

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 1 – Abusive Behaviour

Abusive behaviour towards partner or ex-partner

Section 1 – Aggravation of offence where abuse of partner or ex-partner

8. *Section 1* provides for a statutory aggravation that an offence is aggravated by constituting abuse of a partner or ex-partner where the person convicted of the offence either intended to cause, or else was reckless as to whether their actions would cause, physical or psychological harm to their partner or ex-partner.
9. Subsection (2)(a) provides that, where it is libelled that the accused acted with the *intent* of causing their partner to suffer physical or psychological harm the offence itself does not have to have been committed against the person’s partner or ex-partner. As such, the aggravation could be libelled where, for example, a person commits an assault against their ex-partner’s child with the intent of causing psychological harm to their ex-partner.
10. Subsection (2)(b) provides that, where the offence is committed against the person’s partner or ex-partner, the offence is aggravated where the convicted person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm. As such, the aggravation applies where, for example, someone assaults their partner or damages their partner’s property, irrespective of whether it was their *intent* to cause such harm to that person.
11. Subsection (5) requires that, where the aggravation is proved, the court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by constituting abuse of a partner or ex-partner.
12. Subsection (6) provides that, for the purpose of the aggravation, “partner” means a person’s spouse or civil partner (or cohabiting equivalent), or a person in an intimate personal relationship with the applicant. Former relationships of the specified types are covered in addition to current relationships. The phrase “intimate personal relationship” is 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.

Disclosure of an intimate photograph or film

Section 2 – Disclosing, or threatening to disclose, an intimate photograph or film

13. **Section 2** creates an offence relating to disclosure of intimate images.
14. Subsection (1) provides that the offence can be committed in two ways. Firstly, it is an offence to disclose a photograph or film showing a person in an intimate situation. Secondly, it is an offence to threaten to disclose a photograph or film showing a person in an intimate situation. The *mens rea* of the offence is intention to cause fear, alarm or distress to the person shown in the intimate situation or recklessness as to fear, alarm or distress being caused. However an offence will not be committed where the intimate image has already been made publicly available with the consent of the person shown in the intimate situation.
15. Subsection (2) brings within the scope of the offence disclosure of material in a format from which a photograph or film can be created, for example a photographic negative or data stored electronically on a portable hard drive or disk.
16. Subsection (3) provides for four defences to the offence. The defence at subsection (3)(c) is that the disclosure was reasonably believed to be necessary for the prevention, detection, investigation or prosecution of crime (for example, disclosing to the police an image believed to be portraying illegal activity). It is anticipated that there will be few occasions on which disclosure of intimate photographs or images could be reasonably believed to be in the public interest in terms of the defence at subsection (3)(d), bearing in mind that what is of interest to the public is not the same thing as what is in the public interest; this will be a matter for the courts to assess in the particular circumstances of a case. Subsection (4) provides clarification of the meaning of “consent” for the purpose of the defences at subsection (3)(a) and (b).
17. Subsection (5) provides that it is a defence that the intimate photograph or film was taken in a public place and members of the public were present. This has the effect of excluding from the scope of the offence photographs or films taken of, for example, someone protesting when naked in a public place or someone “streaking” in a public place. Subsection (5)(b) provides that the defence is not available where a person is in an intimate situation in public against their will. This could be, for example, where the person has been stripped naked in a public place, or sexually assaulted, then photographed.
18. Subsection (6) provides that, for the purpose of the defences at subsections (3) and (5), an evidential burden of proof is placed on the accused to bring forward sufficient evidence to raise an issue with respect to the defence, but the legal burden of disproving the defence and proving that the offence has been committed remains with the prosecution.
19. Subsection (7) makes provision for the maximum penalties which will attach to the offence. The maximum penalties are the same whether the offence has been committed by disclosing a photograph or image or by threatening to disclose a photograph or image.

Section 3 – Interpretation of section 2

20. **Section 3** defines the meaning of certain terms for the purpose of section 2.
21. Subsection (2) provides definitions of “film” and “photograph”. Those terms include any material that was originally captured by photography or by making a recording of a moving image, whether or not it has been altered in any way. As such, the offence applies to digitally enhanced or manipulated photographs or films, but it does not apply to material that looks like a photograph or film but does not in fact contain any photographic element (for example, because it had been generated entirely by computer).

Section 4 – Section 2: special provision in relation to providers of information society services

22. **Section 4** introduces schedule 1, which addresses the position of information society services in respect of the new offence at section 2, to give effect to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, often referred to as the E-Commerce Directive (“the Directive”).
23. Paragraph 1 of schedule 1 sets out the conditions under which service providers may be exempted from liability under the section 2 offence where acting as “mere conduits” for the transmission of, or provision of access to, information. This means that, providing the conditions in paragraph 1 are met, a business providing access to the internet (e.g. a home internet service provider) is exempted from liability if the person using their service discloses an intimate image while making use of the internet. This accords with Article 12 of the Directive.
24. Paragraph 2 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “caching” information, that is, for the automatic, intermediate and temporary storage of information. This means that when an internet service provider automatically makes and “caches” a local copy of a file accessed by a user of its service (which is done in order to provide a more efficient service) it is not criminally liable in the event that the information consists of an intimate image, providing the conditions in paragraph 2 are met. This accords with Article 13 of the Directive.
25. Paragraph 3 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “hosting” information, that is, storing information at the request of a recipient of the service. For example, if a person discloses an intimate image using a social network, then, providing the conditions in paragraph 3 are met, the social network is exempt from criminal liability. This accords with Article 14 of the Directive.
26. Paragraph 4 of schedule 1 defines certain terms used in schedule 1.

Non-harassment orders

Section 5 – Making of non-harassment orders in criminal cases

27. Section 234A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that the prosecutor may apply to a court to impose a non-harassment order where a person is convicted of an offence involving harassment of a person. The court may, if it is satisfied on the balance of probabilities that it is necessary to do so to protect the victim from further harassment, make a non-harassment order.
28. **Section 5(2)** amends section 234A of the 1995 Act to empower a court to make a non-harassment order where a person has been found unfit to stand trial under section 53F by reason of a mental or physical condition and the court has determined that the person has done the act or made the omission constituting the offence, or where the accused is acquitted under section 51A of the 1995 Act because they were not criminally responsible for their actions at the time of the offence by reason of mental disorder.
29. **Sections 5(3) and 5(4)** make consequential amendments to section 234A to reflect the changes to the structure of section 234A(1) and to take account of the fact that the person upon whom a non-harassment order may be imposed will not necessarily have been convicted of a criminal offence.
30. **Section 5(5)** inserts new subsection 234A(2BA), which enables the prosecutor to put information to the court about previous instances on which the person against whom the order is sought has, in relation to the same victim, been found to have done acts constituting an offence, but has not been fit to stand trial, or has been acquitted of the offence on the basis of a lack of criminal responsibility.

*These notes relate to the Abusive Behaviour and Sexual Harm (Scotland)
Act 2016 (asp 22) which received Royal Assent on 28 April 2016*

31. [Section 5\(6\)](#) makes a consequential amendment to section 234A(2C) to reflect the fact that the person against whom a non-harassment order is sought may not have been convicted of a criminal offence.
32. [Section 5\(7\)](#) amends section 234A(3) to provide that non-harassment orders, including orders granted by virtue of the amendments in section 5, and any variations or revocations of those orders, are to be appealed as if they were a sentence. This means that the procedural safeguards of the 1995 Act will apply to such appeals.