

DOMESTIC ABUSE (SCOTLAND) ACT 2018

EXPLANATORY NOTES

THE STRUCTURE AND A SUMMARY OF THE ACT

Part 1 – Offence as to Domestic Abuse

Evidence, aggravation and defence

Section 5 - Aggravation in relation to a child

31. **Section 5** provides for a statutory aggravation that the accused committed the offence of abusive behaviour towards a partner or ex-partner in a way which involved a child.
32. **Section 5(1)(a)** provides that, for the aggravation to apply, it must be specified in the complaint or libelled in the indictment.
33. **Section 5(2)(a)** provides that the aggravation applies where it is shown that, in committing the offence, the perpetrator directed behaviour at a child. So, for example, where the court is satisfied that in committing the offence the perpetrator directed behaviour at a child, such as demeaning, abusive language about the victim which could reasonably have the effect of making the victim feel humiliated, the aggravation would be engaged. Similarly, the aggravation would apply where the offence is committed by threatening violence towards a child to control or frighten the victim.
34. **Section 5(2)(b)** provides that the aggravation applies where it is shown that, in committing the offence, the perpetrator uses a child to direct behaviour at the victim. So, for example, where the court is satisfied that the perpetrator encouraged or directed a child to spy on or report on the day-to-day activities of the victim so as to enable the perpetrator to control, regulate or monitor the victim's day-to-day activities, the aggravation would be proven. The involvement of the child could be unwitting or unwilling, and the child need not be aware of that they are helping the perpetrator to abuse the victim, for example, by telling the perpetrator about the victim's activities. The aggravation would apply to the involvement of any child in the offence, for example the victim's own child, another child living in or visiting the household, or a neighbour's child.
35. **Section 5(3)** provides that the aggravation applies where a child sees, hears or is present during an incident of the perpetrator's behaviour that happens as part of the course of behaviour for which the perpetrator is convicted. This could, for example, be a physical assault or an incident of verbal abuse.
36. **Section 5(4)** provides that the aggravation applies where a reasonable person would consider that the perpetrator's behaviour in committing the offence would be likely to adversely affect a child residing with the victim or the perpetrator (or both). So, for example, if a perpetrator controls a victim's movements to such an extent that they are unable to leave the house to ensure their children get to school, or to get them to doctor's appointments, the court could determine that this could amount to behaviour likely to adversely affect a child. It could also cover circumstances where the effect of

the abusive behaviour is such that a reasonable person would consider it likely that a child's general wellbeing and development would be adversely affected.

37. **Section 5(5)** provides that there does not need to be evidence that a child ever had any awareness of the perpetrator's behaviour, any understanding of the nature of the perpetrator's behaviour or to have actually been adversely affected by the perpetrator's behaviour. This ensures that the aggravation can be proven in cases where, for example, the child is too young to understand the perpetrator's behaviour, or where it is not possible to prove that behaviour likely to adversely affect a child actually had such an adverse effect. Section 5(9) provides that this does not prevent evidence from being led as to a child's observations of, or feelings as to, the perpetrator's behaviour, or evidence of a child's situation, including any adverse effect on a child, insofar as it arose from the perpetrator's behaviour.
38. **Section 5(7)** requires that, where the aggravation is proved, the court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by reason of involving a child.
39. **Section 5(8)** provides that each of the different ways in which the aggravation in relation to a child may be established under section 5(2) to 5(4) may operate separately or together, so that where the aggravation is libelled by the prosecution behaviour falling within any or all of these sections can be included.
40. **Section 5(10)** provides that references to a child being "adversely affected" by the accused's behaviour at section 5(4) and 5(5) include, but are not limited to, causing the child to suffer fear, alarm or distress. In appropriate cases, therefore, it would be open to the court to interpret adverse effect to have a wider meaning.
41. **Section 5(11)** clarifies that a child is a person under 18 years of age who is not either the perpetrator or the victim of the offence. The child aggravation is therefore only engaged when the child in question is a third party.