



# Sexual Offences (Scotland) Act 2009

## 2009 asp 9

### PART 4

#### CHILDREN

##### *Young children*

#### **18 Rape of a young child**

If a person (“A”), with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of rape of a young child.

#### **19 Sexual assault on a young child by penetration**

- (1) If a person (“A”), with any part of A’s body or anything else, penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of sexual assault on a young child by penetration.
- (2) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

#### **20 Sexual assault on a young child**

- (1) If a person (“A”) does any of the things mentioned in subsection (2) (“B” being in each case a child who has not attained the age of 13 years), then A commits an offence, to be known as the offence of sexual assault on a young child.
- (2) Those things are, that A—
  - (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
  - (b) intentionally or recklessly touches B sexually,

---

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

---

- (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
  - (d) intentionally or recklessly ejaculates semen onto B,
  - (e) intentionally or recklessly emits urine or saliva onto B sexually.
- (3) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis.

## **21 Causing a young child to participate in a sexual activity**

If a person (“A”) intentionally causes a child (“B”) who has not attained the age of 13 years to participate in a sexual activity, then A commits an offence, to be known as the offence of causing a young child to participate in a sexual activity.

## **22 Causing a young child to be present during a sexual activity**

- (1) If a person (“A”) either—
- (a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”) who has not attained the age of 13 years, or
  - (b) intentionally and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,
- then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.
- (2) The purposes are—
- (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.
- (3) Without prejudice to the generality of subsection (1), the reference—
- (a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
  - (b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

## **23 Causing a young child to look at a sexual image**

- (1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes a child (“B”) who has not attained the age of 13 years to look at a sexual image, then A commits an offence, to be known as the offence of causing a young child to look at a sexual image.
- (2) The purposes are—
- (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.
- (3) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

- (a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
- (b) A's genitals or the genitals of a third person or imaginary person.

## **24 Communicating indecently with a young child etc.**

- (1) If a person (“A”), intentionally and for a purpose mentioned in subsection (3)—
  - (a) sends, by whatever means, a sexual written communication to, or
  - (b) directs, by whatever means, a sexual verbal communication at,a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of communicating indecently with a young child.
- (2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3) causes a child (“B”) who has not attained the age of 13 years to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing a young child to see or hear an indecent communication.
- (3) The purposes are—
  - (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.
- (4) In this section—
  - “written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
  - “verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—
    - (a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
    - (b) a communication by means of sign language.

## **25 Sexual exposure to a young child**

- (1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) exposes A's genitals in a sexual manner to a child (“B”) who has not attained the age of 13 years, with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to a young child.
- (2) The purposes are—
  - (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.

## **26 Voyeurism towards a young child**

- (1) If a person (“A”) does any of the things mentioned in subsections (2) to (5) in relation to a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of voyeurism towards a young child.

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

- (2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.
- (3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.
- (4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.
- [<sup>F1</sup>(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—
- (a) B's genitals or buttocks (whether exposed or covered with underwear), or
  - (b) the underwear covering B's genitals or buttocks,
- in circumstances where the genitals, buttocks or underwear would not otherwise be visible.
- (4B) The fifth thing is that A records an image beneath B's clothing of—
- (a) B's genitals or buttocks (whether exposed or covered with underwear), or
  - (b) the underwear covering B's genitals or buttocks,
- in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.]
- (5) The [<sup>F2</sup>sixth] thing is that A—
- (a) installs equipment, or
  - [<sup>F3</sup>(b) constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).]
- (6) The purposes referred to in subsection (2) are—
- (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.
- (7) The purposes referred to in subsections (3) [<sup>F4</sup>, (4), (4A) and (4B)] are—
- (a) obtaining sexual gratification (whether for A or C),
  - (b) humiliating, distressing or alarming B.
- (8) Section 10 applies for the purposes of this section as it applies for the purposes of section 9 (the references in that section to section 9(3) [<sup>F5</sup>, (4A)] and (5) being construed as references to subsections (3) [<sup>F6</sup>, (4A)] and (5) of this section).

#### Textual Amendments

- F1** S. 26(4A)(4B) inserted (1.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), [ss. 43\(4\)\(a\)](#), 206; S.S.I. 2010/357, [art. 2\(b\)](#)
- F2** Word in s. 26(5) substituted (1.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), [ss. 43\(4\)\(b\)\(i\)](#), 206; S.S.I. 2010/357, [art. 2\(b\)](#)
- F3** S. 26(5)(b) substituted (1.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), [ss. 43\(4\)\(b\)\(ii\)](#), 206; S.S.I. 2010/357, [art. 2\(b\)](#)

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

- F4** Words in s. 26(7) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(4)(c), 206; S.S.I. 2010/357, art. 2(b)
- F5** Word in s. 26(8) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(4)(d), 206; S.S.I. 2010/357, art. 2(b)
- F6** Word in s. 26(8) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(4)(d), 206; S.S.I. 2010/357, art. 2(b)

## **27 Belief that child had attained the age of 13 years**

It is not a defence to a charge in proceedings under any of sections 18 to 26 that A believed that B had attained the age of 13 years.

### *Older children*

## **28 Having intercourse with an older child**

If a person (“A”), who has attained the age of 16 years, with A's penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”), who—

- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of having intercourse with an older child.

## **29 Engaging in penetrative sexual activity with or towards an older child**

- (1) If a person (“A”), who has attained the age of 16 years, with any part of A's body or anything else penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who—

- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in penetrative sexual activity with or towards an older child.

- (2) Without prejudice to the generality of subsection (1), the reference in that paragraph to penetration with any part of A's body is to be construed as including a reference to penetration with A's penis.

## **30 Engaging in sexual activity with or towards an older child**

- (1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsection (2), “B” being in each case a child who—

- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in sexual activity with or towards an older child.

- (2) Those things are, that A—

- (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,

---

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

---

- (b) intentionally or recklessly touches B sexually,
  - (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
  - (d) intentionally or recklessly ejaculates semen onto B,
  - (e) intentionally or recklessly emits urine or saliva onto B sexually.
- (3) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis.

### **31 Causing an older child to participate in a sexual activity**

If a person (“A”), who has attained the age of 16 years, intentionally causes a child (“B”), who—

- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

to participate in a sexual activity, then A commits an offence, to be known as the offence of causing an older child to participate in a sexual activity.

### **32 Causing an older child to be present during a sexual activity**

- (1) If a person (“A”), who has attained the age of 16 years either—
- (a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”), who—
    - (i) has attained the age of 13 years, but
    - (ii) has not attained the age of 16 years, or
  - (b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,
- then A commits an offence, to be known as the offence of causing an older child to be present during a sexual activity.
- (2) The purposes are—
- (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.
- (3) Without prejudice to the generality of subsection (1), the reference—
- (a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
  - (b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

### **33 Causing an older child to look at a sexual image**

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) causes a child (“B”), who—
- (a) has attained the age of 13 years, but
  - (b) has not attained the age of 16 years,

---

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

---

to look at a sexual image, then A commits an offence, to be known as the offence of causing an older child to look at a sexual image.

- (2) The purposes are—
- (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.
- (3) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—
- (a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
  - (b) A's genitals or the genitals of a third person or imaginary person.

### **34 Communicating indecently with an older child etc.**

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, a child (“B”) who—
- (a) has attained the age of 13 years, but
  - (b) has not attained the age of 16 years,
- then A commits an offence, to be known as the offence of communicating indecently with an older child.
- (2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) who is a child described in paragraphs (a) and (b) of subsection (1) to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing an older child to see or hear an indecent communication.
- (3) The purposes are—
- (a) obtaining sexual gratification,
  - (b) humiliating, distressing or alarming B.
- (4) In this section—
- “written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and
- “verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—
- (a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
  - (b) a communication by means of sign language.

### **35 Sexual exposure to an older child**

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) exposes A's genitals in a sexual manner to a child (“B”) who—

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

(a) has attained the age of 13 years, but  
 (b) has not attained the age of 16 years,  
 with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to an older child.

- (2) The purposes are—  
 (a) obtaining sexual gratification,  
 (b) humiliating, distressing or alarming B.

### 36 Voyeurism towards an older child

(1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsections (2) to (5) in relation to a child (“B”) who—  
 (a) has attained the age of 13 years, but  
 (b) has not attained the age of 16 years,  
 then A commits an offence, to be known as the offence of voyeurism towards an older child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.

(3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

[<sup>F7</sup>(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—

- (a) B's genitals or buttocks (whether exposed or covered with underwear), or  
 (b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

- (a) B's genitals or buttocks (whether exposed or covered with underwear), or  
 (b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.]

(5) The [<sup>F8</sup>sixth] thing is that A—  
 (a) installs equipment, or

- [<sup>F9</sup>(b) constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).]

(6) The purposes referred to in subsection (2) are—

- (a) obtaining sexual gratification,



*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

- (b) humiliating, distressing or alarming B.
- (7) The purposes referred to in subsections (3) [<sup>F10</sup>, (4), (4A) and (4B)] are—
  - (a) obtaining sexual gratification (whether for A or C),
  - (b) humiliating, distressing or alarming B.
- (8) Section 10 applies for the purposes of this section as it applies for the purposes of section 9 (the references in that section to section 9(3) [<sup>F11</sup>, (4A)] and (5) being construed as references to subsections (3) [<sup>F12</sup>, (4A)] and (5) of this section).

#### Textual Amendments

- F7** S. 36(4A)(4B) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(a), 206; S.S.I. 2010/357, art. 2(b)
- F8** Word in s. 36(5) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(b)(i), 206; S.S.I. 2010/357, art. 2(b)
- F9** S. 36(5)(b) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(b)(ii), 206; S.S.I. 2010/357, art. 2(b)
- F10** Words in s. 36(7) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(c), 206; S.S.I. 2010/357, art. 2(b)
- F11** Word in s. 36(8) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(d)(i), 206; S.S.I. 2010/357, art. 2(b)
- F12** Word in s. 36(8) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(b)(ii), 206; S.S.I. 2010/357, art. 2(b)

### 37 Older children engaging in sexual conduct with each other

- (1) If a child (“A”), being a child mentioned in subsection (2), does any of the things mentioned in subsection (3), “B” being in each case a child mentioned in subsection (2), then A commits an offence, to be known as the offence of engaging while an older child in sexual conduct with or towards another older child.
- (2) The child is a child who—
  - (a) has attained the age of 13 years, but
  - (b) has not attained the age of 16 years.
- (3) The things are that A—
  - (a) penetrates sexually, with A's penis and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
  - (b) intentionally or recklessly touches the vagina, anus or penis of B sexually with A's mouth.
- (4) In the circumstances specified in subsection (1), if B engages by consent in the conduct in question, then B commits an offence, to be known as the offence of engaging while an older child in consensual sexual conduct with another older child.
- (5) In paragraph (b) of subsection (3), the reference to A's mouth is to be construed as including a reference to A's tongue or teeth.

### 38 Penetration and consent for the purposes of section 37

- (1) This section applies for the purposes of section 37.

---

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

---

- (2) Penetration is a continuing act from entry until withdrawal of whatever is intruded.
- (3) “Consent” means free agreement (and related expressions are to be construed accordingly).
- (4) Without prejudice to the generality of subsection (3), free agreement to conduct is absent in the circumstances set out in section 13(2) (references in that section to A and B being construed in accordance with section 37).
- (5) A person is incapable, while asleep or unconscious, of consenting to any conduct.
- (6) Consent to conduct does not of itself imply consent to any other conduct.
- (7) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.
- (8) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

### **39 Defences in relation to offences against older children**

- (1) It is a defence to a charge in proceedings—
  - (a) against A under any of sections 28 to 37(1) that A reasonably believed that B had attained the age of 16 years,
  - (b) against B under section 37(4) that B reasonably believed that A had attained the age of 16 years.
- (2) But—
  - (a) the defence under subsection (1)(a) is not available to A—
    - (i) if A has previously been charged by the police with a relevant sexual offence, <sup>F13</sup> . . .
    - [<sup>F14</sup>(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or]
    - (ii) if there is in force in respect of A a risk of sexual harm order,
  - (b) the defence under subsection (1)(b) is not available to B—
    - (i) if B has previously been charged by the police with a relevant sexual offence, <sup>F15</sup> . . .
    - [<sup>F16</sup>(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or]
    - (ii) if there is in force in respect of B a risk of sexual harm order.
- (3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A's age and B's age did not exceed 2 years.
- (4) Those sections are—
  - (a) section 30(2)(a), but not in so far as the charge is founded on—
    - (i) penetration of B's vagina, anus or mouth with A's penis,
    - (ii) penetration of B's vagina or anus with A's mouth, tongue or teeth,
  - (b) section 30(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving—
    - (i) B's vagina, anus or penis being touched sexually by A's mouth,

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

- (ii) A's vagina, anus or mouth being penetrated by B's penis,
  - (iii) A's vagina, anus or penis being touched sexually by B's mouth,
  - (c) section 30(2)(d) [<sup>F17</sup>or (e)],
  - (d) any of sections 31 to 36.
- (5) In paragraphs (a) and (b) of subsection (2)—
- (a) “a relevant sexual offence” means an offence listed in schedule 1,
  - [<sup>F18</sup>(aa) “a previous conviction for a relevant foreign offence” means a previous conviction by a court in a member State of the European Union other than the United Kingdom for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,]
  - (b) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c. 42).
- [<sup>F19</sup>(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.
- (5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—
- (a) regardless of the age of the victim, or
  - (b) only if committed against a person under an age other than 16 years.]
- (6) The Scottish Ministers may by order modify schedule 1 so as to add an offence against a child which involves sexual conduct or delete an offence listed there.
- (7) It is not a defence to a charge in—
- (a) proceedings under any of sections 28 to 37(1) against A that A believed that B had not attained the age of 13 years,
  - (b) proceedings under section 37(4) against B that B believed that A had not attained the age of 13 years.

#### Textual Amendments

- F13** Word following s. 39(2)(a) repealed (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(2\)\(a\)\(i\)](#); S.S.I. 2010/413, [art. 2](#), Sch.
- F14** S. 39(2)(a)(ia) inserted (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(2\)\(a\)\(ii\)](#); S.S.I. 2010/413, [art. 2](#), Sch.
- F15** Word following s. 39(2)(b) repealed (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(2\)\(b\)\(i\)](#); S.S.I. 2010/413, [art. 2](#), Sch.
- F16** S. 39(2)(b)(ia) inserted (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(2\)\(b\)\(ii\)](#); S.S.I. 2010/413, [art. 2](#), Sch.
- F17** Word. in s. 39(4)(c) inserted (1.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), [ss. 44](#), 206; S.S.I. 2010/357, [art. 2\(b\)](#)
- F18** S. 39(5)(aa) inserted (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(3\)](#); S.S.I. 2010/413, [art. 2](#), Sch.
- F19** S. 39(5A)(5B) inserted (13.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss 71(1), 206, [Sch. 4 para. 13\(4\)](#); S.S.I. 2010/413, [art. 2](#), Sch.

---

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

---

### *General*

#### **40 Special provision as regards failure to establish whether child has or has not attained certain ages**

- (1) Deeming provision 1 applies to a trial where—
  - (a) A is charged with an offence under any of sections 28 to 36 or 37(1),
  - (b) there is a failure to establish beyond reasonable doubt that B was a child who had attained the age of 13 years at the relevant time, and
  - (c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had not attained the age of 16 years at the time.
- (2) Deeming provision 2 applies to a trial where—
  - (a) B is charged with an offence under section 37(4),
  - (b) there is a failure to establish beyond reasonable doubt that A was a child who had attained the age of 13 years at the relevant time, and
  - (c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had not attained the age of 16 years at the time.
- (3) Deeming provision 3 applies to a trial where—
  - (a) A is charged with an offence under section 37(1),
  - (b) there is a failure to establish beyond reasonable doubt that A was a child who had not attained the age of 16 years at the relevant time, and
  - (c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that A had attained the age of 13 years at the time.
- (4) Deeming provision 4 applies to a trial where—
  - (a) B is charged with an offence under section 37(4),
  - (b) there is a failure to establish beyond reasonable doubt that B was a child who had not attained the age of 16 years at the relevant time, and
  - (c) the court or, in the case of a trial of an indictment, the jury is satisfied it is established beyond reasonable doubt that B had attained the age of 13 years at the time.
- (5) Where any of the deeming provisions apply, references in sections 28 to 37 to A or B having or not having attained a particular age are to be construed in accordance with this section and section 41.
- (6) In this section and section 41, the “relevant time” is when the conduct to which the proceedings relate occurred.

#### **41 Special provision as regards age: deeming provisions**

The deeming provisions are—

---

*Deeming provision 1*

B is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

---

*Status: Point in time view as at 13/12/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4. (See end of Document for details)*

---

*Deeming provision 2*

A is to be deemed for the purposes of the proceedings to be a person who has attained the age of 13 years at the relevant time.

*Deeming provision 3*

A is to be deemed for the purposes of the proceedings to be a child who has not attained the age of 16 years at the relevant time.

*Deeming provision 4*

B is to be deemed for the purposes of the proceedings to be a person who has not attained the age of 16 years at the relevant time.

---

**Status:**

Point in time view as at 13/12/2010.

**Changes to legislation:**

There are currently no known outstanding effects for the Sexual Offences (Scotland) Act 2009, Part 4.