

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5 – Abuse of Position of Trust

Section 42 – Sexual abuse of trust

121. **Section 42** creates the offence of “sexual abuse of trust”. Subsection (1) provides that a person commits the offence of sexual abuse of trust if he or she is aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 43 defines what is meant by “a position of trust.”

Section 43 – Positions of trust

122. This section defines “position of trust” for the purposes of the offence of sexual abuse of trust in section 42. Definitions of the terms used in this section are provided in section 44.
123. Subsection (1) states that person A is in a position of trust in relation to person B if any of the five conditions set out in the remainder of the section are fulfilled.
124. Subsection (2) provides that a position of trust is constituted where B is detained in an institution by virtue of an order of a court or under an enactment and A looks after persons under 18 in that institution.
125. Subsection (3) provides that a position of trust is constituted where B resides in accommodation provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 and A looks after persons under 18 in that place.
126. Subsection (4) provides that a position of trust is constituted where B is accommodated in any of the places described in paragraphs (a) to (e) of this subsection and A looks after persons under the age of 18 in that place.
127. Subsection (5) provides that a position of trust is constituted where B is receiving education at a school and A looks after persons under the age of 18 in that school or where B is receiving education in a further or higher education institution and A looks after B in that institution.
128. Subsection (6) provides that a position of trust is constituted if A and B are members of the same household and A has (or had, or fulfils) parental rights or parental responsibilities in respect of B, or if A treats B as a child of A’s family.
129. Subsection (7) provides that A “looks after” a person for the purposes of this section if A cares for, teaches, trains, supervises or is in sole charge of the person, so long as A does so regularly.

Section 44 – Interpretation of section 43

130. This section defines the meaning of certain terms for the purposes of section 43.

Section 45 – Sexual abuse of trust: defences

131. This section provides for the defences which can be invoked by a person who is charged with an offence under section 42 (sexual abuse of trust).
132. Subsection (1)(a) provides that it is a defence if the accused reasonably believed that, at the time the sexual conduct took place, the person with whom it took place (or towards whom it was directed) was aged 18 or over.
133. Subsection (1)(b) provides that it is a defence if the accused reasonably believed, at the time of the sexual conduct, that the person with whom it took place (or towards whom it was directed) was not a person in relation to whom the accused was in a position of trust.
134. Subsection (2)(a) provides that it is a defence for the accused to show that the other party was his or her spouse or civil partner at the time of the conduct they are charged with.
135. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim was in existence immediately before the particular position of trust with the victim was established. This defence has been provided in order that those who were already in a sexual relationship (but who are not married to, or in civil partnership with, each other) at the time that a position of trust arises should be free to continue that relationship while a position of trust persists without committing a criminal offence.
136. Subsection (3) provides that the defences under subsection (2) do not apply where the position of trust is as described in section 32(6). In other words, they do not apply where the position of trust is within a family setting.

Section 46 – Sexual abuse of trust of a mentally disordered person

137. This section creates the offence of “sexual abuse of trust of a mentally disordered person”. The definition of “mental disorder” is provided at section 60. It is the same definition as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.
138. Subsection (1) states that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in a sexual activity with, or directed at, a mentally disordered person.
139. Subsection (2) defines those classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in (or contracted to provide services in, or who manage), a hospital in which a mentally disordered person is receiving medical treatment.
140. Subsection (3) defines the meaning of “providing care services” for the purpose of subsection (2) and provides that the Scottish Ministers may set out further circumstances which fall within this term by order (subject to negative resolution procedure).
141. Subsection (4) defines certain terms used elsewhere in this section.

Section 47 - Sexual abuse of a mentally disordered person: defences

142. This section provides for the defences which can be invoked by a person who is charged with an offence under section 46 (sexual abuse of trust of a mentally disordered person).

*These notes relate to the Sexual Offences (Scotland) Act
2009 (asp 9) which received Royal Assent on 14 July 2009*

143. Subsection (1)(a) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that the person with whom that conduct took place (or towards whom it was directed) did not have a mental disorder.
144. Subsection (1)(b) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that he or she was not a person who fell within any of the classes of person specified in section 46(2).
145. Subsection (2)(a) provides that it is a defence for the accused to show that the victim was his or her spouse or civil partner at the time the sexual conduct in the charge was said to have taken place.
146. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim existed immediately before the time when the accused is considered to have fallen within either of the classes of person specified in section 46(2).