

DOMESTIC ABUSE (SCOTLAND) ACT 2018

EXPLANATORY NOTES

THE STRUCTURE AND A SUMMARY OF THE ACT

Part 1 – Offence as to Domestic Abuse

Engaging in course of abusive behaviour

Section 1 – Abusive behaviour towards partner or ex-partner

8. **Section 1** makes it an offence for a person to engage in a course of behaviour which is abusive of the person's partner or ex-partner.
9. **Section 1(1)** provides that a person commits an offence if the person engages in a course of behaviour which is abusive of the partner or ex-partner of that person and the two further conditions in section 1(2) are met.
10. A description of what constitutes abusive behaviour is contained in section 2. A definition of "partner", and "ex-partner" is provided in section 11. Section 10(4) provides that a course of behaviour involves behaviour on at least two occasions, and the rest of section 10 gives a broad meaning to behaviour and how it may be effected.
11. The two further conditions in section 1(2) are as follows.
12. **Section 1(2)(a)** provides that, for the offence to be committed, a reasonable person must consider that the course of behaviour would be likely to cause the complainer to suffer physical or psychological harm.
13. The test that the court is being required to apply is whether the behaviour would be likely to cause the complainer to suffer harm. The test would be met where the course of behaviour was such that a reasonable person would consider the behaviour likely to cause harm to that particular individual, taking account of their particular characteristics, irrespective of whether the behaviour would in question would be likely to cause harm to a "reasonable person". As such, the court is entitled to take account of any particular vulnerability of the complainer in considering whether the accused's behaviour would be likely to cause them to suffer physical or psychological harm. But it is not a requirement for the offence to be committed that the prosecution show that the course of behaviour actually caused physical or psychological harm (see section 4).
14. **Section 1(2)(b)** sets out the mens rea for the offence. It provides that the accused must either intend that their course of behaviour causes the complainer to suffer physical or psychological harm, or else be reckless as to whether their course of behaviour would cause such physical or psychological harm. An example of how recklessness as to course of behaviour may occur is a person who is persistently verbally abusive and demeaning towards their partner and who may claim that they did not intend that their behaviour cause psychological harm to their partner. If the court is satisfied that their behaviour was such that the accused person was, at the very least, reckless as to whether their behaviour would cause such harm, then this condition would be met.

Section 2 – What constitutes abusive behaviour

15. **Section 2** provides a description of what constitutes abusive behaviour. The description is non-exhaustive and it therefore remains open to the court to decide in any individual case that the accused's behaviour was abusive in some other way.
16. **Section 2(2)** provides that behaviour which is abusive of a person's partner or ex-partner (B) includes behaviour directed at B which is violent, threatening or intimidating (for example, assault or threats). It also covers behaviour directed at B or at any other person (in particular, a child of B) which has as its purpose, or among its purposes, or would be considered by a reasonable person likely to have, one or more of the effects on B that are listed in section 2(3).
17. **Section 2(3)** provides a list of effects on the victim that are relevant in order to indicate behaviour is abusive in connection with the offence. This is intended to ensure that, for example, psychological abuse or coercive and controlling behaviour that could not currently be prosecuted under existing offences falls within the definition of abusive behaviour. There is inevitably some overlap because some abusive behaviour may have several of the listed effects on the victim or may be capable of prosecution under existing offences (for example, threatening or abusive behaviour, assault).
18. **Section 2(3)(a)** provides that behaviour which makes the victim dependent on or subordinate to the perpetrator can be considered to have a relevant effect. This could include, for example, preventing the victim from having access to money, forcing the victim to leave their job, taking charge of household decision-making to the exclusion of the victim or treating the victim as a domestic slave.
19. **Section 2(3)(b)** provides that behaviour which has the effect of isolating the victim from friends, relatives or other sources of support can be considered to have a relevant effect. This could include, for example, controlling the victim's movements or access to their phone or other forms of communication, not allowing visits from or to the victim's friends or family, or deliberately failing to pass on messages from friends or family.
20. **Section 2(3)(c)** provides that behaviour which has the effect of controlling, regulating or monitoring the victim's day-to-day activities can be considered to have a relevant effect. This could include, for example, checking the victim's phone, e-mail or social media use, controlling what clothes the victim can or cannot wear, or placing unreasonable requirements on the victim to, for example, prepare meals in a particular way at a particular time every day.
21. **Section 2(3)(d)** provides that behaviour which has the effect of depriving the victim of, or restricting the victim's freedom of action is behaviour which can be considered to have a relevant effect. This addresses behaviour which robs victims of their autonomy, for example, preventing the victim from attending work or college, preventing the victim from leaving the house alone, insisting on accompanying the victim to medical appointments, or taking decisions for the victim in relation to private, individual matters that a person would normally decide for themselves.
22. **Section 2(3)(e)** provides that behaviour which has the effect of frightening, humiliating, degrading or punishing the victim is behaviour which has a relevant effect. This could include, for example, abusive name-calling, threats of self-harm, playing mind games with the victim that cause them to doubt their sanity, controlling the victim's access to the toilet or forcing the victim to eat food off the floor.
23. **Section 2(4)** provides that references to violent behaviour include sexual violence as well as other physical violence. It should be noted that non-violent sexually abusive behaviour may be considered abusive under section 2(2)(b) and (3) where it is behaviour that is intended, or likely to have, one of the effects on the victim; for example, behaviour which has the effect of frightening, humiliating, degrading or punishing the victim. Non-violent sexually abusive behaviour may also be considered threatening or intimidating in terms of section 2(2)(a).

Section 3 – Extra-territorial jurisdiction

24. [Section 3\(1\)](#) provides that the offence of abusive behaviour towards a partner or ex-partner can be committed where the course of behaviour occurs wholly or partly outside the UK. The effect of this is that the Scottish courts can take cases relating to a course of domestic abuse alleged to have occurred either partly or entirely in another state, subject to the condition at subsection (3) that the accused is either a UK national or a habitual Scottish resident when the course of behaviour is alleged to have occurred.
25. Where the course of behaviour is alleged to have occurred wholly outside the UK, it would not be clear which sheriff court had jurisdiction over the matter. [Section 3\(2\)](#) provides for the accused to be prosecuted in a sheriff court in the district in which they are apprehended or in custody, or in a sheriff court district to be determined by the Lord Advocate.
26. [Section 3\(4\)](#) provides a definition of a UK national.