

SEXUAL OFFENCES (AMENDMENT) ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Sections 1 and 2: Age of consent

9. *Subsections (1) and (2)* of section 1 of the Act deal with the age of consent in England and Wales. They substitute the word “eighteen” with the word “sixteen” where it appears in Section 12 and paragraph 16 of Schedule 2 to the Sexual Offences Act 1956 (as amended) and in section 1 of the Sexual Offences Act 1967. Extracts with the changes shown are set out at the end of these notes. The result is that:

- consensual buggery with another person is not an offence if the act takes place in private and both have attained the age of 16 (rather than 18 at present);
- an act of buggery with a man or an act of gross indecency with a man or being a party to the commission of such acts in private is not an offence provided that both parties have consented and have attained the age of 16 (rather than 18);
- the prosecution will have to show that one of the parties had not attained the age of 16 (rather than 18) at the time of the act;
- the greater maximum penalty which is available to the courts when a man over 21 commits the offences of (i) indecency between men or (ii) attempting to procure the commission by a man of an act of gross indecency will now apply where the other male is under 16 (rather than 18 at present).

These changes affect the maximum penalty for offences of buggery and attempted buggery contrary to section 12(1) of the 1956 Act which are provided for in paragraph 3 of Schedule 2 to that Act. The maximum penalties for the offence of buggery will now be as follows:

- If committed with a person under the age of 16 or with an animal, life imprisonment. This applies equally whether the offence was committed in public or in private;
- If committed by a person aged 21 or over with a person aged 16 or 17, 5 years imprisonment;
- In any other case, 2 years imprisonment.

The same maximum penalties will apply in respect of the offences of attempted buggery.

Subsection (2) also substitutes the word “sixteen” for the word “twenty-one” in section 8 of the 1967 Act. Extracts with the changes shown are set out at the end of these notes. The effect is that the Director of Public Prosecutions’ consent to the institution of proceedings for gross indecency with another male, buggery with another male or aiding, abetting, counselling, procuring or commanding the commission of these offences, will only be required where one of the males involved is under the age of 16 (rather than 21 at present). This change from 21 to 16 may appear more substantial than the other age changes proposed, but this is because by an oversight no consequential

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(c.44) which received Royal Assent on 30 November 2000*

change from twenty-one to eighteen was made in the 1994 Act in line with the other age changes contained in that legislation.

10. *Subsection (3)* makes similar changes to the law in Scotland and substitutes the word “eighteen” with the word “sixteen” where it appears in section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995. Extracts with the changes shown are set out at the end of these notes. The result is that consensual acts in private of sodomy or gross indecency or shameless indecency by one male person with another will not be an offence provided the parties to the act are aged 16 or over.
11. *Subsection (4)* makes similar changes to the law in Northern Ireland. However, the age of heterosexual consent in Northern Ireland is set at 17, so where the number “18” appears in the Homosexual Offences (Northern Ireland) Order 1982 (as amended) the word “17” is substituted for it. Extracts with the changes shown are set out at the end of these notes. The result is that consensual acts in private of buggery with another man, an act of gross indecency with another man or the act of being a party to the commission by a man of such an act, will not be an offence provided the parties to the act are aged 17 or over.
12. *Section 2* provides that no offence is committed in England and Wales under sections 12 and 13 of the Sexual Offences Act 1956 (as amended) by a person under the age of 16 if:
 - he or she engages in buggery with a person over 16;
 - he commits an act of gross indecency with a male over the age of 16;
 - he is a party to the commission of an act of gross indecency with a person over 16.

Extracts with the changes shown are set out at the end of these notes. The section does not affect the liability of a person over the age of 16 who engages in such activities with a person under the age of consent - they continue to commit an offence. Both parties remain liable in the criminal law if they are both under the age of 16. Similar changes to those mentioned above are also made to the law in Scotland and Northern Ireland to decriminalise a male under 16 (17 in Northern Ireland) who engages in homosexual activities with someone over that age.

Sections 3 to 6: Abuse of position of trust

13. *Sections 3 and 4* create a new offence of abuse of trust, which would apply to the whole of the United Kingdom. It would be an offence for a person aged 18 or over to have sexual intercourse or engage in other sexual activity with a person under that age where they are in a “position of trust” in relation to the younger person. The definition of position of trust is limited to particular circumstances where the young person is particularly vulnerable or the relationship of trust particularly strong.
14. The test as to whether conduct amounts to “sexual activity” is whether a reasonable person would in the circumstances regard the activity as sexual. So for instance, a normal gynaecological examination by a doctor is an activity which it is envisaged a reasonable person would not regard as “sexual activity”. Behaviour which a reasonable person would only regard as sexual activity if he was aware of the parties' intentions, motives or feelings is specifically excluded. Thus, behaviour which is non-sexual in nature, for example a sports trainer tackling a pupil on a rugby pitch, may not be challenged because of alleged hidden motives.
15. A person aged 18 or over is said to be in a “position of trust” in relation to a younger person if one of four conditions is met:
 - the younger person is detained in an institution under a court order or under any enactment and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18. This would include where

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the young person is detained as a result of the criminal justice system or penal system under the Immigration or Mental Health Acts or under military law;

- the younger person is resident in and provided with accommodation (or accommodation and maintenance) by a local authority, an equivalent Northern Ireland body or a voluntary organisation in a home or other place, and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18 there. This would apply to the full range of settings in which such young people might be accommodated, including foster care; residential care (local authority, private or voluntary, including secure accommodation); and semi-independent accommodation;
- the younger person is in any of the following:
 - a) a hospital
 - b) a residential care home, nursing home, mental nursing home or private hospital
 - c) a community home, voluntary home, children's home or residential establishment
 - d) a home provided under section 82(5) of the Children Act 1989

and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18 there. This would include some young people with physical or learning disabilities, mental illness or behavioural problems; it would include NHS and private and voluntary accommodation;

- the younger person is in full time education in an educational institution and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18 there. Where the younger person is registered as receiving full time education at one establishment but attends another establishment as part of his or her course, the older person is treated as in a position of trust at either establishment.

The word 'persons' can include a single person, for example where only one child is in the care of foster parents.

16. [Section 4](#) also provides that the four conditions above may be added to by an Order which may be made by the Secretary of State and which would have to be laid before and be approved by both Houses of Parliament. In Scotland, any such order would fall to be considered by the Scottish Parliament, by virtue of section 7(2) of the Act and section 118 of the Scotland Act 1998.
17. It is a defence for a person charged with such an offence if at the time of intercourse or sexual activity:
 - he did not know or could not reasonably have been expected to know that (i) the younger person was under 18 or (ii) that he was in a position of trust in relation to the younger person; or
 - he was lawfully married to the younger person.

In addition, there is a transitional provision to ensure that the offence will not apply where the older person was in a sexual relationship with the younger person at a time when he was in a position of trust in relation to the younger person immediately before the commencement of this Act.

18. A person found guilty at the magistrates' court in England and Wales or the District Court or Sheriff Court sitting summarily in Scotland of the offence of abuse of trust is liable to a maximum penalty of six months imprisonment and/or the statutory maximum fine (currently £5,000). On conviction at the Crown Court in England and Wales or in

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the Sheriff Court sitting with a jury or the High Court in Scotland the maximum penalty is five years imprisonment, an unlimited fine, or both.

19. *Section 5* makes the offence one that is listed in the Sex Offenders Act 1997, so that anyone convicted of this offence in the UK will be subject to the notification requirements under that Act. However, those under 20 who are convicted of the offence of abuse of trust will not have to register. - - - - -
20. *Section 6* includes the offence of abuse of trust as a “sexual offence” listed in section 161(2) of the Powers of Criminal Courts (Sentencing) Act 2000¹ and in section 210A(10) of the Criminal Procedure (Scotland) Act 1995. The courts in England and Wales have a discretion, under sections 58 - 60 of the Crime and Disorder Act 1998, to impose “extended sentences” in respect of such offences. An “extended sentence” under the 1998 Act (which can apply to a person of any age) comprises the normal period of imprisonment and supervision which would apply, followed by an “extension period”, during which the offender continues to be on licence. An extended sentence, including extension period, must remain within the maximum penalty that is available for the offence in question - for abuse of trust, a maximum of 5 years. Section 86-88 of the Crime and Disorder Act 1998 introduced similar provisions for extended sentences in Scotland.
21. *Section 7(2)* provides that, for the purposes of the Scotland Act 1998, the Act shall be treated as a pre-commencement enactment within the meaning of that Act. One effect of this is that, in relation to Scotland, the power to make orders under section 3 is exercisable by the Scottish Ministers within the meaning of that Act.

¹ Section 6(1) of the Act refers to inserting the abuse of trust offence as a “sexual offence” within the meaning of section 31(1) of the Criminal Justice Act 1991. Section 31 of the 1991 Act was repealed by Schedule 12 to the Powers of Criminal Courts (Sentencing) Act 2000 (PCCA). However, paragraph 1(4) of Schedule 11 to the PCCA has the effect of replacing the definition of “sexual offence” in the 1991 Act with a reference to section 161(2) of the PCCA.