

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

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.