

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – Children

Older Children

Section 39 – Defences in relation to offences against older children

109. This section provides that a defence can be invoked by a person who has criminal proceedings brought against them for an offence against an older child.
110. Subsection (1) provides that an accused person, who has criminal proceedings brought against them for an offence under sections 28 to 37 may make use of a defence in those proceedings that he or she reasonably believed that the older child had attained the age of 16 years at the time the conduct took place.
111. Subsection (2) provides that an accused may not use the defence set out in subsection (1) if he or she has previously been charged by the police with a relevant sexual offence or if there is in force in respect of the accused a Risk of Sexual Harm Order. Subsection (5) provides that a relevant sexual offence is one which is listed in schedule 1. This subsection also defines the term “Risk of Sexual Harm Order.” This definition means that if there is a Risk of Sexual Harm Order in force against a person in Scotland, England, Wales or Northern Ireland, and such a person is charged by the police in Scotland with an offence under sections 28 to 37, the defence of reasonable mistaken belief of age cannot be invoked by that person.
112. Subsections (3) and (4) provide that it shall be a defence to any criminal proceedings relating to the offences in sections 30 to 36 that the difference between the accused’s age and that of the older child did not exceed 2 years. However, this defence is not available to the offences under section 30 where the conduct would constitute an offence under section 37 if both parties were aged 13 to 15.
113. Subsection (6) provides the Scottish Ministers with a power to modify Schedule 1 so as to add an offence against a child which involves sexual conduct, or delete an offence listed there.
114. Subsection (7) provides that a belief that the child was in fact a young child is not a defence to a charge of any of the offences in sections 28 to 37.