

Introduction

The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 came into force following Royal Assent on 28 April 2016. The Act provides guidance on defining abuse and harm and the legal provisions that can be imposed if a defendant is found guilty.

For the first time in legislation the Act addresses the issue of psychological harm as well as physical harm, with any intent to cause either or both as a form of aggravated assault.

In addition to defining abuse and sexual harm the Act examines the disclosure of film and images of an explicit nature, looks at relationships and introduces a number of orders to protect the community and its members. The orders include Sexual Harm Prevention Orders, Sexual Risk Orders and non-Harassment Orders. The Act also makes provision for interim orders.

Content Summary

The new legislation examines the abuse and sexual harm in multiple formats providing legislation for the protection of 'partners' and also the harm that is associated with the disclosure of photographs and film without consent. Photographs and film have been covered in part in other legislation, however this Act provides specific guidance on the issues and the implication if found guilty of such a charge.

In addition to providing sanction on specific causes of harm the Act also introduces new orders which can be imposed and are aimed at protecting children, young people, vulnerable adults and community members.

The content is broken down into the following:

Partners

The intent to cause physical harm is covered by a range of legislation; however this Act specifically provides guidance on not just physical harm but also psychological harm inflicted upon a 'partner'. The term 'partner' has many meanings and can be taken in different contexts; as a result the Act defines a partner as:

- A civil partner
- partners who live together as spouses or civil partners
- people who are in an intimate relationship with each other
- Ex-partners refer to the above but in an historical context or 'ex' context

Psychological Harm

The inclusion of psychological harm and harassment is a first within Scottish legislation, defining psychological harm as harm that is caused as a result of an individual inducing fear, alarm and distress. Further to this the offence can be classified as aggravated if there is an intent to cause physical or psychological harm or if the person acts recklessly resulting in the partner or ex-partner suffering either physical, psychological or both forms of harm.

Intimate Photography or Film Disclosure or Threatened Disclosure

Intimate photography and film is included within the Act due to the psychological harm that can be inflicted by its unauthorised disclosure. It is deemed an offence to disclose or threaten to disclose photographs or film that appears to show another in an intimate situation, which is defined as a situation:

- That would reasonably be considered to be a sexual act
- Is not of a kind that is ordinarily done in public
- Whereby a person's genitals, buttocks or breasts are exposed or covered only by underwear

The Act defines the parameter of what is considered to be film and photography, defining film as any form of moving image in any format including copies, whilst photographs are still images in any format including copies.

It is interesting to note that the Act also defines what would constitute a defence in the case of disclosure stating that viable defences could be:

- There is consent to disclose
- There is reasonable belief that consent had been given
- The disclosure was necessary to prevent, detect, investigate or prosecute a crime
- There is a reasonable assumption that disclosure would be in the public interest

The punishment for the unlawful disclosure of film or photography can be imprisonment. In the case of a summary conviction the term would not exceed two years, however convictions under indictment can be extended to no more than five years. In both cases the alternative could be a fine or both depending on the circumstances.

Orders (Harassment, Harm and Risk)

The legislation provides three new types of order which can be implemented with the express aims of protecting children and vulnerable adults from sexual harm by individual who reside inside and outside Scotland. These orders are:

- **Non-Harassment Order (NHO).** A non-harassment order can be requested by the prosecution upon conviction of an offence of misconduct towards a victim. The order requires a person to refrain, for a specific period as detailed in the order, from such conduct in relationship to the victim. The new legislation provides detailed guidance for juries and includes the processes for appealing such an order.
- **Sexual Harm Prevention Order (SHPO).** The courts can make a Sexual Harm Prevention Order (SHPO) request at its own volition or at the insistence of the

prosecution with the express reason being to protect the public or members of the public from sexual harm. The Chief Constable can also make an application, which would require an appropriate sheriff to issue the SHPO but only if the sheriff is satisfied that the person is a qualifying offender and the persons behaviour makes the imposition of the order necessary to:

- Protect the public of members of the public from sexual harm
- Protect children from sexual harm
- Protect vulnerable adults from sexual harm
- A qualifying offender for the SHPO, in accordance with the act, is someone who:
 - Has been convicted under schedule 3 of the 2003 Act
 - Has been acquitted by special defence for reasons of insanity
 - Is unfit for trial
 - Is under a disability that has impaired judgement

The content of the order is aimed at preventing an individual from engaging in certain activities and will require them to do something or something as directed in the order, which despite it being a Scottish legislation will have effect across the UK.

The SHPO will remain in effect for no less than five years, with a flexibility built in to apply to different requirements. The order also impacts on foreign travel with offenders having to surrender their passport at a police station and having to report as stipulated in the order, with their detailed added to public protection registers.

Sexual Risk Order (SRO). The Sexual Risk Order (SRO) can be applied for by the Chief Constable with the application presided over by an appropriate Sheriff, who is content that the request is in the public's interest and that the order will provide protection to the public, children and vulnerable adults from sexual harm.

The order is valid for not less than two years with different periods depending on the severity of the risk posed. As per the SHPO the order has a restriction imposed on foreign travel which can be in effect for up to five years, with specific countries identified as prohibited to travel. The individual must surrender their passport at a local police station.

As per the previous order the individual can appeal such an order with the full details of how this is done recorded in Section 32 of the Act.

Interim Orders

The application for interim non-Harassment, Sexual Harm Prevention and Sexual Risk Orders can be made as a prelude to a full order or in response to a specific case. The process for the application of an interim order is the same as the application for a full order with the processes, requirements and restrictions remaining the same. Although deemed as interim the orders carry the same restrictions and consequences as a full order and any breach of these orders carried the same consequences and sentences.

Breaches of Orders

If an individual breaches the order then it is considered an offence. The severity of the punishment of the breach will be dependent on the case with penalties ranging from imprisonment of up to 12 months and/or a fine or for more severe cases imprisonment for up to five years and/or a fine.

Links

For further information on the Act visit the following links:

Legislation.gov.uk; Abusive Behaviour and Sexual Harm (Scotland) Act 2016;
<http://www.legislation.gov.uk/asp/2016/22/contents/enacted>

The Scottish Parliament; Abusive Behaviour and Sexual Harm (Scotland) Bill;
<http://www.parliament.scot/parliamentarybusiness/Bills/92672.aspx>

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