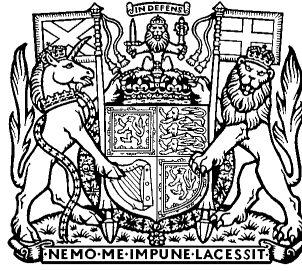


Domestic Abuse (Scotland) Act 2018

2018 asp 5

Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

£6.00



Domestic Abuse (Scotland) Act 2018

2018 asp 5

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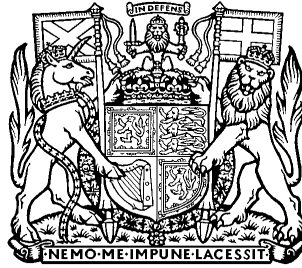
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Domestic Abuse (Scotland) Act 2018

2018 asp 5

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 1st February 2018 and received Royal Assent on 9th March 2018

An Act of the Scottish Parliament to create an offence with respect to the engaging by a person in a course of behaviour which is abusive of the person's partner or ex-partner; and to make rules of criminal procedure for that offence and also for offences subject to the statutory aggravation involving abuse of partners or ex-partners.

PART 1

OFFENCE AS TO DOMESTIC ABUSE

Engaging in course of abusive behaviour

1 Abusive behaviour towards partner or ex-partner

- (1) A person commits an offence if—
 - (a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and
 - (b) both of the further conditions are met.
- (2) The further conditions are—
 - (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
 - (b) that either—
 - (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
 - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
- (3) In the further conditions, the references to psychological harm include fear, alarm and distress.

2 What constitutes abusive behaviour

- (1) Subsections (2) to (4) elaborate on section 1(1) as to A’s behaviour.

- (2) Behaviour which is abusive of B includes (in particular)—
 - (a) behaviour directed at B that is violent, threatening or intimidating,
 - (b) behaviour directed at B, at a child of B or at another person that either—
 - (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
 - (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).
- (3) The relevant effects are of—
 - (a) making B dependent on, or subordinate to, A,
 - (b) isolating B from friends, relatives or other sources of support,
 - (c) controlling, regulating or monitoring B’s day-to-day activities,
 - (d) depriving B of, or restricting B’s, freedom of action,
 - (e) frightening, humiliating, degrading or punishing B.
- (4) In subsection (2)—
 - (a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,
 - (b) in paragraph (b), the reference to a child is to a person who is under 18 years of age.

3 Extra-territorial jurisdiction

- (1) An offence under section 1(1) can be constituted by a course of behaviour engaged in by A even if the course of behaviour occurs wholly or partly outside the United Kingdom.
- (2) If the course of behaviour occurs wholly outside the United Kingdom—
 - (a) A may be prosecuted, tried and punished for the offence—
 - (i) in a sheriff court district in which A is apprehended or in custody, or
 - (ii) in a sheriff court district that is determined by the Lord Advocate, as if the offence has been committed entirely in that district,
 - (b) the offence is, for all things incidental to or consequential on trial and punishment, deemed to have been committed entirely in that district.
- (3) Subsections (1) and (2) apply only if A, when the course of behaviour occurs—
 - (a) is habitually resident in Scotland, or
 - (b) is a UK national.
- (4) “UK national” means someone who is, as referred to in the British Nationality Act 1981—
 - (a) a British citizen,
 - (b) a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen, or
 - (c) a British subject or a British protected person.

Evidence, aggravation and defence

4 Evidence of impact on victim

- (1) The commission of an offence under section 1(1) does not depend on the course of behaviour actually causing B to suffer harm of the sort mentioned in section 1(2).
- (2) The operation of section 2(2)(b) does not depend on behaviour directed at someone actually having on B any of the relevant effects set out in section 2(3).
- (3) Nothing done by or mentioned in subsection (1) or (2) prevents evidence from being led in proceedings for an offence under section 1(1) about (as the case may be)—
 - (a) harm actually suffered by B as a result of the course of behaviour, or
 - (b) effects actually had on B of behaviour directed at someone.

5 Aggravation in relation to a child

- (1) This subsection applies where it is, in proceedings for an offence under section 1(1)—
 - (a) specified in the complaint or libelled in the indictment that the offence is aggravated by reason of involving a child, and
 - (b) proved that the offence is so aggravated.
- (2) The offence is so aggravated if, at any time in the commission of the offence—
 - (a) A directs behaviour at a child, or
 - (b) A makes use of a child in directing behaviour at B.
- (3) The offence is so aggravated if a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour.
- (4) The offence is so aggravated if a reasonable person would consider the course of behaviour, or an incident of A's behaviour that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with A or B (or both).
- (5) For it to be proved that the offence is so aggravated, there does not need to be evidence that a child—
 - (a) has ever had any—
 - (i) awareness of A's behaviour, or
 - (ii) understanding of the nature of A's behaviour, or
 - (b) has ever been adversely affected by A's behaviour.
- (6) Evidence from a single source is sufficient to prove that the offence is so aggravated.
- (7) Where subsection (1) applies, the court must—
 - (a) state on conviction that the offence is so aggravated,
 - (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.
- (8) Each of subsections (2) to (4) operates separately along with subsection (5), but subsections (2) to (4) may be used in combination along with subsection (5).
- (9) Nothing in subsections (2) to (5) prevents evidence from being led about—
 - (a) a child’s observations of, or feelings as to, A’s behaviour, or
 - (b) a child’s situation so far as arising because of A’s behaviour.
- (10) In subsections (4) and (5), the references to adversely affecting a child include causing the child to suffer fear, alarm or distress.
- (11) In this section, the references to a child are to a person who—
 - (a) is not A or B, and
 - (b) is under 18 years of age.

6 Defence on grounds of reasonableness

- (1) In proceedings for an offence under section 1(1), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances.
- (2) That is to be regarded as shown if—
 - (a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (1), and
 - (b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (1).

Presumption, alternative and penalty

7 Presumption as to the relationship

- (1) In proceedings for an offence under section 1(1), the matter of B being A’s partner or ex-partner is to be taken as established—
 - (a) according to the stating of the matter in the charge of the offence in the complaint or indictment, and
 - (b) unless the matter is challenged as provided for in subsection (2).
- (2) The matter is challenged—
 - (a) in summary proceedings, by—
 - (i) preliminary objection before the plea is recorded, or
 - (ii) later objection as the court allows in special circumstances,
 - (b) in proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the Criminal Procedure (Scotland) Act 1995.

8 Alternative available for conviction

- (1) In proceedings for an offence under section 1(1), A may be convicted of an alternative offence if the facts proved against A—
 - (a) do not amount to the offence under section 1(1), but

- (b) do amount to the alternative offence.
- (2) An alternative offence as referred to in subsection (1) is one or other of these—
 - (a) an offence under section 38(1) (threatening or abusive behaviour) of the Criminal Justice and Licensing (Scotland) Act 2010,
 - (b) an offence under section 39 (offence of stalking) of that Act.

9 Penalty for offence under section 1(1)

A person who commits an offence under section 1(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 14 years or a fine (or both).

Meaning given to key expressions

10 Meaning of references to behaviour

- (1) Subsections (2) to (4) explain what is meant by the references to behaviour in this Part.
- (2) Behaviour is behaviour of any kind, including (for example)—
 - (a) saying or otherwise communicating something as well as doing something,
 - (b) intentionally failing—
 - (i) to do something,
 - (ii) to say or otherwise communicate something.
- (3) Behaviour directed at a person is such behaviour however carried out, including (in particular)—
 - (a) by way of conduct towards property,
 - (b) through making use of a third party,as well as behaviour in a personal or direct manner.
- (4) A course of behaviour involves behaviour on at least two occasions.

11 Meaning of partner and ex-partner

- (1) Subsections (2) and (3) describe who is a person's partner or ex-partner as referred to in this Part.
- (2) Someone is a person's partner if they are—
 - (a) spouses or civil partners of each other,
 - (b) living together as if spouses of each other, or
 - (c) in an intimate personal relationship with each other.
- (3) Whether someone is a person's ex-partner is to be determined accordingly.

PART 2

FURTHER AND FINAL MATTERS

*Schedule, regulations and reporting***12 The 1995 Act etc.**

- (1) The schedule modifies the 1995 Act and some other enactments in various respects, including under several headings as to rules of criminal procedure—
 - restriction on bail in solemn cases,
 - bail condition concerning precognition,
 - prohibition on conduct of own defence,
 - special measures for vulnerable witnesses,
 - presentation of certain expert evidence,
 - victim safety in relation to sentencing,
 - consideration of non-harassment order.
- (2) In this section (together with the schedule), “the 1995 Act” means the Criminal Procedure (Scotland) Act 1995.

13 Ancillary provision

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
- (2) Regulations under subsection (1) may—
 - (a) modify any enactment (including this Act),
 - (b) make different provision for different purposes.
- (3) Regulations under subsection (1)—
 - (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act,
 - (b) otherwise, are subject to the negative procedure.

14 Reporting requirement

- (1) The Scottish Ministers must prepare a report on the use of, during the reporting period—
 - (a) an offence under section 1(1),
 - (b) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
- (2) The report must set out, in relation to those sorts of offences—
 - (a) the number of cases for which criminal proceedings are undertaken,

- (b) the number of cases where it has been—
 - (i) specified in the complaint or libelled in the indictment that the offence is aggravated by reason of involving a child as described in section 5(1)(a),
 - (ii) proved that the offence is so aggravated,
 - (c) the number of convictions in criminal proceedings,
 - (d) the number of cases in which a non-harassment order has been made under section 234AZA of the Criminal Procedure (Scotland) Act 1995 (non-harassment orders: domestic abuse cases) in favour of—
 - (i) a victim,
 - (ii) a child by virtue of subsection (3) of that section,
 - (e) the average length of time—
 - (i) from service of the complaint or indictment,
 - (ii) to finding or verdict as to guilt (including plea of guilty),
 - (f) information about the experience of witnesses (including witnesses who are children) at court,
 - (g) such additional information as the Scottish Ministers think fit.
- (3) The report must, in relation to those sorts of offences—
- (a) include distinct statistics for each of them,
 - (b) provide details with respect to particular—
 - (i) areas,
 - (ii) types of court.
- (4) For the purpose of the report, the Scottish Ministers must seek information from the Lord President of the Court of Session on how court business is arranged, including in different areas or types of court, so as to ensure the efficient disposal of cases involving those sorts of offences.
- (5) The report must be laid before the Scottish Parliament as soon as practicable after the end of the reporting period.
- (6) The reporting period is the period of 3 years beginning with the day on which section 1(1) comes into force.

Commencement and short title

15 Commencement

- (1) The following provisions come into force on the day after Royal Assent—
 - (a) section 13,
 - (b) this section and section 16.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under subsection (2) may—
 - (a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

16 Short title

This short title of this Act is the Domestic Abuse (Scotland) Act 2018.

SCHEDULE
(introduced by section 12)

MODIFICATION OF ENACTMENTS

PART 1

RULES OF CRIMINAL PROCEDURE

CHAPTER 1

RESTRICTION ON BAIL IN SOLEMN CASES

- 1 (1) The 1995 Act is amended as follows.
- (2) In section 23D—
- (a) in subsection (2)—
- (i) in paragraph (a), for the words “a violent or sexual offence” there is substituted “an offence falling within subsection (3A)”,
- (ii) in paragraph (b), for the words “a violent or sexual offence” there is substituted “an offence falling within subsection (3A)”,
- (b) after subsection (3) there is inserted—
- “(3A) An offence falls within this subsection if it is—
- (a) a violent offence,
- (b) a sexual offence, or
- (c) a domestic abuse offence.”,
- (c) in subsection (4), after the first definition there is inserted—
- ““domestic abuse offence” means—
- (a) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018, or
- (b) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016;”,
- (d) in subsection (5), for the words “a violent or sexual offence or a drug trafficking offence” there is substituted “a type of offence”.

CHAPTER 2

CONDUCT OF PRECOGNITION AND DEFENCE

Bail condition concerning precognition

- 2 (1) The 1995 Act is amended as follows.
- (2) In section 24—
- (a) in paragraph (e) of subsection (5), for the words “to which section 288C of this Act applies” there is substituted “listed in subsection (7A)(b)”,
- (b) for subsection (7A) there is substituted—
- “(7A) For the purpose of subsection (5)(e)—

- (a) “complainer” means the person against whom the offence is alleged to have been committed,
- (b) the list is—
 - (i) an offence to which section 288C applies (certain sexual offending),
 - (ii) an offence to which section 288DC applies (domestic abuse cases).”.

Prohibition on conduct of own defence

- 3 (1) The Legal Aid (Scotland) Act 1986 is amended as follows.
 - (2) In section 22, in subsection (1)(dd), for the words “sexual offence” there is substituted “certain offences”.
- 4 (1) The 1995 Act is amended as follows.
 - (2) In section 35—
 - (a) in the opening text of subsection (4A), for the words “a sexual offence to which section 288C of this Act applies” there is substituted “an offence listed in subsection (4AA)(b)”,
 - (b) in paragraph (a) of subsection (4A), the words “(within the meaning of section 288C(1A))” are repealed,
 - (c) after subsection (4A) there is inserted—

“(4AA)For the purposes of subsection (4A)—

 - (a) “relevant hearing” is to be construed in accordance with section 288C(1A) or (as the case may be) 288DC(4),
 - (b) the list is—
 - (i) an offence to which section 288C applies (certain sexual offending),
 - (ii) an offence to which section 288DC applies (domestic abuse cases).”.
 - (3) In section 66—
 - (a) in paragraph (b) of subsection (4C), for the words “a sexual offence to which section 288C of this Act applies” there is substituted “an offence listed in subsection (14A)(b)”,
 - (b) in subsection (6A)—
 - (i) in the opening text, for the words “a sexual offence to which section 288C of this Act applies” there is substituted “an offence listed in subsection (14A)(b)”,
 - (ii) in paragraph (a)(i), the words “(within the meaning of section 288C(1A))” are repealed,
 - (c) after subsection (14) there is inserted—

“(14A)For the purposes of subsections (4C) and (6A)—

- (a) “relevant hearing” is to be construed in accordance with section 288C(1A) or (as the case may be) 288DC(4),
 - (b) the list is—
 - (i) an offence to which section 288C applies (certain sexual offending),
 - (ii) an offence to which section 288DC applies (domestic abuse cases).”.
- (4) In section 71, after paragraph (a) of subsection (B1) there is inserted—
 - “(aa) in respect of an offence to which section 288DC of this Act applies (domestic abuse cases).”.
- (5) In section 72, in each of—
 - (a) paragraph (a) of subsection (2), and
 - (b) paragraph (a)(i) of subsection (6),after the words “section 288C” there is inserted “or 288DC”.
- (6) In section 72F, in paragraph (a) of subsection (6), after the words “section 288C” there is inserted “or 288DC”.
- (7) In section 92, after paragraph (a) of subsection (2F) there is inserted—
 - “(aa) in respect of an offence to which section 288DC of this Act applies;”.
- (8) In section 140—
 - (a) in subsection (2A)—
 - (i) in the opening text, for the words “a sexual offence to which section 288C of this Act applies” there is substituted “an offence listed in subsection (2C)(c)”,
 - (ii) in paragraph (a), the words “(within the meaning of section 288C(1A))” are repealed,
 - (b) for subsection (2C) there is substituted—
 - “(2C) For the purposes of subsection (2A)—
 - (a) “commissioner proceedings” means proceedings before a commissioner appointed under section 271I(1) or by virtue of section 272(1)(b),
 - (b) “relevant hearing” is to be construed in accordance with section 288C(1A) or (as the case may be) 288DC(4),
 - (c) the list is—
 - (i) an offence to which section 288C applies (certain sexual offending),
 - (ii) an offence to which section 288DC applies (domestic abuse cases).”.
- (9) In section 144—
 - (a) in subsection (3A)—

- (i) in the opening text, for the words “a sexual offence to which section 288C of this Act applies” there is substituted “an offence listed in subsection (3AA)(b)”,
 - (ii) in paragraph (a), the words “(within the meaning of section 288C(1A))” are repealed,
- (b) after subsection (3A) there is inserted—
- “(3AA)For the purposes of subsection (3A)—
- (a) “relevant hearing” is to be construed in accordance with section 288C(1A) or (as the case may be) 288DC(4),
 - (b) the list is—
 - (i) an offence to which section 288C applies (certain sexual offending),
 - (ii) an offence to which section 288DC applies (domestic abuse cases).”.
- (10) In section 146—
- (a) in subsection (3A)—
 - (i) in the opening text, for the words “a sexual offence to which section 288C of this Act applies” there is substituted “an offence listed in subsection (3AA)(b)”,
 - (ii) in paragraph (a), the words “(within the meaning of section 288C(1A))” are repealed,
 - (b) after subsection (3A) there is inserted—
- “(3AA)For the purposes of subsection (3A)—
- (a) “relevant hearing” is to be construed in accordance with section 288C(1A) or (as the case may be) 288DC(4),
 - (b) the list is—
 - (i) an offence to which section 288C applies,
 - (ii) an offence to which section 288DC applies.”.
- (11) In section 148A—
- (a) in subsection (1), for the words “a sexual offence to which section 288C of this Act applies” there is substituted “an offence listed in subsection (10)”,
 - (b) after subsection (9) there is inserted—
- “(10) For the purposes of this section, the list is—
- (a) an offence to which section 288C applies,
 - (b) an offence to which section 288DC applies.”.
- (12) The title of section 148A becomes “Interim diet required in certain sexual or domestic abuse cases”.
- (13) In section 150A, after paragraph (a) of subsection (8), there is inserted—
- “(aa) in respect of an offence to which section 288DC of this Act applies;”.

- (14) Before section 288E (and after the italic heading immediately preceding that section) there is inserted—
- “288DC Prohibition of personal conduct of defence in domestic abuse cases**
- (1) This section applies to—
- (a) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
- (b) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
- (2) An accused in proceedings for an offence to which this section applies is prohibited from conducting the accused’s case in person at, or for the purposes of, any relevant hearing in the course of the proceedings.
- (3) Section 288D applies in the case of proceedings in respect of an offence to which this section applies as it does in the case of proceedings in respect of an offence to which section 288C applies (and a reference in section 288D to a relevant hearing is to be read accordingly).
- (4) In subsection (2), “relevant hearing” means a hearing at, or for the purposes of, which a witness is to give evidence.”.
- (15) In section 288E, in paragraph (c)(ii) of subsection (3), after the words “section 288C” there is inserted “or 288DC”.
- (16) In section 288F, after paragraph (b) of subsection (1) there is inserted—
- “(ba) in respect of an offence to which section 288DC of this Act applies,”.
- 5 (1) The Criminal Justice (Scotland) Act 2016 is amended as follows.
- (2) In section 20—
- (a) in subsection (1), in each of paragraphs (a) and (b)(ii), for the words “a sexual offence to which section 288C of the 1995 Act applies” there is substituted “an offence listed in subsection (3)(b)”,
- (b) in paragraph (a) of subsection (2), the words “(within the meaning of section 288C(1A) of the 1995 Act)” are repealed,
- (c) after subsection (2) there is inserted—
- “(3) For the purposes of subsections (1) and (2)—
- (a) “relevant hearing” is to be construed in accordance with section 288C(1A) or (as the case may be) 288DC(4) of the 1995 Act,
- (b) the list is—
- (i) an offence to which section 288C of the 1995 Act applies (certain sexual offending),
- (ii) an offence to which section 288DC of the 1995 Act applies (domestic abuse cases).”.
- (3) The title of section 20 becomes “Information to be given in particular cases”.

CHAPTER 3

VULNERABLE WITNESSES AND EXPERT EVIDENCE

Special measures for vulnerable witnesses

- 6 (1) The 1995 Act is amended as follows.
- (2) In section 271B, in subsection (2)—
- (a) paragraph (c) is repealed (as is the word “and” immediately preceding paragraph (f)),
 - (b) after paragraph (f) there is inserted—
 - “(g) an offence to which section 288C applies (certain sexual offending),
 - (h) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
 - (i) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.”.

Presentation of certain expert evidence

- 7 (1) The 1995 Act is amended as follows.
- (2) In section 275C—
- (a) in subsection (1)—
 - (i) the words from “any” to the end become paragraph (a),
 - (ii) after that paragraph (as so numbered) there is inserted—
 - “(b) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
 - (c) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.”.
 - (b) after subsection (3) there is inserted—
 - “(3A) Where the offence is as referred to in subsection (1)(b) above, the reference in the last definition in subsection (3) above to any behaviour or statement subsequent to the offence includes any behaviour or statement subsequent to a particular part of the course of behaviour of which the offence consists.”.

CHAPTER 4

VICTIM SAFETY AND NON-HARASSMENT

Victim safety in relation to sentencing

- 8 (1) The 1995 Act is amended as follows.

- (2) After section 210AA there is inserted—

“Approach in domestic abuse cases

210AB Particular factor as to victim safety

- (1) When sentencing a person convicted of an offence listed in subsection (2)(b), the court must have particular regard to the aim of ensuring that the victim is not the subject of a further such offence committed by the convicted person.
- (2) For the purpose of subsection (1)—
 - (a) “victim” means the person against whom the offence was committed,
 - (b) the list is—
 - (i) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
 - (ii) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.”.

Consideration of non-harassment order

- 9 (1) The 1995 Act is amended as follows.

- (2) After section 234A there is inserted—

“234AZA Non-harassment orders: domestic abuse cases

- (1) Section 234A applies subject to this section if an offence referred to in subsection (1) of that section is one listed in subsection (2)(c).
- (2) For the purposes of this section—
 - (a) “victim” has the same meaning as it has in section 234A,
 - (b) “child” has the same meaning as given by section 5(11) of the Domestic Abuse (Scotland) Act 2018,
 - (c) the list is—
 - (i) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
 - (ii) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
- (3) A non-harassment order in the person’s case may include provision for the order to apply in favour of any of the following, in addition to the victim—
 - (a) in any circumstances, a child usually residing with the person or a child usually residing with the victim (or a child usually residing with both the person and the victim),
 - (b) where the offence is one under section 1(1) of the Domestic Abuse (Scotland) Act 2018, and is aggravated as described in section 5(1)(a) of that Act, a child to whom the aggravation relates,

if the court is satisfied that it is appropriate for the child to be protected by the order.

- (4) The court must—
- (a) without an application by the prosecutor, consider whether to make a non-harassment order in the person’s case,
 - (b) after hearing the prosecutor as well as the person, make such an order unless of a negative conclusion on the question,
 - (c) if of a negative conclusion on the question, explain the basis for this.
- (5) Here, a negative conclusion on the question is the conclusion by the court that there is no need for—
- (a) the victim, or
 - (b) the children (if any) in mind by virtue of subsection (3),
- to be protected by such an order.
- (6) In the operation of section 234A along with subsection (4)—
- (a) subsection (1A) of that section is of no effect (and the reference in subsection (2) of that section to an application under subsection (1A) of that section is to be ignored),
 - (b) further—
 - (i) the references in subsections (2A), (2BA) and (2C) of that section to the person against whom the order is sought are to be read as being to the person in whose case the making of a non-harassment order is being considered,
 - (ii) the reference in subsection (2C) of that section to representations in response to the application is to be read as being to representations on the question of whether to make a non-harassment order,
 - (iii) the reference in subsection (6) of that section to the prosecutor at whose instance the order is made is to be read as being to the prosecutor in the case in which the non-harassment order is made.
- (7) For the avoidance of doubt, nothing in this section affects the ability to make a non-harassment order in the case instead of or in addition to dealing with the person in any other way.”.

PART 2

MINOR AND CONSEQUENTIAL AMENDMENTS

- 10 (1) The 1995 Act is amended as follows.
- (2) In section 79 (preliminary pleas and preliminary issues), after paragraph (c) of subsection (3A) there is inserted—
- “(d) section 1A(2)(b) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 or section 7(2)(b) of the Domestic Abuse (Scotland) Act 2018.”.
- 11 (1) The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 is amended as follows.

(2) In section 1 (aggravation of offence where abuse of partner or ex-partner), in subsection (6)(b), the words “or civil partners” are repealed.

(3) After section 1 there is inserted—

“1A Presumption as to the relationship

(1) In proceedings for an offence that is aggravated as described in section 1(1)(a), the matter of a person being another person’s partner or ex-partner is to be taken as established—

(a) according to the stating of the matter in the charge of the offence in the complaint or indictment, and

(b) unless the matter is challenged as provided for in subsection (2).

(2) The matter is challenged—

(a) in summary proceedings, by—

(i) preliminary objection before the plea is recorded, or

(ii) later objection as the court allows in special circumstances,

(b) in proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.”.



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