

# **CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 2 - Criminal Law**

##### ***Section 28 – Involvement in serious organised crime***

131. **Section 28(1)** makes it an offence for a person to agree with at least one other person to become involved in the commission of serious organised crime including when a person agrees to do something when he or she knows, or ought reasonably to have known or suspected that such an act would further serious organised crime. The effect is that those who conspire to commit serious organised crime, as defined, are guilty of an offence.
132. **Section 28(3)** defines serious organised crime for the purpose of this section and sections 29, 30 and 31 as crime involving two or more people acting together for the principal purpose of committing or conspiring to commit one or more serious offences.
133. A “serious offence” is also defined in subsection (3). It is an indictable offence that is committed with the intention of obtaining a material benefit, for any person or an act of violence committed, or a threat made for the purpose of obtaining such benefit at some time in the future. “Material benefit” for these purposes is a right in or interest in any property.
134. **Section 28(4)** provides that this offence will attract a maximum penalty on indictment of 10 years imprisonment, an unlimited fine or both. In summary proceedings the available penalties are a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both.

##### ***Section 29 – Offences aggravated by connection with serious organised crime***

135. **Section 29** makes provision about a statutory aggravation which applies in cases where an accused commits an offence connected with serious organised crime. Subsection (1) provides that section 29 applies where an indictment or complaint libels or specifies that an offence is aggravated by a connection with serious organised crime and it is subsequently proved that the offence is aggravated in that way.
136. **Section 29(2)** explains the circumstances in which an offence can be regarded to have been aggravated by a connection with serious organised crime. This relies on proof that the accused was motivated, in whole or in part, by the objective of committing or conspiring to commit serious organised crime. In terms of subsection (3), it is not material to the matter of establishing the accused’s motivation whether or not the accused actually enabled a person to commit serious organised crime (as defined in section 28(2)).

137. **Section 29(4)** specifies that the normal rules on corroboration in criminal proceedings do not apply to establishing the aggravation. Evidence from a single source is sufficient proof.
138. **Section 29(5)** sets out the steps the court must take when it is libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime and proved that the offence is so aggravated. In addition to a number of formal matters, the court must take the aggravation into account in determining the appropriate sentence.

### ***Section 30 – Directing serious organised crime***

139. **Section 30(1)** makes it an offence to direct another person to commit a serious offence (as defined in section 28(2)) or an offence aggravated by a connection with serious organised crime under section 29.
140. **Section 30(2)** provides that a person also commits an offence where the direction he or she gives is to direct a further person to commit a serious offence or an offence aggravated by a connection with serious organised crime.
141. **Section 30(3)** and **(5)** set out what constitutes direction for the purposes of subsections (1) and (2). First, by virtue of section 30(3), the accused must have done something, or a series of things, to direct another person to commit an offence. Second, the accused must have intended that the thing or things done will persuade that person to commit an offence. And third, the accused must intend that the direction will result in a person committing or enable a person to commit serious organised crime. Section 30(5) provides that “directing” a person to commit an offence includes, but is not limited to, “inciting” a person to commit an offence.
142. By virtue of section 30(4), any person directing a person to commit an offence mentioned in section 30(1) will be deemed to have done so regardless of whether that offence was in fact committed.
143. **Section 30(6)** deals with penalties. The penalty for the offences in subsections (1) and (2) when tried on indictment is a maximum of 14 years imprisonment, a fine or both. On summary conviction, the available penalties are a maximum of 12 months imprisonment, a fine not exceeding the statutory maximum or both.

### ***Section 31 – Failure to report serious organised crime***

144. **Section 31** places certain classes of individual under a duty to report to the police any knowledge or suspicion of another person’s involvement in serious organised crime. It is an offence for an individual under such a duty to fail to disclose that knowledge or suspicion.
145. Subsections (1) and (2) describe the circumstances in which section 31 applies. Subsection (1) provides that this section applies where a person knows or suspects that another person has committed an offence under section 28 or 30 or an offence aggravated under section 29 in cases where that knowledge or suspicion arises from information obtained in one of two sets of circumstances, namely: (a) in the course of a person’s trade, profession, business or employment or (b) as a result of a close personal relationship between the person holding the knowledge or suspicion and the person who has allegedly committed the offences. By virtue of subsection (2), section 31 only applies by virtue of a close personal relationship where the person holding the knowledge or suspicion has obtained material benefit as a result of the commission of serious organised crime by the alleged offender.
146. **Section 31(3)** describes the offence. It provides that where this section applies it is an offence to fail to disclose to a constable any knowledge or suspicion described above and the information on which that is based.

147. **Section 31(4)** provides that it will be a defence to prove that the accused had a reasonable excuse for failing to disclose a knowledge or suspicion of the information on which it is based.
148. Subsections (5) and (6) provide that disclosure is not required by a professional legal adviser in relation to information they have received in privileged circumstances and set out what is meant by “privileged circumstances”.
149. **Section 31(7)** makes it clear that the reference to a constable in subsection (3) includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.
150. The penalty for failing to report serious organised crime is stated in subsection (8) to be a maximum of five years imprisonment, a fine or both in proceedings tried on indictment or a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both on summary conviction.

***Section 32 – Genocide, crimes against humanity and war crimes: UK residents***

***Section 33 – Genocide, crimes against humanity and war crimes: retrospective application***

151. **Sections 32 and 33** of this Act amend the International Criminal Court (Scotland) Act 2001 (“the 2001 Act”) in respect of the offences of genocide, crimes against humanity and war crimes. These sections match changes made to the International Criminal Court Act 2001 for England and Wales and Northern Ireland by the Coroners and Justice Act 2009.
152. **Section 32** inserts a new section 8A into the 2001 Act to make supplemental provision about UK residents. Such residents are liable under the 2001 Act for offences committed abroad if they are resident at the time of committing the crime or subsequently become resident. New section 8A makes additional provision in respect of UK residents in two ways. First, subsection (2) lists a number of categories of person who are to be treated as being resident in the UK for the specific purposes of Part 1 of the 2001 Act to the extent this would not otherwise be the case. The specific categories are listed in paragraphs (a) to (j). Secondly, subsection (3) of new section 8A provides a non-exhaustive list of considerations a court must take into account in determining whether a person is resident in the UK.
153. **Section 33** inserts a new section 9A into the 2001 Act. The new section 9A provides for the retrospective application of the offences of genocide, crimes against humanity and war crimes and related offences to things done on or after 1 January 1991. That is the date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the Tribunal’s Statute adopted by the United Nations Security Council.
154. New section 9A has the effect of applying certain offences to acts committed on or after 1 January 1991. Those offences are genocide, crimes against humanity, war crimes, conduct ancillary to such offences committed outside the jurisdiction, offences ancillary to those offences and offences based on the responsibility of commanders and other superiors for such offences. With the exception of genocide and some of the categories of war crimes, the retrospective application of these offences is subject to a requirement that, at the time of its commission, the act constituting the offence amounted in the circumstances to a criminal offence under international law.
155. The effect of this requirement is to allow the courts to apply these offences in the 2001 Act to the extent that they were recognised in international law during the relevant period. So, for example, if a particular offence was recognised in international law at the time of the relevant conduct but in a narrower form than that of the offence set out in the 2001 Act, the defendant may still be convicted of the offence provided that his or her conduct met the elements of the offence as recognised at the relevant time in

international law. The international law requirement ensures that the provisions comply with the principles enshrined in Article 7 of the European Convention of Human Rights. The requirement does not apply to genocide and certain categories of war crimes as it is beyond dispute that those offences (and all their constituent elements) were fully recognised in international law in 1991. The requirement is necessary for the other offences as, whilst the vast majority of them were recognised in international law during the relevant period, a small number may have been recognised in a narrower form than that provided for in the 2001 Act and a very small number of offences may not have been sufficiently recognised at all. In addition, international law developed during the period in question.

156. [Section 33](#) also inserts a new section 9B into the 2001 Act. The new section 9B modifies the penalties applicable for the period of retrospectation (1 January 1991 to either 1 September or 17 December 2001) in respect of certain specific offences. The 2001 Act provides for a maximum sentence of 30 years' imprisonment (other than where murder is involved). The same will generally apply for offences committed from 1 January 1991.
157. However for genocide and grave breaches of the Geneva Conventions (a category of war crimes), both of which were already offences in domestic law in 1991, a maximum penalty of 14 years' imprisonment applies instead of 30 years' (other than where murder is involved). New section 9B(2) ensures that a higher penalty cannot be imposed for such offences than existed in domestic law at the time of their commission and consequently ensures compliance with Article 7 of the European Convention of Human Rights. The two different dates in 2001 are necessary because the International Criminal Court Act 2001 raised the penalty throughout the UK for grave breaches of the Geneva Conventions from 1 September 2001, with the International Criminal Court (Scotland) Act 2001 coming into force later in the year on 17 December 2001.

### ***Section 34 – Articles banned in prison***

158. This section amends section 41 of the Prisons (Scotland) Act 1989 (“the 1989 Act”) to create additional specific offences in relation to the introduction, use and possession of a personal communication device (including a mobile telephone and any component part of a mobile telephone) in prisons. In addition, it provides a definition of “proscribed article” and “personal communication device”, for the purpose of this section, and inserts further provisions which define the maximum penalty that can be imposed for the introduction, use or possession of personal communication device in a prison, and provide limited circumstances where it is not an offence to have a committed such an act.
159. Subsection (1)(a) substitutes section 41(1) of the 1989 Act, and provides that it is an offence for a person to introduce or attempt to introduce a “proscribed article” in a prison, without a reasonable excuse. It also provides that the maximum penalty that can be imposed for introducing or attempting to introduce a proscribed article (other than a personal communication device) into a prison is, on summary conviction, a period of imprisonment not exceeding 30 days, or a fine not exceeding level 3 on the standard scale (or both).
160. Subsections (1)(b)-(e) make minor consequential amendments to sections 41(2), 41(2A), 41(2B) and 41(3) of the 1989 Act.
161. Subsection (1)(f) inserts two new subsections after section 41(9). The new subsection (9A) provides a definition of “proscribed article” and the new subsection (9B) provides a definition of what a personal communication device includes.
162. Subsection (1)(g) updates the definition of “offensive weapon” in section 41(10) of the 1989 Act, by substituting the reference to the Prevention of Crime Act 1953 with a

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reference to the definition contained in section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995.

163. Subsection (2) inserts two new sections after section 41 of the 1989 Act in relation to personal communication devices; sections 41ZA and 41ZB.
164. The new sections 41ZA(1)-(3) provides that it is an offence for a person to: Give a personal communication device to a prisoner while the prisoner is inside a prison; transmit or intentionally receive any communication by means of a personal communication device in a prison; or be in possession of a personal communication device while inside a prison.
165. Offences in section 41ZA(1)-(3) are, on indictment, a period of imprisonment not exceeding two years, or a fine, or both; or, in summary proceedings, a period of imprisonment not exceeding 12 months, or to a fine not exceeding the statutory maximum, or both.
166. The new section 41ZB provides a number of exceptions in relation to communication devices. In particular, subsections (1) and (2) of section 41AB provide that it will not be an offence to introduce, use or possess a personal communication device in a designated area of a prison, or where the person has received written authorisation from the governor, director of a prison, or the Scottish Ministers.
167. Subsections (3) and (4) of section 41ZB provide that it will not be an offence for a prison officer (or other prison official) to introduce, use or possess a personal communication device if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or the person is acting in accordance with those duties.
168. Subsection (5) of section 41ZB provides that no offence is committed by a person, other than a prisoner, where there is a reasonable excuse for the possession. A prisoner would not have a reasonable excuse, given that personal communication devices are not permitted in prisons and they are asked as part of the reception process whether or not they have any proscribed articles on their possession.
169. Subsections (6) and (7) of section 41ZB provide that it is a defence for a person accused of introducing, using or possessing a personal communication device in a prison to show that the person reasonably believed that the person was acting with authorisation or in circumstances where there was an overriding public interest which justified the person's actions. For example, where an individual from the emergency service had to access the prison with a communication device, in an emergency situation, and there was insufficient time for the individual to receive written authorisation.
170. Subsection (8) of section 41ZB provides the circumstances where written authorisation is given. In particular it provides that written authorisation should be provided in favour of a specified person (or person of a specified description), or for a specified purpose. Written authorisation is given either by the governor or director of the prison (in relation to activities at that prison), or the Scottish Ministers (in relation to activities at a prison specified in the authorisation).
171. Subsection (9) of section 41ZB provides the definition of a designated part of a prison, where it is not an offence to introduce, use or possess a personal communication device. This is necessary because it is not illegal to use or possess a personal communication device in the community. It is not the intention to penalise a person for entering an administrative area or other designated area of a prison with a personal communication device. It should only be an offence to introduce, use or possess a personal communication device beyond the designated part of a prison i.e. in the secure part of the establishment.
172. Subsection (10) of section 41ZB provides that prison officers or other prison officials who are crown servants or agents do not benefit from Crown immunity in relation to

an offence of introducing, using or possessing a personal communication device in a prison. This is to ensure that the personal communication devices are only permitted in prisons in limited circumstances e.g. with authorisation.

### ***Section 35 - Sale and hire of crossbows to persons under 18***

173. The Crossbows Act 1987 controls the sale and hire of crossbows and this section introduces new provisions to that Act. Subsection (3) introduces a new section 1A to achieve consistency with the proof of age provisions of the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon. Subsection (4) introduces a new section 3A which has the effect of legalising an attempt to purchase or hire a crossbow by a young person, where the young person is acting as part of an authorised test purchasing scheme. It also makes provision to ensure the safety of young people participating in such a scheme. These provisions bring the Act into line with the test purchasing provisions of the Licensing (Scotland) Act 2005.

### ***Section 36 - Sale and hire of knives and certain other articles to persons under 18***

174. Section 141A of the Criminal Justice Act 1988 controls the sale of knives and certain articles with a blade or point to under 18s. Subsections (2) and (3) amend the Act to close a gap in the law relating to the hiring of a knife or bladed article to an under 18. Subsection (4) amends the proof of age provisions of section 141A to ensure consistency with the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon.

### ***Section 37– Offensive weapons etc.***

175. **Section 37** amends the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”). Section 47 of the 1995 Act sets out an offence relating to the possession of an offensive weapon in a public place; section 49 sets out an offence relating to the possession of a knife in a public place; section 49A sets out an offence relating to the possession of an offensive weapon or a knife on school premises and section 49C sets out an offence relating to the possession of an offensive weapon or a knife in certain prisons.
176. **Section 37** amends the definition of “public place” in sections 47 and 49 of the 1995 Act so that a public place means any place other than domestic premises, school premises or prisons. “Domestic premises” specifically excludes the common parts of a shared property. This means that the offences in sections 47 and 49 of the 1995 Act may be committed by possession of an offensive weapon or a knife on the common parts of shared properties such as common landings in tenement blocks of flats.
177. Sections 47, 49, 49A and 49C of the 1995 Act do not currently provide the same defences to the offences created by those provisions. A person charged with an offence under section 47 of the 1995 Act is provided with a defence if they can prove they had “lawful authority or reasonable excuse” for carrying an offensive weapon in a public place. By contrast, someone charged with an offence under section 49 is provided with a defence if they can prove that they had “good reason or lawful authority” for carrying a knife in a public place.
178. **Section 37** amends the statutory defences available to those charged with an offence under sections 47, 49, 49A, and 49C so that the same defence is applicable to each offence. That defence is that the person is able to show that they had a reasonable excuse or lawful authority to be in possession of the offensive weapon or knife, as the case may be.
179. The penalties for offences relating to obstruction or concealment detailed in sections 48(2) and 50(4) differ. The maximum penalty under section 48(2) is a level 4 fine while the maximum penalty under section 50(4) is a level 3 fine. Section 37 increases the

maximum penalty under section 50(4) of the 1995 Act to a level 4 fine in order to align that provision with the similar offence under section 48(2) of the 1995 Act.

### ***Section 38 – Threatening or abusive behaviour***

180. This section creates an offence of engaging in ‘threatening or abusive behaviour’. Subsection (1) provides that it is an offence for a person to behave in a threatening or abusive manner where that behaviour would be likely to cause a reasonable person to suffer fear or alarm and he or she either intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.
181. Subsection (2) provides a defence for a person who has been charged with an offence of threatening or abusive behaviour to show that the behaviour was, in the particular circumstances, reasonable.
182. Subsection (3) provides, for the avoidance of doubt, that this section applies to behaviour of any kind, including things said or otherwise communicated as well as things done, and that it applies both in respect of behaviour consisting of a single act and behaviour consisting of a course of conduct (e.g. the repeated sending of threatening texts or emails or repeatedly following them from their home or place of work).
183. Subsection (4) provides that the maximum penalty on conviction on indictment is imprisonment for a term not exceeding 5 years or a fine or both. The maximum penalty on summary conviction is imprisonment for a term not exceeding 1 year or a fine not exceeding the statutory maximum or both

### ***Section 39 – Offence of stalking***

184. This section creates an offence of ‘stalking’. Subsection (1) provides that a person (A) who stalks another person (B) commits an offence. Subsection (2) sets out what the elements of stalking are: that A stalks B where he engages in a course of conduct and either subsection (3) or subsection (4) applies and A’s course of conduct causes B to suffer fear or alarm.
185. Subsection (3) applies where A engages in a course of conduct with the intention of causing B to suffer fear or alarm.
186. Subsection (4) applies where A engages in a course of conduct which he knows, or ought in all the circumstances to know would be likely to cause B to suffer fear or alarm.
187. Subsection (5) provides for three defences to the offence. The first is that A’s actions were authorised by virtue of any enactment or rule of law. The second is that A engaged in the conduct for the purpose of preventing or detecting crime. The third is that the course of action was, in the particular circumstances, reasonable.
188. Subsection (6) provides for a definition of ‘conduct’ necessary for stalking. It provides that, for the purpose of the offence of ‘stalking’, a ‘course of conduct’ involves conduct on at least two occasions. A definition of ‘conduct’ is provided at subsection (6). It defines ‘conduct’ as any of the following:
- following B or any other person;
  - contacting, or attempting to contact, B or any other person by any means;
  - publishing any statement or other material which either relates to, or purports to relate to B or to any other person, or purports to originate from B or from any other person (for example, publishing on the internet derogatory or defaming material relating to B or to a third person such as B’s partner or child);
  - monitoring the use by B or by any other person of the internet, email or any other form of electronic communication (for example, by installing spyware on their computer to enable their emails or internet use to be tracked);

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- entering any premises (for example, B’s home or place of work, or the home or place of work of a member of B’s family);
  - loitering in any place (whether public or private);
  - interfering with any property in the possession of B or of any other person;
  - giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person;
  - watching or spying upon B or any other person; or
  - acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm.
189. Subsection (7) provides that the maximum penalty on conviction on indictment is imprisonment for a term not exceeding 5 years or a fine or both, and the maximum penalty on summary conviction is imprisonment for a term not 1 year or a fine not exceeding the statutory maximum or both.
190. Subsection (8) and (9) together provide that, where, in the trial of a person charged with the offence of stalking, the court or jury is not satisfied that the accused committed the offence, but is satisfied that the accused committed an offence under section 38(1) of ‘threatening or abusive behaviour’, the jury or, as the case may be, the court, may acquit the accused of the charge and instead find the accused guilty of an offence under section 38(1).

***Section 40 - Certain sexual offences by non-natural persons***

191. This section makes amendments to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. Subsection (2) broadens the range of penalties available for offences under sections 9(4)(b), 9(5)(b), 10(2)(b), 11(2)(b) and 12(2)(b) of the 2005 Act to include an unlimited fine. Consequently, a person found guilty of an offence on indictment under sections 9 to 12 of the 2005 Act, may be liable to an unlimited fine and/or imprisonment for up to 7 years in the case of offences to which section 9(4)(b) relate or, for the other relevant offences, for up to 14 years.
192. Subsection (3) inserts a new section 14A into the 2005 Act. Inserted section 14A provides that, where an offence under sections 10, 11 or 12 of the 2005 Act is committed by a body corporate (such as a company), a Scottish partnership, or an unincorporated association, certain officers of the body or other persons purporting to act in such a capacity may in certain circumstances be held to have committed the offence and will be liable to prosecution as well as the body.

***Section 41 - Indecent images of children***

193. This section extends the provisions of sections 52 and 52A of the Civic Government (Scotland) Act 1982 (“the 1982 Act”) to make it an offence to take, make, distribute, show, publish or possess etc. derivatives of indecent photographs or pseudo-photographs such as line traced and computer traced images. It also extends Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (Offences Against Children Under the Age of 17 Years to which Special Provisions Apply) to include pseudo-photographs and amends Schedule 3 to the Sexual Offences Act 2003 (Sexual offences for the purposes of Part 2 of that Act) in relation to derivatives of indecent photographs or pseudo-photographs.
194. Subsection (1)(a)(i) amends section 52(2C)(b) of the 1982 Act to make clear that indecent pseudo-photographs include data capable of conversion into a pseudo-photograph only where that conversion would result in an indecent image.

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195. Subsection (1)(a)(ii) amends section 52 of the 1982 Act by the insertion of new subsections (9) and (10). Section 52(9) extends the definition of “photograph” to cover derivatives of photographs or pseudo-photographs or combinations of these. For example, it includes a computer tracing which is neither a photograph nor a pseudo-photograph but is derived from one. Section 52(10) provides that subsection 52(2B) applies to such derivatives in the same way that it applies to pseudo-photographs.
196. Subsection (2) amends paragraph 2B of Schedule 1 to the Criminal Procedure (Scotland) Act 1995, which lists offences against children under the age of 17 to which special provisions apply. Paragraph 2B, which concerns offences under sections 52 and 52A of the Civic Government (Scotland) Act 1982, is amended to include offences involving indecent pseudo-photographs, as well as indecent photographs of a child under the age of 17 years.
197. Subsection (3) amends Schedule 3 to the Sexual Offences Act 2003, which lists sexual offences for the purposes of Part 2 of that Act. Part 2 of the 2003 Act makes provision for relevant offenders to be subject to the notification requirements set out in that Part of that Act
198. Subsection (3)(a) amends paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 which relates to offences under section 170 of the Customs and Excise Management Act 1979 (concerning the penalty for the fraudulent evasion of duty etc.) in relation to goods which are prohibited from being imported where they included indecent photographs of children under 16. So as to provide consistency with the entries in the Schedule relating to offences in the Civic Government (Scotland) Act 1982 concerning the making, possessing and distribution of such indecent images, the entry is amended to provide that it applies only where the offender is 18 or over, or is or has been sentenced to at least 12 months imprisonment, or where the court considers it appropriate that the sex offender notification requirements should apply. While this will limit the automatic application of the notification requirements, the provisions outlined in the preceding paragraphs concerning Sexual Offences Prevention Orders will mean that the restriction does not apply in relation to applications for Sexual Offences Prevention Orders. Paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 is also amended to include reference to pseudo-photographs of children under 16.
199. Subsection (3)(b) amends the interpretative provision in paragraph 97(b) of Schedule 3 to the 2003 Act to extend the meaning of indecent photographs and pseudo-photographs for that Act to include derivatives of such photographs and pseudo-photographs (by applying definitions in the 1982 Act which include the amendments made by subsection (1)(a)(ii), above).

***Section 42 - Extreme pornography***

200. This section creates a new offence of possession of extreme pornography and increases the maximum penalty for the sale etc. of obscene material of that nature. It inserts new sections 51A to 51C into the Civic Government (Scotland) Act 1982, amends section 51 of that Act and inserts new paragraph 44A into Schedule 3 to the Sexual Offences Act 2003.
201. Subsection (1) amends section 51(3) of the 1982 Act to increase the maximum penalty, on conviction on indictment, from 3 to 5 years imprisonment for the offence of displaying, publishing, selling, distributing or possessing etc. with a view to selling or distributing obscene material, where that material contains an extreme pornographic image.
202. Subsection (2) inserts new sections 51A “Extreme pornography”, 51B “Exception to section 51A offence” and 51C “Defences to section 51A offence” into the 1982 Act.

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203. New section 51A creates an offence of possession of an extreme pornographic image, defines such images and specifies the maximum penalty which may be imposed for the offence.
204. Subsection (2) provides that an extreme pornographic image must be “obscene”, “pornographic” and “extreme”. The test of “obscene” means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.
205. Subsection (3) defines a “pornographic” image as one which must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Therefore, an image is not pornographic if it can reasonably be assumed that the image has been made principally for another purpose e.g. educational purposes.
206. Subsection (4) provides that where an image forms part of a series of images which can provide a context, then that context and the image itself must be taken into account when determining whether the image is pornographic and reference may also be had to any sounds accompanying the image.
207. Subsection (5) sets out an example of how subsection (4) can work. Where an image forms an integral part of a narrative (e.g. a story), the whole story will be considered for the purposes of determining whether the image in question is pornographic. This could lead to the conclusion that an image is not pornographic, notwithstanding that when considered on its own, the opposite conclusion would be reached. Subsection (5) is only one example of how subsection (4) may operate. The reference to “context” in subsection (4) not only covers a narrative, it can also, for example, include a series of images which do not tell a story, but which have a recurring theme. In addition, subsection (4) may operate so as to have the opposite effect to that described in subsection (5)(b): examination of an image’s context could lead to the conclusion that an image *is* pornographic.
208. Subsection (6) provides that an image is extreme if it depicts in an explicit and realistic way any of the acts set out in subsection (6)(a) to (e). The terms “explicit” and “realistic” require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.
209. Subsection (7) provides that where an image is an integral part of a narrative, the context provided by that narrative may be taken into account in determining whether an image is extreme in terms of subsection (6). In addition, any description or sound accompanying the image can similarly be taken into account.
210. New section 51B makes provision to exclude images in unaltered classified works and defines the circumstances in which such images are not excluded.
211. Subsections (1) and (2) provide that possession of an excluded image is not an offence under section 51A and define an excluded image.
212. Subsection (3) provides that an image extracted from a classified work for the purposes of sexual arousal is not an excluded image.
213. Subsection (4) provides that in determining whether an image has been extracted for the purpose of sexual arousal, account may be taken of the storage, description, accompanying sound and context of the image.
214. Subsection (5) defines terms used in this section including “classified work” and thereby “excluded image” in subsection (2).
215. New section 51C makes provisions for defences to the offence of possession of extreme pornography. It replicates defences provided for possession of indecent images of children under section 52A of the 1982 Act and makes specific provision in relation to extreme images.

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216. Subsection (1) provides that the onus is on the accused to prove the matters specified in subsections (2), (3) and (4) in order to use one or more of the defences. The Crown must prove the essential elements of the offence beyond reasonable doubt.
217. Subsection (2) provides that it is a defence for a person to prove that: (a) he/she had a legitimate reason for possession of the image, (b) he/she had no knowledge of the image and no awareness as to the nature of the image or (c) the image was unsolicited and disposed of promptly.
218. Subsection (3) provides a defence for those who directly participated in the act depicted in an extreme pornographic image and can prove the circumstances set out in subsection (4). When read with subsections (4) and (5) this subsection limits the defence to those who directly participate in simulated acts and retain the images for their own private use. The defence does not extend to a person who films or watches an act depicted in an image but who does not participate directly.
219. Subsection (4) provides that a direct participant must be able to demonstrate that the act depicted in the image was simulated i.e. that it did not actually:
- take or threaten a person's life;
  - result in nor was it likely to result in severe injury;
  - involve non-consensual activity;
  - feature a human corpse;
  - feature an animal or carcass.
220. Subsection (5) provides that the defence in subsection (3) is not available if the image in question is shown, given or offered for sale to any person who was not a direct participant in the act depicted in the image.
221. Subsection (6) provides that the terms "image" and "extreme pornographic" image are to be construed in accordance with section 51A.
222. Subsection (3) inserts paragraph 44A into Schedule 3 to the Sexual Offences Act 2003, which lists the offences conviction of which leads to an offender being made subject to the sex offender notification requirement contained at Part 2 of the 2003 Act. It provides that a person convicted of the offence of possession of extreme pornography who is 18 years of age or over at the time of the offence, and is sentenced to a term of imprisonment of more than 12 months, may be made subject to the sex offender notification requirements where the court considers it appropriate.

***Section 43 – Voyeurism: additional forms of conduct***

223. **Section 43** amends the voyeurism offence in the Sexual Offences (Scotland) Act 2009 to include additional forms of conduct.
224. Subsection (2)(a) inserts two new subsections into the voyeurism offence at section 9 of that Act: subsections (4A) and (4B) which provide for additional forms of conduct constituting the offence of voyeurism.
225. New subsection (4A) provides that the voyeurism offence is committed where a person (A) operates equipment beneath another person (B)'s clothing, with the intention of enabling A or another person (C) to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks in circumstances where the genitals, buttocks or underwear would not otherwise be visible, without B's consent and without any reasonable belief that B consents. The offence is committed where A acts for the purpose of causing B humiliation, alarm or distress, or for the purpose of obtaining sexual gratification (whether for A or C).

226. New subsection (4B) provides that the voyeurism offence is committed where a person (A) records an image beneath another person (B)'s clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, without B's consent and without any reasonable belief that B consents, and in circumstances where B's genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person will look at the image. The offence is committed where A acts for the purpose of causing B humiliation, alarm or distress, or for the purpose of obtaining sexual gratification (whether for A or for a third person).
227. Subsections (2)(b), (c) and (3) make consequential changes to sections 9 and 10 of the 2009 Act as a result of the insertion of new subsections (4A) and (4B).
228. Subsection (4) makes equivalent changes to the offence of 'voyeurism towards a young child' at section 26 of the 2009 Act but there is no reference to consent as children under the age of 13 are deemed to lack the capacity to consent to sexual activity.
229. Subsection (5) makes equivalent changes to the offence of 'voyeurism towards an older child' at section 36 of the 2009 Act without reference to consent, as it is an offence for a person over the age of 16 to engage in voyeuristic conduct towards a child under 16, regardless of whether the child consents.

#### ***Section 44 – Sexual offences: defences in relation to offences against older children***

230. This section amends section 39 of the Sexual Offences (Scotland) Act 2009 so as to provide that the defence of 'proximity of age' provided for at section 39(4) shall apply in respect of the offence at section 30(2)(e) .

#### ***Section 45 – Penalties for offences of brothel-keeping and living on the earnings of prostitution***

231. This section amends sections 11 and 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act") to increase the maximum penalties for offences under sections 11(1)(a) (living on the earnings of prostitution), 11(5) (brothel-keeping) and 13(9) (living on the earnings of male prostitution).
232. Subsection (2) of this section amends section 11(1) of the 1995 Act by deleting the reference to existing penalties which apply and inserting a new subsection (1A) that increases the maximum penalty for an offence under section 11(1)(a), on conviction on indictment, to imprisonment for a period not exceeding 7 years, a fine or both. The penalty on summary conviction for this offence changes to imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum or both.
233. The change to the term of imprisonment for the offence under section 11(1)(b) of the 1995 Act is to conform with the provisions of section 45 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 which increased the sentencing powers of the sheriff court from 6 months to 12 months for statutory offences triable both summarily and on indictment. While there is no specific provision for a fine to be imposed for an offence under section 11(1)(b), section 199 of the Criminal Procedure (Scotland) Act 1995 allows for a fine to be substituted instead of imprisonment.
234. Section 11(4) of the 1995 Act is amended to reflect the penalties at new subsection (1A).
235. The penalties provided for in section 11(6), for an offence under section 11(5) of the 1995 Act, are replaced by a new subsection (6) which increases the maximum penalty that applies on conviction on indictment to imprisonment for a period not exceeding 7 years, to a fine or both. The penalty on summary conviction for this offence changes to imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum or both. This is replicated for the maximum penalties which apply in respect of offences under section 13(9) of the 1995 Act.

**Section 46 - People trafficking**

236. Trafficking for the purposes of prostitution or for the making or production of obscene or indecent material is an offence under the provisions of section 22 of the Criminal Justice (Scotland) Act 2003, (the “2003 Act”) including where it is believed that another person is likely to exercise such control or to so involve the individual.
237. **Section 46** amends section 22 of the 2003 Act by:
- aligning the wording of section 22 of the 2003 Act with that now contained in the Sexual Offences Act 2003 by amending section 22(1)(a) to extend its scope so that it refers to facilitating “entry into” the UK as well as the “arrival in” the UK to reflect the changes made by the UK Borders Act 2007;
  - creating a new offence (under section 22(1A)) which covers the trafficking of persons into, within or out of a country other than the UK;
  - amending section 22(2), which explains what is meant by a person exercising control over prostitution by an individual, so that it applies to the new offence;
  - substituting a new section 22(4) to provide that the offences in sections 22(1) and (1A) apply to anything done in or outwith the UK;
  - replacing section 22(5) to provide greater certainty in statute to clarify that the sheriff court has jurisdiction, under both solemn and summary procedure, for any offence to which section 22 applies;
  - amending section 22(6) by extending the extra-territorial effect by providing that the offences in sections 22(1) and (1A) apply to UK nationals, persons habitually resident in Scotland and UK corporate bodies.
238. Similar changes are made to the offences relating to trafficking for purposes other than sexual exploitation in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“the 2004 Act”) by amending:
- section 4(1) by extending its scope so that it refers to “entry into” the UK as well as the “arrival in” the UK to again reflect changes made by the UK Borders Act;
  - section 4(2) to remove the requirement that a person who arranges or facilitates the travel of an individual within the UK intending to exploit that individual (or believes that someone else is likely to do so) has a belief that an offence under section 4(1) may have been committed; and
  - creation of a new offence under section 4 as set out in new section 4(3A) which covers the trafficking of persons into, within or out of a country other than the UK regardless of where the exploitation is to occur.
239. The definition of exploitation in section 4(4) of the 2004 Act is expanded in several ways:
- The existing reference in section 4(4)(b) to exploitation which would involve offences under the UK human tissue legislation is expanded to ensure that it applies to such conduct wherever it takes place.
  - A new paragraph (ba) is added to cover exploitation involving removal of body parts which would amount to an offence other than under the human tissue legislation (which deals principally with removal of organs for transplantation). For these purposes body parts comprise all parts of the body including blood.
  - The existing paragraph (d) in section 4(4) is replaced by a new paragraph (d) to make an equivalent change to that made for other parts of the UK in section 54 of the Borders, Citizenship and Immigration Act 2009, to cover the use or attempted use of a person for the provision of services or the provision or acquisition of benefits of

any kind, where the person is chosen on the grounds of ill-health, disability, youth or family relationship. This will ensure the offence captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.

- Section 5 of the 2004 Act is amended to make clear that the offences in section 4(1), (2), (3) and (3A) apply to anything done in or outwith the UK and that the extra-territorial effect is extended by providing that these offences apply to UK nationals, persons habitually resident in Scotland and UK corporate bodies. New subsections (2A) and (2B) have been added to this section of the 2004 Act in order to confirm that the sheriff court has jurisdiction, under both solemn and summary procedure, for any offence to which section 4 applies.

### ***Section 47 - Slavery, servitude and forced or compulsory labour***

240. This section introduces a new statutory offence of holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour. The offence has been introduced in response to the case of *Siliadin v France*<sup>1</sup> (where the European Court of Human Rights held that there had been a violation of Article 4 of the European Convention on Human Rights which covers the exploitative behaviours of slavery, servitude and forced or compulsory labour).
241. Subsection (2) provides that the offence must be interpreted in accordance with Article 4 of the European Convention on Human Rights which prohibits these exploitative behaviours and sets out the circumstances in which where such behaviour would not fall under the term “forced or compulsory labour” e.g. work required while subject to a term of imprisonment, military service, etc.
242. The maximum penalties for an offence under this section are provided for in subsection (3), namely:
- on conviction on indictment, to imprisonment for a period not exceeding 14 years, to a fine or both;
  - on summary conviction for this offence increases to imprisonment for a period not exceeding 12 months, to a fine not exceeding the statutory maximum or both.

### ***Section 48 - Alternative charges for fraud and embezzlement***

243. Paragraph 8 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 can be applied in certain cases where the evidence led in court would not support a conviction on the basis of the offence as charged but would permit conviction of a different offence. It permits this application of an alternative charge in certain offences involving dishonest appropriation of property. For example, in terms of paragraph 8(2) of Schedule 3 an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of reset.
244. The amendments to Schedule 3 extend this principle to cover fraud and embezzlement. As a result of these changes, it will be possible for an accused charged with “breach of trust and embezzlement” to instead be convicted of “falsehood, fraud and wilful imposition”. Similarly, an accused charged with “falsehood, fraud and wilful imposition” may be convicted instead of “breach of trust and embezzlement”.

### ***Section 49 – Articles for use in fraud***

245. **Section 49** provides for two new criminal offences relating to fraud.
246. **Section 49(1)** makes it an offence for a person to possess or have within their control an article for use in, or in connection with, the commission of fraud. It will have to be

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<sup>1</sup> [http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN\\_v\\_FR.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN_v_FR.pdf)

established that the accused possessed or had control of the article and that the article was to be used in the course of or in connection with fraud. Section 49(2) provides that an offence under subsection (1) can be tried both in summary proceedings (where the maximum penalty will be a custodial sentence not exceeding 12 months and/or a fine not exceeding the statutory maximum) and on indictment (where the maximum penalty will be a custodial sentence of up to 5 years and/or an unlimited fine).

247. [Section 49\(3\)](#) makes it an offence to make, adapt, supply or offer to supply an article knowing either that the article is designed or adapted for use in, or in connection with, the commission of fraud; or intending the article to be used in, or in connection with, the commission of fraud. Section 49(4) provides that an offence under subsection (3) can be tried both in summary proceedings (where the maximum penalty will be a custodial sentence not exceeding 12 months and/or a fine not exceeding the statutory maximum) and on indictment (where the maximum penalty will be a custodial sentence not exceeding 10 years and/or an unlimited fine).
248. [Section 49\(5\)](#) provides that an ‘article’ within this new section includes a program or data held in electronic form. Therefore, the definition of ‘article’ includes more than simply a physical object and could include, for example, such a thing as a list of credit card numbers held on a computer.

### ***Section 50 - Conspiracy to commit offences outwith Scotland***

249. Section 11A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is in itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out. However, section 11A of the 1995 Act does not cover conspiracies formed in Scotland to commit an offence in England, Wales or Northern Ireland. Section 50 of this Act amends the scope of section 11A of the 1995 Act to cover conspiracy in Scotland to commit an offence in other parts of the United Kingdom.

### ***Section 51 – Abolition of offences of sedition and leasing-making***

250. [Section 51](#) abolishes the common law offences of sedition and leasing-making. This follows amendments made in section 73 of the [Coroners and Justice Act 2009 \(c.25\)](#) to abolish the common law offences of sedition, seditious libel, defamatory libel and obscene libel, which applied in the rest of the UK.
251. Paragraphs 1 and 2 of Schedule 7 to the Act repeal the [Libel Act 1792 \(c.60\)](#) and the [Criminal Libel Act 1819 \(c.8\)](#) in their entirety.
252. Paragraphs 6, 19, 64 and 72 of Schedule 7 to the Act provide for consequential amendments to the Defamation Acts of 1952 and 1996, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Legal Deposit Libraries Act 2003. These remove references that are made redundant either by the abolition of the offence of sedition in Scotland or the abolition of the various forms of criminal libel in the rest of the United Kingdom.