

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 2 – Sexual Harm

Chapter 1 – Jury directions relating to sexual offences

Section 6 – Jury directions relating to sexual offences

33. [Section 6](#) inserts two new sections, 288DA and 288DB, into the 1995 Act, which provide that jury directions must be given by the judge in sexual offence trials where certain conditions apply.
34. Jury directions form part of the judge’s charge to the jury. The judge’s charge is given after the prosecution and defence have given their concluding address but prior to the jury returning their verdict or retiring to consider their verdict. Jury directions will ordinarily include those matters which require to be considered by the jury in determining whether they are of the view that a particular offence has been committed. The provisions set out in section 6 provide that the judge will be required to set out certain matters to the jury if particular circumstances arise during the trial. The wording of the jury directions will remain a matter for the particular judge.
35. Section 288DA applies in relation to certain sexual offences defined at section 288DA(4), where it is revealed at trial that the victim has not told anyone about the offence or has not reported it to the authorities, or has delayed in doing so.
36. Section 288DA(1) provides that when these offences are being tried on indictment the requirement to give a direction as set out in subsection (2) applies in two general circumstances: firstly where evidence is given which suggests that the complainer did not tell, or delayed in telling, anyone, or a particular person (such as a partner, friend or family member), about the offence or did not report, or delayed reporting, the offence to any investigating agency or a particular investigating agency, such as the police; and secondly, where a question is asked or a statement is made with a view to eliciting or drawing attention to evidence of that nature.
37. Section 288DA(2) provides that where subsection (1) applies, the judge must advise the jury that there can be good reasons why a person may not tell another person that they have been a victim of a sexual offence, or not report that matter to the police, or may delay in doing so, and that this does not necessarily indicate that the allegation is false.
38. Section 288DA(3) provides that a direction need not be given if the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that there was a delay or failure to report the offence, or tell another person about the offence, to be relevant to the question of whether the offence has been proven. This may be the case where, for example, the offence is alleged to have been committed against someone who was a baby or very young child at the time the offence was alleged to

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Act 2016 (asp 22) which received Royal Assent on 28 April 2016*

have been committed and could not understand that an offence had been committed against them.

39. Section 288DA(4) defines the meaning of certain terms for the purpose of this section. Sexual offence takes its meaning from section 210A of the 1995 Act which itself lists a variety of offences. However, offences under section 170 of the Customs and Excise Management Act 1979, in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (where the prohibited goods include indecent photographs of persons), or under 52A of the Civic Government (Scotland) Act 1982 (possession of indecent images of children) are excluded from the definition of sexual offence as used in section 288DA as it is considered that neither of these offences could be committed “against” a person who may not tell or report it, or delay in telling or reporting it.
40. Section 288DB makes provision that directions must be given by the trial judge to the jury when, during a trial for a sexual offence listed at section 288DB(7), evidence is led that the person against whom the offence is alleged to have been committed did not offer physical resistance or that the alleged perpetrator did not use physical force to overcome the will of the alleged victim.
41. Section 288DB(1) provides that subsection (2) applies where, during a trial for a sexual offence, evidence is given which suggests that sexual activity took place between the accused and the complainer and the complainer did not physically resist their alleged attacker, or where a question is asked or a statement is made with a view to eliciting or drawing attention to that evidence.
42. Section 288DB(2) provides that the judge must advise the jury that there can be good reasons why a person against whom a sexual offence is committed may not physically resist their attacker and that this does not necessarily indicate that the allegation is false. Examples of a lack of physical resistance which this provision is designed to cover are instances such as where a person may freeze in fright, or may fear that offering physical resistance will provoke their attacker to become more violent.
43. Section 288DB(3) provides that the judge does not need to give such a direction where the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that the complainer did not offer physical resistance to their alleged attacker to be relevant to the question of whether the offence was proven. This may be the case where, for example, the person against whom the offence is alleged to have been committed was asleep or unconscious at the time of the alleged offence.
44. Section 288DB(4) provides that subsection (5) applies where during a trial for a sexual offence, evidence is given which suggests that sexual activity took place between the accused and the complainer without the accused using physical force to overcome the will of the person against whom the offence is alleged to have been committed, or where a question is asked or a statement is made with a view to eliciting or drawing attention to that evidence.
45. Section 288DB(5) provides that where subsection (4) applies, the judge must advise the jury that there can be good reasons why a person may not need to use physical force to overcome the will of the person against whom a sexual offence is committed and that the fact that the accused did not use physical force does not necessarily indicate the allegation is false. Examples where a person may not need to use physical force to overcome the will of a person could include where the victim has frozen in fear and offers no resistance.
46. Section 288DB(6) provides that the judge does not need to give such a direction where the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that the complainer did not offer physical resistance to their alleged attacker to be relevant to the question of whether the offence was proven. This

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may be the case where, for example, the person against whom the offence is alleged to have been committed was asleep or unconscious at the time of the alleged offence.

47. Section 288DB(7) defines the meaning of certain terms for the purpose of this section. The definition of “sexual offence” is narrower than that provided for at section 288DA as it is restricted to those offences which involve physical contact between the perpetrator and the victim.