



# Sexual Offences (Scotland) Act 2009

## 2009 asp 9

### PART 7

#### MISCELLANEOUS AND GENERAL

##### *Miscellaneous*

- 49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36**
- (1) For the purposes of sections 5 to 9, 22 to 26 and 32 to 36, A's purpose was—
- (a) obtaining sexual gratification, or
  - (b) humiliating, distressing or alarming B,
- if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.
- (2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.
- 50 Power to convict for offence other than that charged**
- (1) If, in a trial—
- (a) on an indictment for an offence mentioned in the first column of schedule 3 the jury are not satisfied that the accused committed the offence charged but are satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, they may, or
  - (b) in summary proceedings for an offence mentioned in the first column of that schedule the court is not satisfied that the accused committed the offence charged but is satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, it may,
- acquit the accused of the charge but find the accused guilty of the alternative offence in respect of which so satisfied (the accused then being liable to be punished accordingly).

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- (2) Where either of conditions 1 or 2 apply in a trial, the court or jury may acquit the accused of the charge but find the accused guilty of the alternative older child offence (the accused then being liable to be punished accordingly).
- (3) Condition 1 is that—
- (a) A is charged with an offence under sections 18 to 26, and
  - (b) but for a failure to establish beyond reasonable doubt that B had attained the age of 13 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—
    - (i) having intercourse with an older child,
    - (ii) engaging in penetrative sexual activity with or towards an older child,
    - (iii) engaging in sexual activity with or towards an older child,
    - (iv) causing an older child to participate in a sexual activity,
    - (v) causing an older child to be present during a sexual activity,
    - (vi) causing an older child to look at a sexual image,
    - (vii) communicating indecently with an older child,
    - (viii) causing an older child to see or hear an indecent communication,
    - (ix) sexual exposure to an older child,
    - (x) voyeurism towards an older child,
    - (xi) engaging while an older child in sexual conduct with or towards another older child,
    - (xii) engaging while an older child in consensual sexual conduct with another older child.
- (4) Condition 2 is that—
- (a) A is charged with an offence under section 28, 29 or 30, and
  - (b) but for a failure to establish beyond reasonable doubt that A had not attained the age of 16 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—
    - (i) engaging while an older child in sexual conduct with or towards another older child,
    - (ii) engaging while an older child in consensual sexual conduct with another older child.
- (5) In this section, the “relevant time” is when the conduct to which the proceedings relate occurred.
- (6) A reference in this section to an offence includes a reference to—
- (a) an attempt to commit,
  - (b) incitement to commit,
  - (c) counselling or procuring the commission of, and
  - (d) involvement art and part in,
- an offence.

## **51 Exceptions to inciting or being involved art and part in offences under Part 4 or 5**

A person (“X”) is not guilty of inciting, or being involved art and part in, an offence under Part 4 or 5 if, as regards another person (“Y”), X acts—

- (a) for the purpose of—
  - (i) protecting Y from sexually transmitted infection,
  - (ii) protecting the physical safety of Y,
  - (iii) preventing Y from becoming pregnant, or
  - (iv) promoting Y’s emotional well-being by the giving of advice, and
- (b) not for the purpose of—
  - (i) obtaining sexual gratification,
  - (ii) humiliating, distressing or alarming Y, or
  - (iii) causing or encouraging the activity constituting the offence or Y’s participation in it.

## **52 Common law offences**

For all purposes not relating to offences committed before the coming into force of this section—

- (a) the common law offences of—
  - (i) rape,
  - (ii) clandestine injury to women,
  - (iii) lewd, indecent or libidinous practice or behaviour, and
  - (iv) sodomy,are abolished, and
- (b) without prejudice to paragraph (a), in so far as the provisions of this Act regulate any conduct they replace any rule of law regulating that conduct.

## **53 Continuity of law on sexual offences**

(1) This section applies where, in any trial—

- (a) the accused is charged in respect of the same conduct both with an offence under this Act (“the new offence”) and with an offence specified in subsection (2) (“the existing offence”),
- (b) there is a failure to establish beyond reasonable doubt that—
  - (i) the time when the conduct took place was after the coming into force of the provision providing for the new offence, and
  - (ii) the time when the conduct took place was before the abolishment or replacement of or, as the case may be, the coming into force of the repeal of the enactment providing for, the existing offence, and
- (c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

- (a) rape (at common law),
- (b) clandestine injury to women,
- (c) lewd, indecent or libidinous practice or behaviour,
- (d) any other common law offence which is replaced by an offence under this Act,

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- (e) an offence under section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39) (intercourse of person in position of trust with child under 16),
  - (f) an offence under section 5(1), (2) or (3) (intercourse with girl under 16) or 6 (indecent behaviour towards girl between 12 and 16) of that Act,
  - (g) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c. 44) (abuse of position of trust).
- (3) Where this section applies, the accused may be found guilty—
- (a) if the maximum penalty for the existing offence is less than the maximum penalty for the new offence, of the existing offence,
  - (b) in any other case, of the new offence.
- (4) In subsection (3) the reference, in relation to an offence, to the maximum penalty is a reference to the maximum penalty by way of imprisonment or other detention that could be imposed on the accused on conviction of the offence in the proceedings in question.
- (5) A reference in this section to an offence includes a reference to—
- (a) an attempt to commit an offence,
  - (b) incitement to commit an offence,
  - (c) counselling or procuring the commission of an offence,
  - (d) involvement art and part in an offence, and
  - (e) an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39).

#### **54 Incitement to commit certain sexual acts outside the United Kingdom**

- (1) If a person does an act in Scotland which would amount to the offence of incitement to commit a listed offence but for the fact that what the person had in view (referred to in this section as “the relevant conduct”) is intended to occur in a country outside the United Kingdom, then—
- (a) the relevant conduct is to be treated as the listed offence, and
  - (b) the person accordingly commits the offence of incitement to commit the listed offence.
- (2) However, a person who is not a UK national commits an offence by virtue of subsection (1) only if the relevant conduct would also involve the commission of an offence under the law in force in the country where the whole or any part of it was intended to take place.
- (3) Conduct punishable under the law in force in the country is an offence under that law for the purposes of subsection (2) however it is described in that law.
- (4) The condition specified in subsection (2) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—
- (a) stating that, on the facts as alleged with respect to the relevant conduct, the condition is not in the accused’s opinion satisfied,
  - (b) setting out the grounds for the accused’s opinion, and
  - (c) requiring the prosecutor to prove that the condition is satisfied.

- (5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.
- (6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.
- (7) Any act of incitement by means of a message (however communicated) is to be treated as done in Scotland if the message is sent or received in Scotland.
- (8) In this section—
  - “country” includes territory,
  - “listed offence” means an offence listed in Part 1 of schedule 4,
  - “UK national” means an individual who was at the time the relevant conduct took place, or who has subsequently become—
    - (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
    - (b) a person who under the British Nationality Act 1981 is a British subject, or
    - (c) a British protected person within the meaning of that Act.

## **55 Offences committed outside the United Kingdom**

- (1) If a UK national does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence then the UK national commits that offence.
- (2) If—
  - (a) a UK resident does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence, and
  - (b) the act constitutes an offence under the law in force in that country,then the UK resident commits the listed offence.
- (3) For the purposes of subsection (2)(b), an act punishable under the law in force in the country is an offence under that law however it is described in that law.
- (4) The condition specified in subsection (2)(b) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—
  - (a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused’s opinion satisfied,
  - (b) setting out the grounds for the accused’s opinion, and
  - (c) requiring the prosecutor to prove that the condition is satisfied.
- (5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.
- (6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.
- (7) A person may be proceeded against, indicted, tried and punished for any offence to which this section applies—
  - (a) in any sheriff court district in Scotland in which the person is apprehended or is in custody, or

(b) in such sheriff court district as the Lord Advocate may determine, as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.

(8) In this section—

“country” includes territory,

“listed offence” means an offence listed in Part 2 of schedule 4,

“sheriff court district” is to be construed in accordance with section 307(1) (interpretation) of the Criminal Procedure (Scotland) Act 1995 (c. 46),

“UK national” has the meaning given in section 54,

“UK resident” means an individual who was at the time the act mentioned in subsection (2) took place, or who has subsequently become, resident in the United Kingdom.

## **56 Continuity of law on sexual offences committed outside the United Kingdom**

(1) This section applies where, in any trial—

(a) the accused is charged in respect of the same conduct both—

(i) with an offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), and

(ii) with that offence as modified by section 55,

(b) there is a failure to establish beyond reasonable doubt that—

(i) the time when the conduct took place was after the coming into force of section 55, and

(ii) the time when the conduct took place was before the coming into force of the repeal of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995, and

(c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

(a) an offence under section 52 of the Civic Government (Scotland) Act 1982 (c. 45) (taking and distribution of indecent images of children),

(b) an offence under section 52A of that Act (possession of indecent images of children),

(c) an offence under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (paying for sexual services of a child),

(d) an offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography),

(e) an offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography),

(f) an offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).

(3) Where this section applies, the accused may be found guilty of the offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.

- (4) A reference in this section to an offence includes a reference to—
- (a) an attempt to commit,
  - (b) incitement to commit,
  - (c) counselling or procuring the commission of, and
  - (d) involvement in and part in,
- an offence.

### *General provisions*

## **57 Offences by bodies corporate etc.**

- (1) Where—
- (a) an offence under this Act has been committed by—
    - (i) a body corporate,
    - (ii) a Scottish partnership, or
    - (iii) an unincorporated association other than a Scottish partnership, and
  - (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of—
    - (i) a relevant individual, or
    - (ii) an individual purporting to act in the capacity of a relevant individual, that individual (as well as the body corporate, partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.
- (2) In subsection (1), “relevant individual” means—
- (a) in relation to a body corporate (other than a limited liability partnership)—
    - (i) a director, manager, secretary or other similar officer of the body,
    - (ii) where the affairs of the body are managed by its members, a member,
  - (b) in relation to a limited liability partnership, a member,
  - (c) in relation to a Scottish partnership, a partner,
  - (d) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

## **58 Ancillary provision**

- (1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, this Act or any provision of it.
- (2) An order under this section may modify any enactment, instrument or document.

## **59 Orders**

- (1) Any power of the Scottish Ministers to make orders under this Act—
- (a) must be exercised by statutory instrument,
  - (b) may be exercised so as to make different provision for different purposes,

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- (c) includes power to make incidental, supplemental, consequential, transitional, transitory or saving provision.
- (2) A statutory instrument containing an order made under this Act (except an order made under section 62(2)) is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Parliament.
- (3) A statutory instrument containing—
  - (a) an order under section 39(6) or section 43(8), or
  - (b) an order under section 58 containing incidental, supplemental or consequential provision,is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

## **60 Interpretation**

- (1) In this Act—
  - “mental disorder” has the meaning given by section 17(3),
  - “penis” and “vagina” have the meanings given by section 1(4).
- (2) For the purposes of this Act—
  - (a) penetration, touching, or any other activity,
  - (b) a communication,
  - (c) a manner of exposure, or
  - (d) a relationship,is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

## **61 Modification of enactments**

- (1) Schedule 5 (which contains modifications of enactments) has effect.
- (2) The enactments mentioned in the first column of schedule 6 are repealed to the extent specified in the second column of that schedule.

## **62 Short title and commencement**

- (1) This Act may be cited as the Sexual Offences (Scotland) Act 2009.
- (2) This Act (other than sections 1(4), 17(3), 58 to 60 and this section) comes into force in accordance with provision made by the Scottish Ministers by order.