reaching those conclusions are not disclosed?

The scheme also raises human rights issues which further problematise Police Scotland’s decision not to place this more detailed account of DSDAS in the public domain. Article 8 of the European Convention on Human Rights provides that “everyone has the right to respect for his private and family life, his home and his correspondence”. The right is not absolute, however, and interferences with privacy rights by public authorities can be justified for Convention purposes if the intrusions are “according to law”, “pursue a legitimate aim”, and are “necessary in a democratic society” – representing a proportionate interference with the protected right. In order to be Convention compliant, all three of these tests must be satisfied.

Like other schemes involving the disclosure of prior convictions, cautions or police intelligence by public authorities, DSDAS engages Article 8 of the ECHR because it impacts on the private life of persons subject to police disclosures.<sup>3</sup> Police Scotland is a “public authority” for the purposes of the Human Rights Act 1998. Under section 6 of the Act, “it is unlawful for a public authority to act in a way which is incompatible with a Convention right”. Recognition of the importance of Convention rights

---

<sup>2</sup> *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37 [19].

<sup>3</sup> See, for example: *R(L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2009] UKSC 3 [27].

---

has clearly informed the drafting and conceptual framework of the DSDAS scheme. The ECHR's language of "lawfulness", "proportionality" and "necessity" is woven through the DSDAS guidance. While the proportionality of deciding to make a disclosure is likely to be specific to each case, the basic policy of disclosing histories of abuse to applicants or persons judged at risk is obviously justified under Article 8(2), on the basis that domestic abuse disclosures are made "for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". But is the Scottish scheme "in accordance with law"? To satisfy this requirement, two tests must be met. First, there must be "a clear and accessible legal basis" for any interference with privacy rights by a public authority.<sup>4</sup> And secondly, as the Strasbourg Court set out in the leading case of *Sunday Times v United Kingdom*, a qualitative test applies whereby:

a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>5</sup>

This clear and accessible legal basis need not be statutory in form – official police guidance built on the back of an appropriately clear source of legal authority for a scheme will do – but the ECHR requires that the legal framework justifying intrusions into basic rights must be reasonably accessible to members of the public whose rights are affected by the scheme, and minimise the risk of the arbitrary exercise of power by public officials, including police forces. This test is arguably not satisfied by the current unpublished iteration of the DSDAS. While Police Scotland's DSDAS documentation recognises the risk of judicial review of decisions made under the scheme – alluding to the possibility three times in the guidance – it does not currently recognise that the decision not to *publish* this guidance represents one basis on which the lawfulness of the DSDAS scheme might be contested, either on common law or ECHR grounds.

While the common law grants broad discretionary authority to the police to make disclosures of information in the public interest – subject to the Human Rights Act 1998 and now the Data Protection Act 2018 – the existence of an unpublished policy has been held in other contexts to be an unlawful exercise of public power, contrary to public authorities' duty of transparency at common law and

---

<sup>4</sup> *Halford v United Kingdom* [1997] 24 EHRR 523, 524.

<sup>5</sup> *Sunday Times v United Kingdom* [1979-1980] 2 EHRR 245 [49]

---



---

potentially depriving unpublished schemes of the public character necessary to satisfy the “according to law” criterion if challenged under Article 8.<sup>6</sup>

The UK Supreme Court has held that “the rule of law” can require public authorities like Police Scotland to make “a transparent statement” about how broad discretionary powers will be exercised, recognising that individuals interacting with public authorities have the right not only to have their case or application “considered under whatever policy” that public authority adopts to structure its discretionary decision-making, but can also incorporate “a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it”.<sup>7</sup>

In terms of the DSDAS scheme, this argument is made more complex by the fact that Police Scotland has shared some elements of the scheme on its website in the form of the application form and some supporting documentation, while the operation of other aspects of the scheme are not disclosed. Whether or not Police Scotland’s decision not to publish the DSDAS guidance would be held to be unlawful if challenged in court, the net effect of its decision *not* to publish substantive details about how the disclosure scheme works deprives the scheme of the quality of accessibility and transparency for applicants, subjects of disclosures, and anyone else with an interest in the disclosure scheme and its operation, including researchers, campaigners, and third sector organisations advising potential applicants. While no judicial review proceedings have been raised challenging the lawfulness of the Scottish scheme or decisions taken under it, Police Scotland should anticipate this legal risk, and consider following the Home Office and publishing its guidance to ensure it satisfies the requirements of Article 8 of the European Convention, as well as promoting the accessibility and transparency of the scheme as a social good. This approach would also be more consistent with the principle of “policing in a way which is accessible to, and engaged with, local communities”.<sup>8</sup>

### **Legal basis of Police Scotland’s power to disclose**

A second important finding from our analysis of the detail of the DSDAS scheme is that Police Scotland appear to mislocate the source of their legal authority to disclose information to people who may be at risk of domestic abuse. Grace has highlighted that the Scottish scheme is “purportedly based on the provisions of the Police and Fire Reform (Scotland) Act 2012” (Grace 2021, 96). While the Home Office

---

<sup>6</sup> *R (on the application of HM) v Secretary of State for the Home Department* [2022] EWHC 695 (Admin); *R (on the application of K) v Secretary of State for Work and Pensions* [2023] EWHC 233 (Admin).

<sup>7</sup> *Lumba and Mighty v Secretary of State for the Home Department* [2011] UKSC 12 [34]-[35].

<sup>8</sup> Police and Fire Reform (Scotland) Act 2012, s 32(b)(i).

---

guidance identifies that the DVDS scheme in England and Wales “is based on the police’s common law power to disclose information where it is necessary to prevent crime”, in the Guidance document Police Scotland claim they have:

a statutory power under Section 32, Police and Fire Reform (Scotland) Act 2012 to disclose information where it is necessary to prevent and detect crime. It is on this statutory power that the authority of Police Scotland to disclose information under the DSDAS rests. (Police Scotland 2021b, 16)

The 2012 Act was introduced to consolidate Scotland’s eight regional police forces into a single national force – creating the new Police Service of Scotland, known as Police Scotland – subject to the oversight of a new Scottish Police Authority,<sup>9</sup> which is itself subject to the direction of Scottish Ministers on “strategic police priorities”.<sup>10</sup> Section 32 of the 2012 Act sets out some generic “policing principles” which are intended to guide Scottish Ministers, the Scottish Police Authority and the Chief Constable in the organisation of their public duties in respect of policing, representing a modern restatement of the purpose of the police service. The full text of the provision cited as the legal basis for the DSDAS scheme is as follows:

### **32 Policing Principles**

The policing principles are—

(a) that the main purpose of policing is to improve the safety and well-being of persons, localities and communities in Scotland, and

(b) that the Police Service, working in collaboration with others where appropriate, should seek to achieve that main purpose by policing in a way which—

(i) is accessible to, and engaged with, local communities, and

(ii) promotes measures to prevent crime, harm and disorder.

At the time of writing, Police Scotland maintain that section 32 of the 2012 Act is the legal basis for their DSDAS disclosure powers. We believe this is open to question, for a number of legal reasons. While establishing the domestic abuse disclosure scheme is clearly consistent with and “in accordance with key policing principles” (Police Scotland 2021b, 4), a plain language reading of section 32 does not suggest it was intended to give Police Scotland the general power “to disclose information where

---

<sup>9</sup> Ibid ss 1 and 6.

<sup>10</sup> Ibid s 33.

---

it is necessary to prevent and detect crime” described in the DSDAS guidance. Nothing in this provision indicates it intends to confer any new operational powers on police officers.

Read contextually, the “policing principles” are intended to operate as high-level statements of principle that diverse public authorities involved in policing should “have regard” to. For example, the 2012 Act requires the Police Authority to “promote” these principles,<sup>11</sup> imposes a duty on the Chief Constable to ensure policing is carried out “with due regard” to these principles,<sup>12</sup> and requires Scottish Ministers to “have regard” to them in determining “strategic police priorities”.<sup>13</sup> This interpretation of the purpose and effect of section 32 is supported by the policy documentation underpinning the 2012 Act. The Scottish Government’s *Policy Memorandum* describes section 32 as setting out “policing principles to set the strategic direction for the Service and a requirement on the Scottish Police Authority to provide a strategic and annual plan” (Scottish Government 2012a, para 9). The *Explanatory Notes* to the 2012 Act produced by the Scottish Government are similarly unhelpful for an expansive reading of section 32, stressing that this provision sets out “the policing principles and new arrangements for setting priorities, objectives and planning” rather than conferring any additional operational authority on Police Scotland to do anything otherwise regulated by statute or common law powers (Scottish Government 2012b, para 40). In terms of the plain meaning of the words used in the 2012 Act, section 32 is not ambiguous. Nothing in its language, legislative history, policy framework, or explanatory notes provides, anticipates or establishes a new police power to make disclosures of information in the public interest. If the Scottish Parliament had wished to give Police Scotland explicit statutory authority to disclose information in the public interest, they would not have done so using the general, abstract, strategic language of “policing principles.” This is not the legal language used by parliamentary draftsmen conferring new powers on a public authority (Parliamentary Counsel Office 2018). This supports the proposition that section 32 was not intended to do so.

Rooting the legal authority for DSDAS in section 32 seems to rest on a more basic confusion between means and ends. Providing in law that Police Scotland, Scottish Ministers and the Scottish Police Authority should have regard to certain “principles” in organising operational policing does not imply, as a matter of law, that Police Scotland have the legal power to promote any and all measures “to prevent crime, harm and disorder” – though this appears to be the fundamental legal understanding underpinning the internal guidance. The intrinsic difficulty of Police Scotland’s expansive reading of

---

<sup>11</sup> Ibid s 2(1)(b).

<sup>12</sup> Ibid s 17(4)(a).

<sup>13</sup> Ibid s 33(4).

section 32 can be illustrated by considering other policing measures and whether section 32 could credibly provide the legal basis for them. Detaining an individual suspected of committing a serious offence, for example, or the directed surveillance of people involved in organised crime, are “measures” aimed at preventing “crime, harm or disorder”. However, section 32 could not establish an adequate and accessible legal basis for either of these investigative procedures, which are regulated by other statutes which explicitly enumerate police powers and the duties of police in exercising these powers in ways the contested provision in the 2012 Act does not.<sup>14</sup>

Even if we are mistaken in this legal analysis and section 32 *could* be interpreted as accommodating a police power of disclosure underpinning DSDAS, it would be highly vulnerable to challenge on Article 8 grounds. As Lord Hodge held in the *Christian Institute* case, to be “in accordance with the law” under Article 8(2) of the ECHR, measures interfering with privacy rights “must not only have some basis in domestic law” but must “also be accessible to the person concerned and foreseeable as to its effects”.<sup>15</sup> As we have already summarised, disclosing histories of abuse engages Article 8 of the ECHR. To be lawful, interferences with privacy rights must not only pursue a legitimate aim and be proportionate, but must also have a “clear and publicly accessible” basis in law. Considering the legislative language of section 32 does not suggest the provision empowers officers to make disclosures of private information, but instead describes generic, high-level policing principles, Police Scotland may struggle to defend section 32 as an “adequate and accessible” legal basis to make disclosures in a way that is Article 8 compliant. Taken together, these factors suggest section 32 is not the true source of Police Scotland’s authority to make DSDAS disclosures and that the Scheme guidance proceeds on an erroneous basis to this extent.

### **Alternative legal basis for DSDAS**

While this conclusion may initially seem dramatic, in our view there is already a different, better legal basis for Police Scotland’s Domestic Abuse Disclosure Scheme. We argue the true basis in law for Police Scotland’s disclosure power is not the 2012 Act, but the long-established authority of police forces throughout the UK to make disclosures of information they hold, in the public interest and for policing purposes, under the common law. As the UK Supreme Court recently held, “the police have a general power to hold and disclose information for the purposes of performing their functions to uphold the

---

<sup>14</sup> Criminal Justice (Scotland) Act 2016; Regulation of Investigatory Powers (Scotland) Act 2000.

<sup>15</sup> *The Christian Institute v the Lord Advocate* [2016] UKSC 51 [70].

---

---

law and protect the public”,<sup>16</sup> reflecting a series of judicial decisions involving the collection and disclosure of information for policing purposes going back decades.<sup>17</sup> Rooting DSDAS in the well-established authority of the common law has the distinct advantage of being much less susceptible to legal challenge on Article 8 grounds. Identifying the common law as the true legal basis for DSDAS disclosures is also more consistent with the legal arguments articulated by Police Scotland in two recent Court of Session cases involving contested disclosures of information protected by Article 8 – *BC and Ors v Chief Constable of the Police Service of Scotland* [2020] CSIH 61 and *The General Teaching Council for Scotland v Chief Constable of the Police Service of Scotland* [2021] CSOH 110. Both cases concerned the disclosure of information held by Police Scotland. To date, they are the only judicial decisions which have referred to section 32 of the 2012 Act. In *BC*, WhatsApp messages from police constables were discovered during an investigation into a serious sexual offence. These messages were described by the court as “sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability and included a flagrant disregard for police procedures by posting crime scene photos of current investigations”.<sup>18</sup> Having uncovered this material, Police Scotland launched misconduct proceedings against the officers involved. Raising proceedings in judicial review, the officers argued that disclosing this material for disciplinary purposes violated their rights to privacy under Article 8 of the ECHR on the basis that the constables involved had a reasonable expectation of privacy in their use of social media, and that the disclosure of this material in police disciplinary proceedings would not be “according to law”, pursue a legitimate aim and, critically, be proportionate under Article 8.

In the Inner House of the Court of Session, Lady Dorrian held that the disclosure of this information *did* pursue a legitimate aim and was proportionate. In reaching this conclusion, she referred *en passant* to section 32 of the 2012 Act, by way of demonstrating that the “maintenance of a properly regulated police force is in my view something which squarely falls within an identifiable policing purpose” in section 32, and so justified the use of the WhatsApp material to determine officers’ fitness to retain their commissions.<sup>19</sup> She did not assert or imply section 32 was the source of a general disclosure power.

In the *General Teaching Council for Scotland* case, GTCS sought disclosure from Police Scotland of material held by the Chief Constable for the purposes of disciplinary proceedings against registered teachers accused but not convicted of criminal offences. Police Scotland refused to disclose this

---

<sup>16</sup> *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37 [18].

<sup>17</sup> *R (on the application of Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9.

<sup>18</sup> *BC and Ors v Chief Constable of the Police Service of Scotland* [2020] CSIH 61 [3].

<sup>19</sup> *Ibid* [111]-[112].

information without a court order, on the basis that it would not be “according to law” for the purposes of Article 8 to make these disclosures without judicial authorisation. They did so based on erroneous advice from the Office of the Information Commissioner, which asserted that either a court order or a “specific *statutory* obligation to provide the information” was required for Police Scotland lawfully to disclose this evidence to GTCS.

Rejecting the Information Commissioner’s analysis, Lord Uist held that Police Scotland *already* had the power to disclose information in the public interest without further reference to the court, relying on earlier decisions in *Woolgar v Chief Constable of Sussex Police and UKCC* [2000] 1 WLR 25, *General Dental Council v Savery and Others* [2011] EWHC 3011 (Admin) and *C v The Chief Constable of the Police Service of Scotland* [2020] CSIH 61. While Lord Uist referred in passing to section 32 of the 2012 Act in his judgment, it is clear from his reasoning that he agreed with Police Scotland’s substantive position during oral argument – that police power to disclose information in the public interest was rooted in the common law rather than any provisions of the 2012 Act. This suggests a degree of disconnect between Police Scotland’s approach in litigation, and its internal communications with officers about the legal basis for the DSDAS scheme more generally.

Similar problems in clearly identifying the legal basis of police powers have arisen in the context of other innovations with privacy implications. In 2019, the Scottish Parliament’s Justice Sub-Committee on Policing concluded an investigation into the force’s use of “cyber kiosks”. These are digital device triage systems which allowed officers to download data contained on the phone of an accused person or a complainer or witness, bypassing the device’s passwords and security measures (Scottish Parliament 2019). In 2018, 41 cyber kiosks were purchased by Police Scotland at a cost of £444,821 with minimal evidence the force had fully considered the regulatory and legal implications of their use of this technology or established that the extraction of private data in this way fell within police powers. The technology and the lack of a clear regulatory basis for its use was subject to criticism by a range of stakeholders, including the Scottish Human Rights Commission, the Law Society of Scotland, and the Faculty of Advocates. The Committee found that the “main criticism from stakeholders was that the current legal framework does not meet the necessary standard of being ‘clear, foreseeable and accessible’ for the purposes of the ECHR”, concluding that the new cyber kiosks should not “be deployed by Police Scotland until clarity on the legal framework is established” (Scottish Parliament 2019, paras 120 and 150). As currently framed, it seems significant that DSDAS raises identical concerns.

---

Determining the legal significance of asserting that DSDAS rests on contested statutory provisions rather than established common law powers is somewhat complicated. Does misidentifying the legal basis for the DSDAS scheme have any impact on the lawfulness of disclosures made under it? In 2021, the UK Supreme Court endorsed the House of Lords' reasoning in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 about the factors which might result in a policy like DSDAS being found to be unlawful on the basis of any legal error. The Court held that the key test is: "does the policy in question authorise or approve unlawful conduct by those to whom it is directed?".<sup>20</sup> In this context, the answer would appear to be "no". While we believe Police Scotland are in error in their assessment that DSDAS is an exercise of a statutory power, the common law provides the missing authority for the scheme which is otherwise cast in terms which have clear and consistent regard to key Convention thresholds, including legality, legitimacy and proportionality of individual disclosures. Critically, it seems unlikely this mistake has resulted in any disclosures being made or not being made.

### **Defining domestic abuse**

In addition to these foundational issues concerning the accessibility and legal basis of the scheme, we also explored the clarity and consistency of the scheme's approach to two critical design features of DSDAS: its definition of "domestic abuse" and approach to qualifying relationships where disclosures can be made. What behaviour qualifies as "abusive"? What relationships are understood as "domestic"? Both questions are intrinsic to the operation of the domestic abuse disclosure scheme, and both are surprisingly difficult to answer in a comprehensive way based on the unpublished DSDAS guidance documentation.

In Scottish law and policy, the concept of "domestic abuse" has been the subject of significant development during the last 20 years, as the Scottish Executive, and subsequently the Scottish Government and Parliament, elaborated more comprehensive understandings first in policy, then in law, of how domestic abuse should be theorised, defined, recorded and ultimately criminalised. The Scottish approach now differs in significant ways from the approach to "domestic violence" taken by the Home Office, and in the criminal law of England and Wales. The next section outlines this evolving policy development history against which the DSDAS must be understood. We show three key things. First, the operational understanding of what is meant by domestic abuse in Scottish policy and law diverges in significant ways from the definitions used in the English and Welsh domestic violence

---

<sup>20</sup> *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37 [38].

---

disclosure scheme. Second, we show that the DSDAS scheme departs from this national legal and policy consensus about what constitutes domestic abuse in important and unexplained ways. Third, we identify a lack of clarity about what behaviours potentially qualify for disclosure under the scheme, raising important questions about the consistency of Police Scotland's approach to disclosure. Our scrutiny of DSDAS suggests a degree of under-regulation – not only of what counts as a qualifying relationship for the purposes of the “right to ask” and the “power to tell” – but also about what kinds of criminal conduct Police Scotland regards as susceptible to disclosure under this policy.

### **What is “domestic abuse”? Scottish legal and policy frameworks**

In 2000, the Scottish Partnership on Domestic Abuse produced a *National Strategy to Address Domestic Abuse in Scotland*. The Scottish Executive – now the Scottish Government – adopted the following national definition of domestic abuse:

Domestic abuse (as gender-based abuse), can be perpetrated by partners or ex partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse, withholding money and other types of controlling behaviour such as isolation from family or friends). (Scottish Executive 2006, 3)

In terms of what constitutes *abuse*, this policy framework is clear that it is not limited to acts of physical violence or sexual violence, but extends to behaviour which can be understood as coercive and controlling, however this manifests. In terms of qualifying *relationships*, the policy framework has specified since 2000 that domestic abuse is primarily understood as arising between “partners or ex-partners”. Implicitly excluded from this definition are cohabiting family relations and non-relations. This differs in important respects from official understandings in the rest of the UK. The Home Office adopted a more expansive definition of “domestic violence” in 2013, including:

“Any incident or pattern of incidents of controlling, coercive, or threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to the following types of abuse: psychological, physical, sexual, financial, emotional”. (Home Office 2013, para 5.1)



---

In echo of the national definition, Police Scotland and Scottish prosecutors now define domestic abuse as:

“any form of physical, verbal, sexual, psychological or financial abuse which might amount to criminal conduct and which takes place within the context of a relationship. The relationship will be between partners (married, cohabiting, civil partnership or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere including online”. (Police Scotland & COPFS 2019, para 4)

This definition is generally operationalised in Police Scotland statistics, resulting in widespread recording of domestic abuse incidents by Police Scotland and its predecessor forces.

The concept of “domestic abuse” was not a term of art in Scots criminal law until 2016, and some of the conduct recognised as abusive under the national definition has only recently been criminalised. The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 introduced a new domestic abuse aggravator which could be attached to crimes such as assault, stalking or threatening or abusive behaviour. If proven, the aggravator is recorded and taken into account by the court in sentencing. Reflecting the national definition, this aggravator was limited to offences committed against a partner or ex-partner,<sup>21</sup> applying to people who are or have been married, in civil partnerships, people “living together as if spouses or civil partners”, and people who are in or have been in an “intimate personal relationship” with another person.<sup>22</sup> Like subsequent legislative interventions, the 2016 Act does not define the concept of an “intimate personal relationship”, however the explanatory notes to the 2016 Act indicate that the term was intended:

to cover relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (e.g. between friends or business partners or work colleagues) are not covered by the aggravation. (Scottish Government 2016, para 12)

In terms of domestically *abusive* behaviour, the 2016 Act provides that a crime is aggravated by domestic abuse if, as a result of the offence, the abusive partner “intends to cause the partner or ex-partner to suffer physical or psychological harm”, or is reckless about causing this harm, whether or not any physical or psychological harm actually resulted from their actions.<sup>23</sup> The Act provides that

---

<sup>21</sup> Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 1(1)(a).

<sup>22</sup> *Ibid* s 1(6).

<sup>23</sup> *Ibid* s 1(2)-(3).

the concept of psychological harm “includes fear, alarm or distress”.<sup>24</sup> This aggravator is not limited to crimes of violence or sexual violence. A theft or attempt to pervert the course of justice could also be aggravated if the domestically abusive context could be proven in court. While this aggravator allowed criminal offences against a partner or ex-partner which caused physical or psychological harm to be recorded as aggravated by domestic abuse, most conduct towards a partner or ex-partner which could be understood as coercive control was not criminalised in Scotland until 2018.

The Scottish Government finally sought to gain legal purchase on this kind of behaviour in the Domestic Abuse (Scotland) Act 2018 (Forbes 2018). As Burman and Brooks-Hay (2018) argue, the 2018 Act is best understood as an attempt to align the criminal *law* in Scotland with the Scottish Government’s already longstanding domestic abuse *policy*. While the criminal law accommodated the physical dimensions of domestic abuse before 2018, and domestically violent partners or ex-partners could be charged with crimes of violence at common law or sexual offences under the Sexual Offences (Scotland) Act 2009, it provided police and prosecutors few tools to contend with the psychological, emotional and financial dimensions of abuse, which had been recognised in national policy for almost two decades, but which could not be subject to criminal charges.

The 2018 Act established a new criminal offence which recognises that a course of domestic abuse may or may not include physical or sexual violence, and can include physical or sexual violence in combination with other non-violent conduct which can be broadly understood as coercive and controlling, including diverse behaviours including “controlling, regulating or monitoring” the complainer’s “day-to-day activities”, “depriving or restricting” their “freedom of action”, and isolating them from “relatives or other sources of support”.<sup>25</sup> If prosecutors can demonstrate that there was a course of abusive conduct by the accused person towards a partner or ex-partner, that a “reasonable person” would consider the course of behaviour is “likely to cause” the complainer to suffer “physical or psychological harm”, and that the accused person either intended or was reckless about causing harm, they can be convicted of the new offence.

In practice, however, police and prosecutors appear to be making only modest use of the new Act in the prosecution of domestically abusive offending. In 2008/2009, 29,283 domestic abuse incidents were recorded by Scottish police forces. Of these, 43% were recorded as minor assaults. Breach of the peace cases made up 33%. The most recent Scottish Government statistics suggest that of the 65,251 incidents of domestic abuse recorded as crimes and offences by Police Scotland in 2020/21, assaults

---

<sup>24</sup> Ibid s 1(7).

<sup>25</sup> Domestic Abuse (Scotland) Act 2018, s 2(3).

---

---

constituted 32% of incidents, with 23% taking the form of breach of the peace, 18% constituting crimes against public justice, and 7% recorded under vandalism. Charges under the 2018 Act accounted for just 4% of recorded incidents (Scottish Government 2021).

### **What counts as “domestic abuse” for the purpose of the DSDAS scheme?**

Considered from the perspective of the DSDAS scheme, this background raises important questions about the diverse offences and complaints officers may encounter in reviewing the histories of potential subjects of disclosure, and how these histories are coded by officers in deciding whether or not to make disclosures. On both sides of the border, policy concepts of domestic abuse are not straightforwardly mirrored in recorded offences. In England and Wales, for example, relevant offences include common assault, battery, unlawful wounding, assault occasioning actual bodily harm, false imprisonment, and “controlling or coercive behaviour in an intimate or family relationship” under the Serious Crime Act 2015. In terms of crimes of violence, Scots law is considerably simpler than the diverse array of offences set out in the English and Welsh Offences against the Person Act 1861, with assault at common law being the primary offence category in Scotland, potentially with aggravators based on the use of a weapon or the extent of the injuries inflicted on the victim. Particularly serious assaults can amount to attempted murder. Crimes against public justice in this context are likely to take the form of attempting to pervert the course of justice by intimidating witnesses or persuading complainers to change their stories.

Against this backdrop, which offences are considered relevant for the purposes of the DSDAS scheme? We identified a lack of consistency and degree of ambiguity in how behaviours of concern are described in different elements of the DSDAS scheme. In the public facing documents, when referring to information about an individual’s past which may be disclosable, the term “domestic abuse” is not used. Rather it is variously described as checks to see if someone has a record of “violent behaviour” “abusive behaviour” or “violent offences” or “other information to indicate you may be at risk” (Police Scotland 2021d, 2021e). Each of these could be subject to its own limitations in terms of how the public might understand relevant conduct of concern. For example, using “violent” may limit how citizens think about what constitutes domestic abuse, which we know frequently includes emotional, sexual, or financial abuse, as well as coercively controlling behaviour (Stark 2007). This may unintentionally deter those who may be concerned about the latter but have less concern about the former. While it is the case that information about domestic abuse, including a definition and information about the Domestic Abuse (Scotland) Act 2018, is available to the public only a few clicks

---

away from the DSDAS scheme information, and Police Scotland clearly recognise the full range of behaviours domestic abuse might include (Police Scotland & COPFS 2019), a definition of domestic abuse is not provided on the DSDAS information pages. A clear definition at the outset of the public-facing scheme information outlining the main types of conduct that would be deemed to constitute domestic abuse would improve clarity for members of the public considering applications and offer the potential to facilitate individuals to identify domestic abuse in their personal relationships.

The same ambiguity is found in the official guidance for police officers implementing the scheme and taking decisions about what criminal histories to disclose. The concept of “domestic abuse” is nowhere defined in the DSDAS guidance documentation. The scheme contains no guidance for officers about the main categories of crimes the disclosure scheme applies to. DSDAS contrasts unfavourably in this respect with the Home Office’s guidance on DVDS in England and Wales, which sets out a “non-exhaustive list of offences where convictions and/or allegations may be disclosed”, running to 66 common law and statutory offences – including crimes of violence including murder, sexual offences, child sexual offences, child abduction offences, firearms offences, crimes of dishonesty including allegations of theft, stalking, modern slavery, trafficking people for exploitation, harassment, witness intimidation, and the modern offence of “controlling or coercive behaviour” under section 76 of the Serious Crime Act 2015 (Home Office 2013, Annex B).

The Scottish scheme, by contrast, incorporates no equivalent indicative list of what kind of criminal offences might qualify for disclosure or be classified as domestically abusive. In practice, Scottish officers are likely to be confronted with a similarly diverse array of potential crimes to consider for disclosure, from common law crimes of murder, culpable homicide and attempted murder and assaults, to common law breach of the peace, statutory offences of threatening or abusive behaviour, stalking and sexual offences, crimes of dishonesty, property damage and vandalism, and crimes against public justice, including witness intimidation – alongside offences which are *explicitly* aggravated in connection with domestic abuse and prosecutions under the 2018 Act. Further empirical research is required to comprehend how Scottish police officers understand and operationalise understandings of what constitutes a relevant offence through the scheme, but the lack of precision in the policy documentation suggests there is scope for fragmentation and inconsistencies in practice about what offences are classified as relevant, and therefore may or may not be shared under DSDAS disclosures. It is also not clear – from either the Scottish, or English and Welsh schemes – to what extent the police triage subjects’ criminal histories in terms of the *identity* of the victim. For example, the DVDS’s non-exhaustive list of qualifying offences suggests that police forces in England and Wales would consider disclosing past offences which were not perpetrated against a subject’s partner or ex-

---

---

partners, or their children. But would, for example, a sexual offence perpetrated against a stranger be considered worthy of disclosure under the DSDAS scheme as suggesting a general propensity towards sexual violence, or would disclosures be limited to sexual crimes committed against current or former domestic partners? The answer to this question is elusive.

### **What counts as a “relationship” for the purposes of DSDAS?**

Given the legal and policy framework, and working definitions of domestic abuse used by Police Scotland and Scottish prosecutors for other purposes, it might have been anticipated that disclosures under DSDAS could be sought and made in respect of current *or* ex “partners”, and of course as with all disclosures, necessarily taking into account the risk factors at play in each individual case. This is the approach taken by the DVDS in England and Wales which now permits disclosures to be made about ex-partners with abusive pasts. The published guidance on the English scheme stresses that it aims to allow people still in relationships with persons with a history of violence or abuse “to make informed choices about continuing in that relationship”, while simultaneously allowing people who have broken up with a former partner to use the scheme to make decisions “about their personal safety if no longer in the relationship” (Home Office 2013, para 12). The Scottish scheme, by contrast, does not appear to allow for police disclosures to applicants about their ex-partners’ histories of abusive behaviour. The unpublished DSDAS guidance documentation indicates “there can be variations in the reasons” why disclosures cannot be made to applicants by officers, but that:

the most common reasons for this may be where Person A [the applicant] and Person B [the ex-partner] are no longer found to be in a relationship, where the relationship is not a domestic relationship or when the applicant does not achieve verification. (Police Scotland 2021d, 23)

This approach represents a significant departure from the legal and policy consensus on the nature of domestic abuse in Scotland, and understandings of the circumstances in which a criminal justice response to domestic abuse may be necessary. Language used elsewhere in the disclosure scheme raises further questions about the *consistency* of decision-making based on the applicant’s relationship status. Elsewhere in the same document, the guidance suggests officers *can* take into account whether “Person A is in or is likely to resume a relationship with Person B”, suggesting – at least in some circumstances – that disclosures are being made *after* the end of a relationship, while other applications are being effectively discontinued if it transpires the relationship has “ended” (Police Scotland 2021d, 20). From the Police Scotland guidance, it is not clear how officers determine

---

that a qualifying relationship has “ended”, or how it is decided whether an applicant is “likely” to resume contact.

Considered in comparative perspective, one curiosity of the DSDAS and the English and Welsh DVDS is that neither of these disclosure schemes neatly aligns with the law and policy definitions of domestic abuse or violence in either jurisdiction. Under English law until the Domestic Abuse Act 2021, conduct towards ex-partners could not be prosecuted as coercive and controlling behaviour unless the ex-partners continued to cohabit, yet the Home Office’s DVDS guidance allows officers to make disclosures to applicants concerning ex-partners. While Scottish policy has recognised that domestic abuse can be perpetrated against current or ex-partners for over 20 years, Police Scotland’s DSDAS scheme specifically stresses that the end of the relationship, however determined, is treated as a basis to suspend consideration of whether or not a disclosure can be made.

Because the DSDAS policy is not in the public domain, the scheme’s departure from the legal and policy consensus has not been previously identified, justified or explained by Police Scotland. However, the policy choice to limit the Scottish disclosure scheme in this way is problematic, not least because the literature on domestic abuse indicates that the end of a relationship can be a significant risk factor in the escalation of domestic abuse and potential lethality (Campbell 1995; Campbell et al. 2003; Katz, Nikupeteri & Laitinen 2020; Logan & Walker 2004; McFarlane et al. 1999).

### **Who counts as a “partner” for the purposes of DSDAS?**

Looking beyond the inconsistencies identified between the DSDAS guidance and the prevailing policy frameworks, the guidance available to the public and police officers is also ambiguous regarding its definition of the concepts of “relationship” and “partner” more generally. We found internal inconsistency both within and between documents produced by Police Scotland. In the public facing guidance, for those wishing to ask about someone they are in a relationship with themselves, the predominant language used is “partner” (Police Scotland 2021d). In the guidance for those asking on behalf of someone else about whom they are concerned, however, the guidance initially refers to someone with whom they are “in a relationship” and later moves to “partner” (Police Scotland, 2021e). It is not clear how these terms may be understood by the general public. “Partner” may imply a more committed relationship and may not be the terminology used by those in more casual relationships. Irrespective of how terms may be variously understood, what is lacking is any operational definition of what constitutes a “partner” or being “in a relationship” in the context of the scheme. While it is clear from Police Scotland’s own guidance for officers, and information for the

---

---

public, that questions will be asked about the “nature of the relationship” between the parties before proceeding with a DSDAS application, no information is provided about what would, or would not, be included in their definitions for the purpose of the scheme.

Empirical research on modern relationships reveals the wide range of forms these may take, and the variation in levels of emotional and physical intimacy (Jamieson 1998), physical contact or time spent together (Holmes 2004), and the temporal aspects of relationships (Yeo & Fung 2018), as well as the fact that many of these variations would not be considered a “partner” (Escourt et al. 2022). Knowing precisely when something becomes a relationship – or someone becomes a partner – may be difficult, and the language of “partner” and “relationship” may not speak to all generations and communities. It is not clear in the guidance for the public, or for officers, which of the wide range of relationship variations would meet the threshold for DSDAS. For example, people increasingly meet online (Escourt et al. 2022; Yeo & Fung 2018) but it is unclear to us whether two individuals who had met online, exchanged messages, but had not yet met in person would be considered “partners” or “in a relationship” for the purposes of the scheme. Further, modern relationships may take the form of “friends with benefits” (Furman & Shaffer 2011) or other casual sexual encounters, or there may be a developing emotional intimacy but without any physical or sexual intimacy. Nor from a temporal perspective is it always clear when relationships formally begin or end as while time organises our social relationships and lives this may not be universally experienced (Zerubavel 1981), and given that DSDAS as it stands is not a suitable route for potential or former partners, clarity is needed in the public and police officer guidance on how these decisions are arrived at. In Police Scotland’s guidance to officers, they indicate a reason to refuse a disclosure is that people are found not to be in a relationship, or that it is found not to be a “domestic relationship” (Police Scotland 2021d, 23). No definition of “domestic” is offered here, so it is unclear what parameters are used in arriving at this decision.

While it is likely that Police Scotland officers approach decisions about what constitutes a relationship on a case-by-case basis, we suggest alterations to the Scottish guidance are needed, to take account of and reflect the diversity of modern relationships and offer greater clarity. This could include a recognition that a “partner” or “relationship” may be committed or non-committed (Williams & Adams 2013), may or may not include sexual or physical intimacy, and may have lasted a long or a short time, with an encouragement to contact Police Scotland for advice if a prospective applicant is unsure. The most recent iteration of the English and Welsh DVDS guidance has sought to address the issue of how an “intimate personal” relationship is defined, and the guidance acknowledges that what constitutes an intimate personal relationship “will differ from case to case”, acknowledging it may or

---

may not include physical/sexual intimacy, and/or emotional intimacy (Home Office 2023, 6). As it stands, it is unclear from Police Scotland's guidance what operational definition they are using for "partner", "relationship" and "domestic", and importantly, while it is clear this is something discussed with applicants during the process, the absence of a definition opens up the possibility of variable practice in whether disclosures are proceeded with. We also contend that the inclusion of former partners should be considered by Police Scotland given the disjuncture with domestic abuse policy and law in Scotland and that domestic abuse often escalates, and chances of lethality increase, when a relationship ends.

### **Conclusion**

Our analysis of the Scottish Domestic Abuse Disclosure scheme reveals a degree of under-regulation of concepts running through the public-facing information and the guidance for Police Scotland staff and officers. This under-regulation has the potential to create inconsistency and confusion both for those administering the scheme, and those requesting or receiving a disclosure under it.

As researchers we have questioned whether members of the public considering a disclosure application would be reassured by the information available to them. As it stands, we suggest there is scope for improvement. We have identified significant ambiguities in Police Scotland's understanding of the legal basis for the DSDAS scheme, and a lack of transparency and accessibility, both in terms of the scheme's general operations, but also in terms of how critical concepts used in DSDAS are understood and operationalised by police officers, including in terms of qualifying relationships, the significance of relationships ending for the possibility of a disclosure being made, and what constitutes abusive behaviour within them.

Building on these findings, we make three key suggestions. First, in order to make the Scottish domestic abuse disclosure scheme more accessible and transparent, Police Scotland should publish its DSDAS guidance in full. We are buttressed in this view by the potential legal ramifications of Police Scotland's decision not to publish detailed information on the scheme, which exposes the framework to a risk of legal challenge and an adverse finding that the operation of the scheme is unlawful on common law or human rights grounds. Second, we argue Police Scotland guidance should be amended accurately to reflect what we consider to be the true legal basis for the operation of the DSDAS scheme in the common law, for similar reasons. Third, to ensure greater consistency of approach and with a view to embedding shared understandings of key definitions used under the scheme, we argue Police Scotland's DSDAS guidance should be revised to provide clearer definitions of what relationships are

---



---

understood to qualify for disclosure under the scheme, an indicative framework for what kinds of criminal conduct the scheme extends to, and a clarification of the scheme's application to ex-partners, with a view to bringing the DSDAS scheme back into line with the prevailing legal and policy framework dealing with domestic abuse in Scots law, reflecting recognised risks of escalation associated with the dissolution of intimate relationships. Taken together, we argue these reforms to the DSDAS framework would reduce Police Scotland's potential legal exposure, better uphold fundamental rights, enhance the accessibility and transparency of the scheme, and more fully and accurately communicate the scope and boundaries of the Domestic Abuse Disclosure Scheme to officers applying it, to applicants, to subjects of disclosure, and to the wider Scottish public. On sharing our findings with Police Scotland, they responded: "Police Scotland welcomes the research and findings. The service will consider these as we continue to develop our services to support the public and communities in Scotland".

## References

- Burman, M. & Brooks-Hay, O. (2018). Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control. *Criminology and Criminal Justice* 18(1): 67-83.
- Campbell, J. (1995). Prediction of homicide of and by battered women. In J. Campbell (Ed.), *Assessing the Risk of Dangerousness: Potential for Further Violence of Sexual Offenders, Batterers, and Child Abusers* (pp. 93-113). Thousand Oaks, CA: Sage.
- Campbell, J., Webster, D., Koziol-McLain, J., Block, C., Campbell, D., Curry, M., et al. (2003). Risk factors for femicide in abusive relationships: Results from a multi-site case control study. *American Journal of Public Health* 93(7): 1089-1097.
- Duggan, M. (2018). Victim hierarchies in the domestic violence disclosure scheme. *International Review of Victimology* 24(3): 199-217.
- Escourt, C.S., Flowers, P., Cassell, J.A., Pothoulaki, M., Vojt, G., Mapp, F., Woode-Owusu, M., Low, N., Saunders, J., Symonds, M., Howarth, A., Wayal, S., Nandwani, R., Brice, S., Comer, A., Johnson, A.M. & Mercer, C.H. (2022). Going beyond 'regular and casual': Development of a classification of sexual partner types to enhance partner notification for STIs. *Sexually Transmitted Infections* 98: 108-114.
- Fitz-Gibbon, K. & Walklate, S. (2017). The efficacy of Clare's Law in domestic violence law reform in England and Wales. *Criminology & Criminal Justice* 17(3): 284-300.
- Forbes, E. (2018). The Domestic Abuse (Scotland) Act 2018: The whole story? *Edinburgh Law Review* 22(3): 406-411.

---

Furman, W. & Shaffer, L. (2011). Romantic partners, friends, friends with benefits, and casual acquaintances as sexual partners. *Journal of Sex Research* 48(6): 554-564.

Grace, J. (2021). *Domestic Abuse Disclosure Schemes: Problems with Policy, Regulation and Legality*. Cham: Springer Nature.

Grace, J. (2015). Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing. *The Journal of Criminal Law* 79(1): 36-45.

Hadjimatheou, K. & Grace, J. (2020). 'No black and white answer about how far we can go': Police decision making under the Domestic Violence Disclosure Scheme. *Policing and Society* 31(7): 834-847.

Holmes, M. (2004). An equal distance? Individualisation, gender and intimacy in distance relationships. *The Sociological Review* 52(2): 180-200.

Home Office. (2013). *Domestic Violence Disclosure Scheme (DVDS) Guidance*. London: Home Office.

Home Office. (2016). *Domestic Violence Disclosure Scheme (DVDS) Guidance*. London: Home Office.

Home Office. (2023). *Domestic Violence Disclosure Scheme (DVDS) Statutory Guidance*. London: Home Office.

Jamieson, L. (1998). *Intimacy: Personal Relationships in Modern Society*. Cambridge and Oxford: Polity Press and Blackwells.

Katz, E., Nikupeteri, A. & Laitinen, M. (2020). When coercive control continues to harm children: Post separation fathering, stalking and domestic violence. *Child Abuse Review* 29: 310-324.

Logan, T.K. & Walker, R. (2004). Separation as a risk factor for victims of intimate partner violence: Beyond lethality and injury: A response to Campbell. *Interpersonal Violence* 19(12): 1478-1486.

McFarlane, J., Campbell, J., Wilt, S., Sachs, C., Ulrich, Y. & Xu, X. (1999). Stalking and intimate partner femicide. *Homicide Studies* 3(4): 300-316.

Parliamentary Counsel Office. (2018). *Drafting Matters! Guidance*. Edinburgh: Scottish Government.

Police Scotland. (2021a). *4500 people told of partner's abusive past*. Available at: <https://www.scotland.police.uk/what-s-happening/news/2020/october/dsdas-5th-anniversary-2020/> (accessed 27.07.23).

Police Scotland. (2021b). *Disclosure Scheme for Domestic Abuse in Scotland (DSDAS) Guidance*. Police Scotland.

Police Scotland. (2021c). *Disclosure Scheme for Domestic Abuse in Scotland*. Available at: <https://www.scotland.police.uk/advice-and-information/domestic-abuse/disclosure-scheme-for-domestic-abuse-scotland/> (accessed 27.07.23).

Police Scotland. (2021d). *Making an application about your partner*. Available at: <https://www.scotland.police.uk/advice-and-information/domestic-abuse/disclosure-scheme-for-domestic-abuse-scotland/making-an-application-about-your-partner/?view=Standard> (accessed 27.07.23).

---

- 
- Police Scotland. (2021e). *Asking on behalf of someone else*. Available at: <https://www.scotland.police.uk/advice-and-information/domestic-abuse/disclosure-scheme-for-domestic-abuse-scotland/asking-on-behalf-of-someone-else/?view=Standard> (accessed 27.07.23).
- Police Scotland. (2022). *Disclosure Scheme for Domestic Abuse in Scotland: Secure form*. Available at: <https://www.scotland.police.uk/secureforms/disclosure/> (accessed 27.07.23).
- Police Scotland and Crown Office and Procurator Fiscal Service. (2019). *Joint Protocol Between Police Scotland and the Crown Office and Procurator Fiscal Service*. Available at: <https://www.scotland.police.uk/spa-media/ymzlwjw/joint-protocol-between-police-scotland-and-copfs-in-partnership-challenging-domestic-abuse.pdf?view=Standard> (accessed 27.07.23).
- Scottish Executive. (2006). *Preventing Domestic Abuse: A National Strategy*. Edinburgh: Scottish Executive.
- Scottish Government. (2012a). *Police and Fire Reform (Scotland) Bill: Policy Memorandum*. Edinburgh: Scottish Government.
- Scottish Government. (2012b). *Police and Fire Reform (Scotland) Act 2012: Explanatory Notes*. Edinburgh: Scottish Government.
- Scottish Government. (2016). *Abusive Behaviour and Sexual Harm (Scotland) Act 2016: Explanatory Notes*. Edinburgh: Scottish Government.
- Scottish Government. (2021). *Domestic Abuse: Statistics Recorded by the Police in Scotland - 2020/21*. Edinburgh: Scottish Government.
- Scottish Parliament Justice Sub-Committee on Policing. (2019). *Report on Police Scotland's Proposal to Introduce the Use of Digital Device Triage Systems (Cyber Kiosks)*. Edinburgh: Scottish Parliament.
- Stark, E. (2007). *Coercive Control: How Men Entrap Women in Personal Life*. Oxford: Oxford University Press.
- Williams, L. & Adams, H. (2013). Friends with benefits or "friends" with deficits? The meaning and contexts of uncommitted sexual relationships among Mexican American and European American adolescents. *Children and Youth Services Review* 35(7): 1110-1117.
- Yeo, T.E.D. & Fung, T.H. (2018). "Mr Right Now": Temporality of relationship formation on gay mobile dating apps. *Mobile Media and Communication* 6(1): 3-18.
- Zerubavel, E. (1981). *Hidden Rhythms: Schedules and Calendars in Social Life*. Chicago: University of Chicago Press.
-