

# Criminal Justice and Licensing (Scotland) Act 2010:

## Threatening or abusive behaviour

### Law

#### Section 38

- (1) A person ("A") commits an offence if—
- (a) A behaves in a threatening or abusive manner,
  - (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
  - (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.
- (2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.
- (3) Subsection (1) applies to—
- (a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and
  - (b) behaviour consisting of—
    - (i) a single act, or
    - (ii) a course of conduct.
- (4) A person guilty of an offence under subsection (1) is liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
  - (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

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1. There are three elements of the offence under [section 38](#) (*Urquhart v HM Advocate* [2015] HCJAC 101; 2016 JC 93 at [15]). Firstly, the accused must have behaved in a

threatening or abusive manner (section 38(1)(b)). Secondly, said behaviour must have been likely to have caused a reasonable person fear or alarm (section 38(1)(b)). Thirdly, the accused must have intended to cause fear or alarm or been reckless as to whether that result ensued (section 38(1)(c)). Note that a public element is not required, distinguishing section 38 from common law breach of the peace.

## Behaviour

2. Section 38(1) defines behaviour as things said or otherwise communicated or done. Words alone can form the basis of a section 38 conviction. Displaying abusive writing or signs also falls under the definition of behaviour under section 38 (*Orr (David) v Procurator Fiscal, Paisley* [2018] SAC (Crim) 11, 2019 SC (SAC) 5). However, no matter the form of the behaviour, it must be threatening and abusive; it is not enough for the behaviour to be simply annoying or offensive (*R v Murphy* [2015] HCJAC 34, 2015 SCL 577 at [15]). It is insufficient to show the behaviour caused fear or alarm if it was not firstly found to be objectively threatening or abusive.

3. Whether behaviour is threatening or abusive is a question of fact (*Baig v Harvie* [2015] HCJAC 109, 2016 SLT 67 at [10]). The timing and location of the behaviour should be considered when determining whether behaviour was threatening or abusive (*Orr (David) v Procurator Fiscal, Paisley* at [9] – [10]). In *KWM v PF Edinburgh* [2022] SAC (Crim) 2, 2022 SLT (Sh Ct) 143, the court found threatening behaviour was established by the offender entering the property at an address uninvited, in a state of undress and cupping his naked genitals. He had been observed completely naked and intoxicated trying to open a bedroom door. He was otherwise silent and made no attempt to physically resist when ushered out by the occupants. The SAC described the conduct as “inherently threatening”.

## Fear or alarm

4. There is no requirement for actual fear or alarm. In *Paterson v Harvie* [2014] HCJAC 87, 2015 JC 118 at [20], the court stated that:

“[P]ara [38(1)](b) sets an objective test. It provides that the requirement of the subsection is made out if the behaviour would be likely to cause a reasonable person to suffer fear or alarm. A reasonable person is someone who is not of abnormal sensitivity. If a reasonable person would have suffered fear or alarm, it follows on the objective test that it is no defence if the behaviour causes no

fear or alarm to the individual complainer, who might be, for example, an intrepid Glasgow police officer.”

Nonetheless, personal fear and alarm suffered by an individual complainer is still a relevant consideration ([HM Advocate v Robertson \[2015\] SC FAL 12, 2015 SLT \(Sh Ct\) 96](#)).

5. Whether behaviour is likely to cause a reasonable person to suffer fear or alarm is a question for the court having heard the evidence of all the circumstances.

## Defences

6. It is a defence to a charge under section 38(1) for an accused to show that the behaviour was, in the particular circumstances, reasonable (section 38(2)). For clarity, this defence is available even where the necessary *mens rea* has been established ([Milne v Harrower \[2016\] SAC \(Crim\) 26, 2017 SC \(SAC\) 1](#) at [14]).

7. Reasonableness is an objective matter, meaning it is not amenable to proof and can be asserted without the accused leading evidence independent from the Crown case ([Urquhart](#) at [24]). This only imposes an evidential burden on the accused ([Urquhart](#) at [21]). Therefore, where this defence is raised, it is still for the Crown to prove that the beyond reasonable doubt that the behaviour was not reasonable.

8. Commenting on [Jolly v HM Advocate \[2013\] HCJAC 96, 2014 JC 171](#) in [Paterson](#), the court said that violent comments about an ex-partner made by a co-operative accused to social workers would have benefited from the section 38(2) defence. The comments were “elicited by specific questioning that encouraged him to articulate his hidden feelings” in a voluntary social work interview, making what was said reasonable in the circumstances (at [28]).

9. In [Urquhart](#), it was held that self-defence is not available as a defence to section 38 (at [15]). However, the court did state (at [15]) that the defence under section 38(2):

“[I]s plainly wide enough to cover all and anything that an accused person may wish to advance to the effect that he was acting in self-defence.”

## POSSIBLE FORM OF DIRECTION ON THREATENING OR ABUSIVE BEHAVIOUR

Charge [x] is a charge of threatening or abusive behaviour, under [section 38 of the 2010 Act](#).

This offence is committed if a person behaves in a threatening or abusive manner and that behaviour would be likely to cause a reasonable person to suffer fear or alarm.

### The behaviour

You must be satisfied that the accused behaved in a threatening or abusive manner. There is no limit to what can be "behaviour". Behaviour includes things said and done, but also failing to do or say something. It includes a single act by, or a course of conduct on the part of, the accused.

### Threatening or abusive

The behaviour must have been threatening, or abusive, or both. Whether behaviour was threatening or abusive is a decision for you in all the circumstances of the case. [*Where appropriate:* Threatening behaviour need not involve an explicit threat or gesture and can involve other behaviour which, in the circumstances, is inherently threatening.]

### Fear or alarm

Whatever form it takes, you must be satisfied that the behaviour would be likely to cause a reasonable person to suffer fear or alarm. 'A reasonable person' simply means the ordinary person in the street.

The behaviour does not require to cause actual fear or alarm to a person, provided the behaviour is such that a reasonable person would be *likely* to suffer fear or alarm.

You must also be satisfied that either: the accused intended to cause fear or alarm, or that, whilst not *intending* that result, the accused was reckless as to whether the behaviour would cause fear or alarm.

Intention is a state of mind, to be inferred or deduced from what has been proved to have been said or done. A person is reckless as to whether their behaviour would

cause fear or alarm if they failed to think about, or were indifferent as to whether, their behaviour would have that result.

## Corroboration

Both the commission of the crime and that the accused committed it must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is said to have been committed. They do not need to be corroborated. That the accused acted intentionally [or recklessly] does not need corroboration.

*[One or more of the following directions should be given where relevant:]*

- **Where the complainer is an essential witness**

*[In cases in which there is sufficient evidence independent of the complainer, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]*

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused behaved in a threatening or abusive manner.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

*[If anything more elaborate is required, reference can be made to "Corroboration: Evidence of Distress" in Part II of the Jury Manual.]*

Corroboration for the complainer's account can come from the evidence of others that the complainer was distressed afterwards, provided the distress was genuine, was caused at least in part by what the complainer said happened, and was not wholly due to other extraneous factors.

- **Where there is evidence of a *de recenti* statement**

When a complainer gives an account to a witness shortly after the event, and as a continuing reaction to it, it is evidence to prove facts. What the witness reported the complainer saying can corroborate the complainer's evidence.

- **Other sources of corroboration**

*[Where appropriate, judges may identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "Corroboration generally/Corroboration in rape etc.".]*

## **Where the defence lead evidence that the behaviour was reasonable in the particular circumstances**

The accused's evidence [*Or: specify the evidential basis*] was that the behaviour was reasonable in the particular circumstances. You will have to decide if you accept that evidence, and if it suggests that the behaviour was reasonable. If you conclude that the accused's behaviour was reasonable in the circumstances, then that is a defence to the charge and you must acquit.

Moreover, the Crown has to prove beyond reasonable doubt that the behaviour was *not* reasonable in the particular circumstances, and so if the evidence leaves you in reasonable doubt about that, you must also acquit.

In deciding whether the behaviour was reasonable, you should consider all of the evidence including: the nature of the behaviour; its frequency; the effect of the behaviour on the complainer; the circumstances in which the behaviour arose; and any explanation given by the accused for the behaviour.

## **Additional directions**

- A background of domestic abuse direction may require to be given in appropriate cases.

## **Summary**

For the Crown to prove this charge, you must be satisfied that:

1. the accused behaved in a threatening or abusive manner;
2. the behaviour would be likely to cause a reasonable person to suffer fear or alarm;
3. the accused intended his behaviour to cause fear or alarm, or was reckless as to whether it would do so; and

*[Only where raised:]*

4. that the accused's behaviour was not reasonable in the circumstances.