

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.

Evidence, aggravation and defence

Section 4 – Evidence of impact on victim

27. **Section 4(1)** provides, for the avoidance of doubt, that the prosecutor does not need to establish that the accused's behaviour actually caused the victim to suffer physical or psychological harm in order for the offence to be committed.
28. Similarly, section 4(2) provides that it is not necessary to prove that a relevant effect under section 2(3) has actually been experienced by the victim.
29. This is because a 'reasonable person' test applies both in section 1(2)(a) (in relation to physical or psychological harm) and 2(2)(b)(2) (in relation to 'relevant effects'). It is therefore sufficient that a reasonable person would consider it likely that the behaviour would result in the victim suffering physical or psychological harm, or experiencing a 'relevant effect'. So, for example, section 2(2)(b) would cover behaviour which a reasonable person would consider likely to frighten, humiliate, punish or degrade the victim, irrespective of whether the victim suffers actual fear, humiliation, punishment or degradation.
30. **Section 4(3)** clarifies that this provision does not prevent evidence being led of actual harm suffered by the victim as a result of the alleged course of behaviour, or of effects that the behaviour actually had on the victim.

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.

Section 6 - Defence on grounds of reasonableness

42. **Section 6** provides that it is a defence to the offence at section 1 for the accused to show that the course of behaviour was, in the particular circumstances, reasonable. This may apply where, for example, the accused acted in order to protect the household finances where their partner is suffering from a gambling addiction, or to prevent their partner from associating with certain persons or frequenting certain places if they are recovering

from alcohol or drug addiction, or to restrict the freedom of movement of a partner who is suffering from dementia.

43. **Section 6(2)** provides that the accused is subject to no more than an evidential burden of proof to bring forward enough evidence to raise an issue with respect to the defence; the legal burden of disproving the defence and proving that the offence has been committed stays with, the prosecution.

Presumption, alternative and penalty

Section 7 - Presumption as to the relationship

44. **Section 7** provides that the matter of the accused (A) being the complainer (B)'s partner or ex-partner is to be taken as established unless the matter is challenged prior to the trial taking place.
45. In summary proceedings, this challenge will be by preliminary objection before the plea is recorded or by later objection that the court allows in special circumstances. In proceedings on indictment, this challenge will be by giving notice of a preliminary objection in accordance with established procedures in sections 71(2) or 72(6)(b)(i) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). Section 71(2) of the 1995 Act is a procedure for dealing with preliminary pleas and preliminary issues at the first diet in solemn proceedings. Section 72(6)(b)(i) of the 1995 Act is a procedure for disposing of preliminary issues at the preliminary hearing in solemn proceedings.

Section 8 - Alternative available for conviction

46. **Section 8(1)** provides that where a charge is brought for the offence at section 1 of the Act, but the court is not satisfied that the accused committed the offence, it is possible to convict the accused of a specified alternative offence where it is proved (to the normal criminal standard of proof) that the accused committed the alternative offence.
47. **Section 8(2)** provides that the alternative offences are the offence of threatening or abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and the offence of stalking under section 39 of that same Act.
48. The offence of threatening or abusive behaviour may be proven where the court is satisfied that an accused engaged in at least one act that amounted to threatening or abusive behaviour, but it is not proven that the accused engaged in a course of behaviour against the complainer. The offence of stalking may be proven where the court is satisfied that an accused engaged in a course of behaviour which caused the victim to suffer fear or alarm, but it is not proven, for instance, that the accused was the partner or ex-partner of the complainer.
49. This section sits alongside the provision for a common law alternative to a statutory offence that is found in paragraph 14 of schedule 3 of the 1995 Act.

Section 9 - Penalty for offence under section 1(1)

50. **Section 9** provides for the available penalties for the offence.

Section 10 – Meaning of references to behaviour

51. **Section 10** provides for the meaning of references to behaviour for the purposes of the offence.
52. **Section 10(2)** provides that "behaviour" includes things said or otherwise communicated as well as things done. It also encompasses an intentional failure to do, say or otherwise communicate something (e.g. a failure to pass on times and dates of appointments or social occasions, or a failure to feed a family pet).

53. **Section 10(3)** provides that behaviour directed at a person includes behaviour directed towards property. It is not a requirement that the property must belong to the complainer. It could, for instance, be shared property or property belonging to a third party, such as the victim's parents. Property includes pets or other animals (for example agricultural livestock) whether belonging to the victim or others.
54. It also provides that behaviour directed at a person includes behaviour carried out with or through a third party. This might include, for example, getting another person to spy on or report on the activities of the complainer. The third party's involvement could possibly be unwitting or unwilling, as they may be entirely unaware that their behaviour was helping the perpetrator to abuse the victim or may have been coerced into participating in the abuse.
55. **Section 10(4)** provides that a course of behaviour involves behaviour on at least two occasions. It would be for the court to determine in the particular circumstances of a case whether two incidents occurring far apart in time, with no evidence that they formed part of any wider pattern of behaviour, truly amounted to a course of behaviour.

Section 11 – Meaning of partner and ex-partner

56. **Section 11** provides that, for the purpose of the offence, "partner" means a person's spouse or civil partner (or cohabiting equivalent), or a person in an intimate personal relationship with the accused. Former relationships of the specified types are covered in addition to current relationships.
57. The phrase "intimate personal relationship" is intended to cover relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (e.g. between friends or business partners or work colleagues) are not covered by the offence.