

ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 2 – Sexual Harm

Chapter 2 – Sexual acts outside Scotland

Section 7 – Incitement to commit certain sexual acts elsewhere in the United Kingdom

48. **Section 7** amends section 54 of the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”) so as to provide that it is a criminal offence for a person to incite the commission of a sexual act that would constitute a “listed offence” (that is, a sexual offence listed at Part 1 of schedule 4 to the 2009 Act) in Scotland, where the act in question is intended to occur outside Scotland, whether within or outside the United Kingdom. Section 54 of the 2009 Act previously only provided for the incitement offence to have extraterritorial effect where the criminal act is intended to occur outside the United Kingdom.
49. The offences listed in Part 1 of schedule 4 to the 2009 Act are in general sexual offences committed against children or young people under 18 (for example, rape, sexual assault, sexual exposure, voyeurism, sexual abuse of trust, indecent assault).
50. Subsection (3) amends section 54(2) of the 2009 Act and inserts a new section 54(2A). This provides that where the person inciting the commission of a sexual act elsewhere in the United Kingdom is not a habitual resident of Scotland, they only commit an offence if the act which they are inciting involves the commission of a criminal offence in the part of the United Kingdom in which it is intended to take place. This means that in the event that, for example, a person habitually resident in Northern Ireland incites the commission of a sexual act in Northern Ireland which is a criminal offence under Scots law listed at part 1 of schedule 4 of the 2009 Act, but which is not unlawful in Northern Ireland, they would not commit the offence. But if a Scottish habitual resident incited an offence in Northern Ireland in the same circumstances, the section 54 incitement offence would be committed, because in that case there is no requirement for the intended conduct to be a criminal offence in both jurisdictions.
51. Subsections (4) and (5) make consequential amendments.
52. Subsection (6)(a) amends section 54(8) of the 2009 Act to add a definition of “a habitual resident of Scotland” as someone who was at the time the act of incitement took place habitually resident in Scotland. Habitual residence is a much-used concept in private international law and it is expected that the courts would interpret this provision in accordance with those principles. Subsection (6)(b) amends the definition of a “UK national” at section 54(8) of the 2009 Act so that it applies only to persons who met the listed criteria at the time the relevant conduct took place, and not to those who became UK citizens or residents at a later date.

53. Subsection (7) amends the heading to section 54 to reflect the fact that it now applies to incitement to commit certain sexual acts anywhere outside Scotland.

Section 8 – Commission of certain sexual offences elsewhere in the United Kingdom

54. **Section 8** inserts new sections 54A, 54B and 54C into the 2009 Act, so as to provide that the Scottish courts may take jurisdiction over an act which takes place elsewhere in the United Kingdom that would have constituted a “listed offence” had it taken place in Scotland. For the purposes of these provisions, “listed offence” means the sexual offences listed at Part 2 of schedule 4 to the 2009 Act (see section 54A(8)), which includes all the sexual offences against children or young people under 18 to which section 54 of the 2009 Act applies, as well as a number of other sexual offences (for example, offences involving indecent images, sexual services and pornography committed against children or young people under 18).
55. The effect of these provisions is that the extra-territorial jurisdiction of Scottish courts in relation to sexual offences against children and young people under 18 is expanded to cover the other jurisdictions of the United Kingdom, as well as places outwith the United Kingdom (which is already provided for at section 55 of the 2009 Act).
56. Section 54A(2) and (3) restrict the extra-territorial offence by providing that it may be committed by a person who is not a habitual resident of Scotland only if the act in question is also a criminal offence, however described, in the country where it took place. If it is proven that the act took place somewhere in the United Kingdom but the particular country where it took place is not proven, the person could only be found guilty of the offence if the act is a criminal offence in all of the countries in which it is alleged it may have taken place.
57. Sections 54A(4) to 54A(6) set out the procedure that a person accused of an offence must follow if they intend to argue that the conduct did not constitute a criminal offence in the part of the United Kingdom in which it took place.
58. Section 54A(8) sets out some relevant definitions, including a definition of habitual resident of Scotland in the same terms as in the amendments to section 54 of the 2009 Act by section 7.
59. New section 54B places limitations on the use of section 54A to prosecute listed sexual offences which were committed elsewhere in the United Kingdom. This applies whether the person committing the offence is a Scottish habitual resident or not. These limitations apply only if the country in the United Kingdom in which the listed offence took place can be determined from the indictment or complaint. If the country cannot be determined, the limitations in new section 54C apply instead.
60. Section 54B(2)(a) provides that, subject to the exception at section 54B(3), the offence cannot be prosecuted in the Scottish courts if the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place.
61. Section 54B(2)(b)(i) provides that, before initiating a prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom, the prosecutor must consult the director of public prosecutions in the country in which the offence is alleged to have been committed.
62. Section 54B(2)(b)(ii) provides that prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom is only competent where the accused is also charged, on the same indictment, with an act in Scotland constituting a listed offence. This is intended to ensure that the Scottish courts can only hear a case relating to an offence alleged to have been committed elsewhere in the United Kingdom where it forms part of a course of conduct of offending, a part of which took place in Scotland.

63. Section 54B(3) provides that the restriction at section 54B(2)(a) prohibiting a prosecution in the Scottish courts where the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place does not apply in circumstances where that prosecution has been withdrawn in order to enable the prosecution of the person in Scotland. This may occur where, for example, such a prosecution brings to light more serious offences committed by that person in Scotland and prosecutors agree that it is appropriate to prosecute all the offences on a single indictment or complaint in the Scottish courts.
64. New section 54C sets out limitations on the prosecution of listed sexual offences where it is not known in which jurisdiction within the United Kingdom the offence is alleged to have been committed. This may occur where, for example, the offence was committed in an unknown location close to the border between Scotland and England. Another example would be where the offences have taken place over a long period within a family unit and the family have lived in different parts of the United Kingdom at different times as the children grew up.
65. Section 54C(1) provides that it is not necessary that an indictment or complaint contains information from which it is possible to determine the jurisdiction in which the act constituting the listed offence is alleged to have taken place. This ensures that it is legally competent for an indictment to be served in which there is uncertainty as to the jurisdiction within which an offence is alleged to have been committed.
66. Section 54C(2) provides that where an indictment or complaint does not contain such information, subject to the exception at section 54C(5), the offence cannot be prosecuted in the Scottish courts if the person is being or has been prosecuted for the same conduct elsewhere in the United Kingdom and that a prosecution is only competent if the applicable conditions in section 54C(3) are met.
67. Section 54C(3) provides that, before serving an indictment or complaint in respect of a listed offence where the jurisdiction in which the act constituting the offence is alleged to have occurred is not known, the prosecutor must consult the Director of Public Prosecutions in the other jurisdiction or jurisdictions in which the act may have been committed.
68. Section 54C(5) provides that the restriction at section 54C(2)(a) prohibiting a prosecution in the Scottish courts where the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place does not apply in circumstances where that prosecution has been withdrawn in order to enable the prosecution of the person in Scotland.

Section 9 – Commission of certain sexual offences outside the United Kingdom

69. **Section 9** amends section 55 of the 2009 Act, which provides Scottish courts with extra-territorial jurisdiction (beyond the United Kingdom) over certain sexual offences committed against children. Sections 9(2) adds new subsections 55(2A) and 55(2B), which provide that a person who was not a UK resident or a UK national at the time they did an act outside the UK which would, if it had been done in Scotland, constitute a listed offence, can be prosecuted for that offence if they subsequently become a UK national or UK resident and the act constituted a criminal offence under the law in force in the country in which it was done.
70. **Section 9(5) and (6)** amend the definitions of UK national and UK resident in section 55 of the 2009 Act so as to provide that a person is to be regarded as a UK national or resident for the purpose of this section only if they were a UK national or resident at the time at which the act constituting an offence is alleged to have taken place. Read with new section 55(2A), the effect is that a person who was not a UK national or UK resident at the time they did an act constituting a listed offence cannot be prosecuted in the Scottish courts if the act did not amount to a criminal offence in the country where the act took place.