

SEXUAL OFFENCES ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Sexual Offences

Section 45: Indecent photographs of persons aged 16 or 17

72. This clause redefines a “child” for the purposes of the Protection of Children Act 1978 (“the 1978 Act”) as a person under 18 years, rather than under 16 years, of age. This change means the offences under that Act of taking, making, permitting to take, distributing, showing, possessing with intent to distribute, and advertising indecent photographs or pseudo-photographs of children will now also be applicable where the photographs concerned are of children of 16 or 17 years of age. The same change applies to the offence of possessing an indecent photograph or pseudo-photograph of a child at section 160 of the Criminal Justice Act 1988 (section 160(4) applies the 1978 Act definition of “child”).
73. However, the clause also creates a number of conditions which if satisfied will mean that the defendant is not guilty of an offence under section 1(1)(a), (b) or (c) of the 1978 Act (provided that the offence charged relates to a photograph and not a pseudo-photograph).
74. The conditions in relation to an offence under section 1(1)(a) of the 1978 Act (taking or making indecent photographs) are as follows:
75. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that at the time of the taking or making of the photograph he and the child were married or living together as partners in an enduring family relationship (section 1A(1)).
76. Secondly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented to the photograph being taken or made, or as to whether the defendant reasonably believed that the child consented (section 1A(4)).
77. Thirdly, the photograph must not be one that shows a person other than the child and the defendant (section 1A(3)).
78. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 1(1)(a) of the 1978 Act. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution also prove that the child did not consent and that the defendant did not reasonably believe that the child consented (section 1A(4)).
79. The conditions in relation to an offence under section 1(1)(b) of the 1978 Act (distributing or showing indecent photographs) are as follows;
80. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over, and that either at the time of distributing or showing it, or at the time of

*These notes refer to the Sexual Offences Act 2003 (c.42)
which received Royal Assent on 20 November 2003*

obtaining it, he and the child were married or living together as partners in an enduring family relationship (section 1A(1) and (2)).

81. Secondly, the photograph must not be one that shows a person other than the child and the defendant (section 1A(3)).
82. If either of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 1(1)(b) of the 1978 Act. But if both the conditions are satisfied, the defendant is not guilty of the offence unless the prosecution prove that the showing or distribution was to a person other than the child (section 1A(5)).
83. The conditions in relation to an offence under section 1(1)(c) of the 1978 Act (being in possession of indecent photographs with a view to their being distributed or shown) are as follows:
84. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that either at the time of his possession of it with a view to distributing or showing it, or at the time when he obtained it, he and the child were married or living together as partners in an enduring family relationship (section 1A(1) and (2)).
85. Secondly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented (or the defendant reasonably believed that the child consented) to the photograph's being in the defendant's possession, and also as to whether the defendant had the photograph in his possession with a view to distributing or showing it to a person other than the child (section 1A(6)).
86. Thirdly, the photograph must not be one that shows a person other than the child and the defendant (section 1A(3)).
87. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 1(1)(c) of the 1978 Act. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution also prove either that the child did not so consent and that the defendant did not reasonably believe that the child so consented, or that the defendant had the photograph in his possession with a view to its being distributed to a person other than the child.
88. Similar provision is made in relation to an offence under section 160 of the Criminal Justice Act 1988 (possession of indecent photograph of a child). The conditions are as follows:
89. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that at the time when he possessed the photograph, or at the time when he obtained it, he and the child were married or living together as partners in an enduring family relationship (section 160A(1) and (2)).
90. Secondly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented to the photograph being in his possession or as to whether the defendant reasonably believed that the child so consented (section 160A(4)).
91. Thirdly, the photograph must not be one that shows a person other than the child and the defendant (section 160A(3)).
92. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 160 of the Criminal Justice Act 1988. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution prove that the child did not consent and that the defendant did not reasonably believe that the child consented (section 160A(4)).