



# Sexual Offences (Scotland) Act 2009

## 2009 asp 9

### PART 4

#### CHILDREN

##### *Older children*

### **39 Defences in relation to offences against older children**

- (1) It is a defence to a charge in proceedings—
- (a) against A under any of sections 28 to 37(1) that A reasonably believed that B had attained the age of 16 years,
  - (b) against B under section 37(4) that B reasonably believed that A had attained the age of 16 years.
- (2) But—
- (a) the defence under subsection (1)(a) is not available to A—
    - (i) if A has previously been charged by the police with a relevant sexual offence,<sup>F1</sup> . . .
    - [<sup>F2</sup>(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16 [<sup>F3</sup>and the court before which the charge is brought considers it is appropriate for that conviction to have that effect], or]
    - (ii) if there is in force in respect of A a risk of sexual harm order,
  - (b) the defence under subsection (1)(b) is not available to B—
    - (i) if B has previously been charged by the police with a relevant sexual offence,<sup>F4</sup> . . .
    - [<sup>F5</sup>(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16 [<sup>F6</sup>and the court before which the charge is brought considers it is appropriate for that conviction to have that effect], or]
    - (ii) if there is in force in respect of B a risk of sexual harm order.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Section 39. (See end of Document for details)*

- (3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A's age and B's age did not exceed 2 years.
- (4) Those sections are—
- (a) section 30(2)(a), but not in so far as the charge is founded on—
    - (i) penetration of B's vagina, anus or mouth with A's penis,
    - (ii) penetration of B's vagina or anus with A's mouth, tongue or teeth,
  - (b) section 30(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving—
    - (i) B's vagina, anus or penis being touched sexually by A's mouth,
    - (ii) A's vagina, anus or mouth being penetrated by B's penis,
    - (iii) A's vagina, anus or penis being touched sexually by B's mouth,
  - (c) section 30(2)(d) [<sup>F7</sup>or (e)],
  - (d) any of sections 31 to 36.
- (5) In paragraphs (a) and (b) of subsection (2)—
- (a) “a relevant sexual offence” means an offence listed in schedule 1,
  - [<sup>F8</sup>(aa) “a previous conviction for a relevant foreign offence” means a previous conviction by a court in a member State of the European Union <sup>F9</sup>... for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,]
  - (b) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c. 42).
- [<sup>F10</sup>(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.
- (5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—
- (a) regardless of the age of the victim, or
  - (b) only if committed against a person under an age other than 16 years.]
- (6) The Scottish Ministers may by order modify schedule 1 so as to add an offence against a child which involves sexual conduct or delete an offence listed there.
- (7) It is not a defence to a charge in—
- (a) proceedings under any of sections 28 to 37(1) against A that A believed that B had not attained the age of 13 years,
  - (b) proceedings under section 37(4) against B that B believed that A had not attained the age of 13 years.

#### Textual Amendments

- F1** Word following s. 39(2)(a) repealed (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(2\)\(a\)\(i\)](#); S.S.I. 2010/413, [art. 2](#), Sch.
- F2** S. 39(2)(a)(ia) inserted (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(2\)\(a\)\(ii\)](#); S.S.I. 2010/413, [art. 2](#), Sch.

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- F3** Words in s. 39(2)(a)(ia) inserted (31.12.2020) by The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (S.S.I. 2020/339), regs. 1(3), **14(a)** (with reg. 16)
- F4** Word following s. 39(2)(b) repealed (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(2)(b)(i)**; S.S.I. 2010/413, **art. 2**, Sch.
- F5** S. 39(2)(b)(ia) inserted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(2)(b)(ii)**; S.S.I. 2010/413, **art. 2**, Sch.
- F6** Words in s. 39(2)(b)(ia) inserted (31.12.2020) by The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (S.S.I. 2020/339), regs. 1(3), **14(a)** (with reg. 16)
- F7** Word. in s. 39(4)(c) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 44**, 206; S.S.I. 2010/357, **art. 2(b)**
- F8** S. 39(5)(aa) inserted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(3)**; S.S.I. 2010/413, **art. 2**, Sch.
- F9** Words in s. 39(5)(aa) omitted (31.12.2020) by virtue of The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (S.S.I. 2020/339), regs. 1(3), **14(b)** (with reg. 16)
- F10** S. 39(5A)(5B) inserted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(4)**; S.S.I. 2010/413, **art. 2**, Sch.

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