



Domestic Abuse (Scotland) Act 2018

2018 asp 5

PROSPECTIVE

PART 1

OFFENCE AS TO DOMESTIC ABUSE

Engaging in course of abusive behaviour

1 Abusive behaviour towards partner or ex-partner

- (1) A person commits an offence if—
 - (a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and
 - (b) both of the further conditions are met.
- (2) The further conditions are—
 - (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
 - (b) that either—
 - (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
 - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
- (3) In the further conditions, the references to psychological harm include fear, alarm and distress.

2 What constitutes abusive behaviour

- (1) Subsections (2) to (4) elaborate on section 1(1) as to A’s behaviour.
- (2) Behaviour which is abusive of B includes (in particular)—
 - (a) behaviour directed at B that is violent, threatening or intimidating,
 - (b) behaviour directed at B, at a child of B or at another person that either—

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- (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
- (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).

(3) The relevant effects are of—

- (a) making B dependent on, or subordinate to, A,
- (b) isolating B from friends, relatives or other sources of support,
- (c) controlling, regulating or monitoring B's day-to-day activities,
- (d) depriving B of, or restricting B's, freedom of action,
- (e) frightening, humiliating, degrading or punishing B.

(4) In subsection (2)—

- (a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,
- (b) in paragraph (b), the reference to a child is to a person who is under 18 years of age.

3 Extra-territorial jurisdiction

(1) An offence under section 1(1) can be constituted by a course of behaviour engaged in by A even if the course of behaviour occurs wholly or partly outside the United Kingdom.

(2) If the course of behaviour occurs wholly outside the United Kingdom—

- (a) A may be prosecuted, tried and punished for the offence—
 - (i) in a sheriff court district in which A is apprehended or in custody, or
 - (ii) in a sheriff court district that is determined by the Lord Advocate, as if the offence has been committed entirely in that district,
- (b) the offence is, for all things incidental to or consequential on trial and punishment, deemed to have been committed entirely in that district.

(3) Subsections (1) and (2) apply only if A, when the course of behaviour occurs—

- (a) is habitually resident in Scotland, or
- (b) is a UK national.

(4) “UK national” means someone who is, as referred to in the British Nationality Act 1981—

- (a) a British citizen,
- (b) a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen, or
- (c) a British subject or a British protected person.

Evidence, aggravation and defence

4 Evidence of impact on victim

(1) The commission of an offence under section 1(1) does not depend on the course of behaviour actually causing B to suffer harm of the sort mentioned in section 1(2).

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- (2) The operation of section 2(2)(b) does not depend on behaviour directed at someone actually having on B any of the relevant effects set out in section 2(3).
- (3) Nothing done by or mentioned in subsection (1) or (2) prevents evidence from being led in proceedings for an offence under section 1(1) about (as the case may be)—
 - (a) harm actually suffered by B as a result of the course of behaviour, or
 - (b) effects actually had on B of behaviour directed at someone.

5 Aggravation in relation to a child

- (1) This subsection applies where it is, in proceedings for an offence under section 1(1)—
 - (a) specified in the complaint or libelled in the indictment that the offence is aggravated by reason of involving a child, and
 - (b) proved that the offence is so aggravated.
- (2) The offence is so aggravated if, at any time in the commission of the offence—
 - (a) A directs behaviour at a child, or
 - (b) A makes use of a child in directing behaviour at B.
- (3) The offence is so aggravated if a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour.
- (4) The offence is so aggravated if a reasonable person would consider the course of behaviour, or an incident of A's behaviour that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with A or B (or both).
- (5) For it to be proved that the offence is so aggravated, there does not need to be evidence that a child—
 - (a) has ever had any—
 - (i) awareness of A's behaviour, or
 - (ii) understanding of the nature of A's behaviour, or
 - (b) has ever been adversely affected by A's behaviour.
- (6) Evidence from a single source is sufficient to prove that the offence is so aggravated.
- (7) Where subsection (1) applies, the court must—
 - (a) state on conviction that the offence is so aggravated,
 - (b) record the conviction in a way that shows that the offence is so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and
 - (d) state—
 - (i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
 - (ii) otherwise, the reasons for there being no such difference.
- (8) Each of subsections (2) to (4) operates separately along with subsection (5), but subsections (2) to (4) may be used in combination along with subsection (5).
- (9) Nothing in subsections (2) to (5) prevents evidence from being led about—
 - (a) a child's observations of, or feelings as to, A's behaviour, or
 - (b) a child's situation so far as arising because of A's behaviour.

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(10) In subsections (4) and (5), the references to adversely affecting a child include causing the child to suffer fear, alarm or distress.

(11) In this section, the references to a child are to a person who—

- (a) is not A or B, and
- (b) is under 18 years of age.

6 Defence on grounds of reasonableness

(1) In proceedings for an offence under section 1(1), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances.

(2) That is to be regarded as shown if—

- (a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (1), and
- (b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (1).

Presumption, alternative and penalty

7 Presumption as to the relationship

(1) In proceedings for an offence under section 1(1), the matter of B being A's partner or ex-partner is to be taken as established—

- (a) according to the stating of the matter in the charge of the offence in the complaint or indictment, and
- (b) unless the matter is challenged as provided for in subsection (2).

(2) The matter is challenged—

- (a) in summary proceedings, by—
 - (i) preliminary objection before the plea is recorded, or
 - (ii) later objection as the court allows in special circumstances,
- (b) in proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the Criminal Procedure (Scotland) Act 1995.

8 Alternative available for conviction

(1) In proceedings for an offence under section 1(1), A may be convicted of an alternative offence if the facts proved against A—

- (a) do not amount to the offence under section 1(1), but
- (b) do amount to the alternative offence.

(2) An alternative offence as referred to in subsection (1) is one or other of these—

- (a) an offence under section 38(1) (threatening or abusive behaviour) of the Criminal Justice and Licensing (Scotland) Act 2010,
- (b) an offence under section 39 (offence of stalking) of that Act.

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9 Penalty for offence under section 1(1)

A person who commits an offence under section 1(1) is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
- (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years or a fine (or both).

Meaning given to key expressions

10 Meaning of references to behaviour

- (1) Subsections (2) to (4) explain what is meant by the references to behaviour in this Part.
- (2) Behaviour is behaviour of any kind, including (for example)—
 - (a) saying or otherwise communicating something as well as doing something,
 - (b) intentionally failing—
 - (i) to do something,
 - (ii) to say or otherwise communicate something.
- (3) Behaviour directed at a person is such behaviour however carried out, including (in particular)—
 - (a) by way of conduct towards property,
 - (b) through making use of a third party,as well as behaviour in a personal or direct manner.
- (4) A course of behaviour involves behaviour on at least two occasions.

11 Meaning of partner and ex-partner

- (1) Subsections (2) and (3) describe who is a person's partner or ex-partner as referred to in this Part.
- (2) Someone is a person's partner if they are—
 - (a) spouses or civil partners of each other,
 - (b) living together as if spouses of each other, or
 - (c) in an intimate personal relationship with each other.
- (3) Whether someone is a person's ex-partner is to be determined accordingly.

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