



# Abusive Behaviour and Sexual Harm (Scotland) Act 2016

2016 asp 22

## PART 1

### ABUSIVE BEHAVIOUR

#### *Abusive behaviour towards partner or ex-partner*

#### **1 Aggravation of offence where abuse of partner or ex-partner**

- (1) This subsection applies where it is—
  - (a) libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and
  - (b) proved that the offence is so aggravated.
- (2) An offence is aggravated as described in subsection (1)(a) if in committing the offence—
  - (a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or
  - (b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.
- (3) It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm.
- (4) Evidence from a single source is sufficient to prove that an offence is aggravated as described in subsection (1)(a).
- (5) Where subsection (1) applies, the court must—
  - (a) state on conviction that the offence is aggravated as described in subsection (1)(a),
  - (b) record the conviction in a way that shows that the offence is so aggravated,
  - (c) take the aggravation into account in determining the appropriate sentence, and

- (d) state—
  - (i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
  - (ii) otherwise, the reasons for there being no such difference.
- (6) For the purposes of this section, a person is a partner of another person if they are—
  - (a) spouses or civil partners of each other,
  - (b) living together as if spouses or civil partners of each other, or
  - (c) in an intimate personal relationship with each other,
 and the references to a person’s ex-partner are to be construed accordingly.
- (7) In this section—
  - “cause” includes contribute to causing (and “causing” is to be construed accordingly),
  - “psychological harm” includes fear, alarm or distress.

*Disclosure of an intimate photograph or film*

**2 Disclosing, or threatening to disclose, an intimate photograph or film**

- (1) A person (“A”) commits an offence if—
  - (a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation,
  - (b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
  - (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B’s consent.
- (2) For the purposes of this section, a photograph or film is disclosed if it, or any data or other thing which is capable of being converted into it, is given, shown or made available to a person other than B.
- (3) In proceedings for an offence under subsection (1), A has a defence if any of the following facts is established—
  - (a) B consented to the photograph or film being disclosed,
  - (b) A reasonably believed that B consented to the photograph or film being disclosed,
  - (c) A reasonably believed that disclosure of the photograph or film was necessary for the purposes of the prevention, detection, investigation or prosecution of crime, or
  - (d) A reasonably believed that disclosure of the photograph or film was in the public interest.
- (4) For the purposes of subsection (3), consent to the photograph or film being disclosed may be—
  - (a) consent which is specific to the particular disclosure or (as the case may be) the particular threatened disclosure, or
  - (b) consent to disclosure generally where that consent covers the particular disclosure or (as the case may be) the particular threatened disclosure.

- (5) In proceedings for an offence under subsection (1), A has a defence if the following matter is established—
- (a) B was in the intimate situation shown in the photograph or film,
  - (b) B was not in the intimate situation as a result of a deliberate act of another person to which B did not agree, and
  - (c) when B was in the intimate situation—
    - (i) B was in a place to which members of the public had access (whether or not on payment of a fee), and
    - (ii) members of the public were present.
- (6) For the purposes of subsection (3), a fact is established, and for the purposes of subsection (5), the matter is established, if—
- (a) sufficient evidence is adduced to raise an issue as to whether that is the case, and
  - (b) the prosecution does not prove beyond reasonable doubt that it is not the case.
- (7) A person who commits an offence under subsection (1) is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

### **3 Interpretation of section 2**

- (1) For the purposes of section 2, a person is in an “intimate situation” if—
- (a) the person is engaging or participating in, or present during, an act which—
    - (i) a reasonable person would consider to be a sexual act, and
    - (ii) is not of a kind ordinarily done in public, or
  - (b) the person’s genitals, buttocks or breasts are exposed or covered only with underwear.
- (2) In section 2—
- “film” means a moving image in any form, whether or not the image has been altered in any way, that was originally captured by making a recording, on any medium, from which a moving image may be produced, and includes a copy of the image,
- “photograph” means a still image in any form, whether or not the image has been altered in any way, that was originally captured by photography, and includes a copy of the image.

### **4 Section 2: special provision in relation to providers of information society services**

Schedule 1 makes special provision in connection with the operation of section 2 in relation to persons providing information society services (as defined in paragraph 4(1) of that schedule).

*Non-harassment orders***5 Making of non-harassment orders in criminal cases**

(1) Section 234A of the 1995 Act is amended as follows.

(2) For subsection (1), substitute—

“(1) This section applies where a person is—

- (a) convicted of an offence involving misconduct towards another person (“the victim”),
- (b) acquitted of such an offence by reason of the special defence set out in section 51A, or
- (c) found by a court to be unfit for trial under section 53F in respect of such an offence and the court determines that the person has done the act or made the omission constituting the offence.

(1A) The prosecutor may apply to the court to make (instead of or in addition to dealing with the person in any other way) a non-harassment order against the person.

(1B) A non-harassment order is an order requiring the person to refrain, for such period (including an indeterminate period) as may be specified in the order, from such conduct in relation to the victim as may be specified in the order.”.

(3) In subsection (2), for “(1)” substitute “(1A)”.

(4) In subsection (2A)(a)—

- (a) in sub-paragraph (i), for “offender” substitute “person against whom the order is sought”,
- (b) in sub-paragraph (ii), for “offender” substitute “person against whom the order is sought”.

(5) After subsection (2B), insert—

“(2BA) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor about any other offence involving misconduct towards the victim—

- (a) in respect of which the person against whom the order is sought was acquitted by reason of the special defence set out in section 51A, or
- (b) in respect of which the person against whom the order is sought was found by a court to be unfit for trial under section 53F and the court determined that the person had done the act or made the omission constituting the offence.”.

(6) In subsection (2C), for “offender” substitute “person against whom the order is sought”.

(7) For subsection (3), substitute—

“(3) A non-harassment order made by a criminal court may be appealed against—

- (a) if the order was made in a case falling within subsection (1)(a) above, as if the order were a sentence,

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*Status: This is the original version (as it was originally enacted).*

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- (b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the order were a sentence passed on the person for the offence.
- (3A) A variation or revocation of a non-harassment order made under subsection (6) below may be appealed against—
- (a) if the order was made in a case falling within subsection (1)(a) above, as if the variation or revocation were a sentence,
  - (b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the variation or revocation were a sentence passed on the person for the offence.”.