

# DOMESTIC ABUSE (SCOTLAND) ACT 2018

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## EXPLANATORY NOTES

### THE STRUCTURE AND A SUMMARY OF THE ACT

#### Part 2 – Further and Final Matters

##### *The schedule – details*

59. The schedule is split into two Parts. Part 1 provides for amendments relating to the rules of criminal procedure and Part 2 provides for minor and consequential amendments.

#### Part 1 – rules of criminal procedure

##### *Chapter 1 – restriction on bail in solemn cases*

60. Under section 23B(1) of the 1995 Act, there is ordinarily a presumption in favour of bail. Section 23D of that Act, however, provides that in some cases, set out in that section, bail is to be granted only in exceptional circumstances. These cases are where a person is accused in solemn proceedings (i.e. cases involving a jury) of either a drugs offence, or a violent or sexual offence, and has a previous conviction on indictment of either a drugs offence, or a sexual or violent offence, respectively. A conviction on indictment is one reached in solemn proceedings.
61. [Paragraph 1](#) amends section 23D of the 1995 Act to add domestic abuse offences to the offences where, if there is a previous conviction on indictment, bail will be granted only in exceptional circumstances in a further solemn case.
62. [Paragraph 1\(2\)\(a\)](#) and (b) achieve this by adding a new subsection (3A) in section 23D of the 1995 Act, grouping domestic abuse offences with violent or sexual offences.
63. [Paragraph 1\(2\)\(c\)](#) defines domestic abuse offence by reference to section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (“the 2016 Act”) (aggravation where an offence involves abuse of a partner or ex-partner) and section 1(1) of this Act.
64. [Paragraph 1\(2\)\(d\)](#) amends section 23D(5) so that previous convictions for offences equivalent to domestic abuse in England and Wales, in Northern Ireland, and in member states of the European Union other than the UK, may be taken into consideration for the purposes of section 23D of the 1995 Act.

##### *Chapter 2 - conduct of precognition and defence*

#### Bail condition concerning precognition

65. Section 24 of the 1995 Act provides for the rules governing bail and imposition of bail conditions. Section 24(5)(e) provides that where a person is accused of any of the sexual offences listed in section 288C of the 1995 Act, a standard condition of bail applies which prohibits the accused from seeking any precognition of or statement from the complainer in relation to the subject matter of the offence other than via a solicitor.

66. Paragraph 2(2) of the schedule adjusts section 24 of the 1995 Act so the prohibition in section 24 operates, in addition to section 288C cases, also in relation to persons being granted bail in respect an offence under section 1(1) of this Act or an offence aggravated under section 1(1)(a) of the 2016 Act.

### **Prohibition on conduct of own defence**

67. Section 288C of the 1995 Act prohibits an accused person from conducting his or her own case in person, without representation by a lawyer, where the offence charged is among the sexual offences listed at section 288C(2), though only in respect of hearings where a witness is to give evidence. In consequence of this prohibition a number of sections of the 1995 Act set out procedure in such cases.
68. Paragraph 4(14) of the schedule inserts a new section 288DC into the 1995 Act to create a similar prohibition on an accused conducting his or her own case in respect of both the domestic abuse offence as defined by this Act, and where the domestic abuse aggravator described in section 1(1)(a) of the 2016 Act apply. Once again the prohibition applies only to hearings where a witness is to give evidence.
69. New section 288DC(3) applies section 288D of the 1995 Act, which provides for the appointment of a solicitor by the court where the accused has not engaged his or her own, or where any solicitor appointed by the accused has been dismissed or has withdrawn.
70. [Paragraph 4\(2\) to \(13\), \(15\) and \(16\)](#) amend various sections of the 1995 Act to deal with the procedural consequences of new section 288DC, principally to ensure that the accused is repeatedly reminded, in notices served and at preliminary hearings, of the need to engage a solicitor to conduct his or her defence.
71. Paragraph 3(2) of the schedule amends section 22(1)(dd) of the Legal Aid (Scotland) Act to take account of legal aid being available automatically where a solicitor is appointed by the court as a result of the accused being prevented from conducting his or her own defence under new section 288DC.
72. Paragraph 5 of the schedule amends section 20 of the Criminal Justice (Scotland) Act 2016 to provide that, where a person has been arrested for a domestic abuse offence covered by new section 288DC, or has been charged with such an offence, he or she is to be advised as soon as possible of the prohibition on conducting one's own defence in hearings where a witness is to give evidence, and that consequently a solicitor should be engaged, or the court will provide one.

## ***Chapter 3 – vulnerable witnesses and expert evidence***

### **Special measures for vulnerable witnesses**

73. Section 271B of the 1995 Act provides for rules relating to special provision for child witnesses under the age of 12. The effect of section 271B is to ensure that the views of the child in question are taken into account by the court when deciding whether the child should give evidence in the court room in relation to certain serious offences.
74. [Paragraph 6](#) of the schedule makes a change to section 271B of the 1995 Act so that these rules also operate for cases involving the new offence under section 1(1) of this Act or an aggravation under section 1(1)(a) of the 2016 Act.

### **Presentation of certain expert evidence**

75. Section 275C of the 1995 Act provides that, in cases involving those sexual offences to which section 288C applies, expert psychological or psychiatric evidence relating to subsequent behaviour of, or statements by, the complainer is admissible to rebut inferences which may be drawn from such behaviour or statement as to the complainer's credibility or reliability as a witness.

76. Paragraph 7(2) of the schedule extends the admissibility of such evidence to the subsequent behaviour of, or statements by, complainers in domestic abuse cases, that is in trials relating to the new offence under section 1(1) of this Act or offences aggravated under section 1(1)(a) of the 2016 Act. As the domestic abuse offence in section 1(1) of this Act is an offence committed by a course of conduct, paragraph 7(2)(b) inserts provision to clarify that the expert evidence is admissible in respect of any behaviour or statements subsequent to any part of that course of conduct.

#### **Chapter 4 – victim safety and non-harassment**

##### **Victim safety in relation to sentencing**

77. Paragraph 8 of the schedule introduces a new section 210AB into the 1995 Act.
78. New section 210AB requires a court when sentencing for a relevant offence to have particular regard to the aim of ensuring the victim is protected from being subject of a further such offence by the convicted person.
79. The relevant offences are the new offence under section 1(1) of this Act and any offence that is aggravated under section 1(1)(a) of the 2016 Act.

##### **Consideration of non-harassment order**

80. Paragraph 9 of the schedule introduces a new section 234AZA into the 1995 Act. This new section provides for new rules in relation to how the court is to consider non-harassment orders when sentencing for a relevant offence.
81. Section 234A of the 1995 Act provides the existing rules relating to non-harassment orders available to the court following conviction. New section 234AZA(1) provides that section 234A continues to operate in cases of domestic abuse but subject to certain modifications.
82. New section 234AZA(2) provides certain definitions for the purpose of this section. This includes listing the relevant offences for the operation of the section as an offence under section 1(1) of this Act and an offence that is aggravated as described in section 1(1)(a) of the 2016 Act.
83. New section 234AZA(3) provides that a non-harassment order, in addition to making provision to protect the victim as defined in section 234A of the 1995 Act, can include provision in respect of children close to the domestic abuse offence i.e. children living with the perpetrator or the victim of domestic abuse or children to whom the aggravation at section 5 applies.
84. New section 234AZA(4)(a) provides that the court is always required to consider whether to make a non-harassment order. An application by the prosecutor is not required to initiate this process.
85. New section 234AZA(4)(b), as read with section 234AZA(5), provides that, after hearing the prosecutor as well as the person, the court must make a non-harassment order unless it concludes that there is no need for a victim, or the children covered by subsection (3), to be protected by such an order.
86. New section 234AZA(4)(c), as similarly read, provides that, if the court concludes that a non-harassment order is not required, it must explain why.
87. New section 234AZA(6) makes a number of consequential adaptations to section 234A which are necessary as a result of the prosecutor not being required to make an application in the circumstances.
88. New section 234AZA(7) preserves the position whereby a non-harassment order may be imposed as an alternative or in addition to some other disposal in the case (e.g. imprisonment or a Community Payback Order).

**Part 2 – minor and consequential amendments**

89. Paragraph 10 of the schedule makes a consequential change to section 79 of the 1995 Act as a result of section 7 of this Act.
90. Paragraph 11(2) of the schedule makes a minor change to section 1 of the 2016 Act. This is to introduce consistency with the approach taken in section 11 of this Act.
91. Paragraph 11(3) of the schedule amends the 2016 Act to provide that for the purposes of applying the domestic abuse aggravation under section 1(1)(a) of that Act the matter of the accused being the complainer’s partner or ex-partner is to be taken as established unless the matter is challenged by way of a preliminary objection prior to the trial taking place.