

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 1 – Abusive Behaviour

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

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

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.