



# Sexual Offences (Scotland) Act 2009

## 2009 asp 9

### PART 5

#### ABUSE OF POSITION OF TRUST

##### *Children*

#### **42 Sexual abuse of trust**

If a person (“A”) who has attained the age of 18 years—

- (a) intentionally engages in a sexual activity with or directed towards another person (“B”) who is under 18, and
- (b) is in a position of trust in relation to B,

then A commits an offence, to be known as the offence of sexual abuse of trust.

#### **43 Positions of trust**

- (1) For the purposes of section 42, a person (“A”) is in a position of trust in relation to another person (“B”) if any of the five conditions set out below is fulfilled.
- (2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after persons under 18 in that institution.
- (3) The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 (c. 36) and A looks after persons under 18 in that place.
- (4) The third condition is that B is accommodated and cared for in—
  - (a) a hospital,
  - (b) accommodation provided by an independent health care service,
  - (c) accommodation provided by a care home service,
  - (d) a residential establishment, or
  - (e) accommodation provided by a school care accommodation service or a secure accommodation service,

and A looks after persons under 18 in that place.

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- (5) The fourth condition is that B is receiving education at—
- (a) a school and A looks after persons under 18 in that school, or
  - (b) a further or higher education institution and A looks after B in that institution.
- (6) The fifth condition is that A—
- (a) has any parental responsibilities or parental rights in respect of B,
  - (b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
  - (c) had any such responsibilities or rights but no longer has such responsibilities or rights, or
  - (d) treats B as a child of A’s family,
- and B is a member of the same household as A.
- (7) A looks after a person for the purposes of this section if A regularly cares for, teaches, trains, supervises, or is in sole charge of the person.
- (8) The Scottish Ministers may by order modify this section (other than this subsection) and section 44 so as to add, delete or amend a condition.

#### **44 Interpretation of section 43**

In section 43—

“care home service” has the meaning given by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8) (“the 2001 Act”),

“further or higher education institution” means a body listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (asp 6),

“hospital” means a health service hospital (as defined in section 108(1) of the National Health Service (Scotland) Act 1978 (c. 29)),

“independent health care service” has the meaning given by section 2(5) of the 2001 Act,

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39),

“parental responsibilities” and “parental rights” have the same meanings as in the Children (Scotland) Act 1995 (c. 36),

“residential establishment” has the meaning given by section 93(1)(a) of that Act of 1995,

“school” has the same meaning as in the Education (Scotland) Act 1980 (c. 44),

“school care accommodation service” has the meaning given by section 2(4) of the 2001 Act, and

“secure accommodation service” has the meaning given by section 2(9) of the 2001 Act.

#### **45 Sexual abuse of trust: defences**

- (1) It is a defence to a charge in proceedings under section 42 that A reasonably believed—
- (a) that B had attained the age of 18, or
  - (b) that B was not a person in relation to whom A was in a position of trust.
- (2) It is a defence to a charge in proceedings under section 42—
- (a) that B was A’s spouse or civil partner, or

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- (b) that immediately before the position of trust came into being, a sexual relationship existed between A and B.
- (3) Subsection (2) does not apply if A was in a position of trust in relation to B by virtue of section 43(6).

#### *Mentally disordered persons*

### **46 Sexual abuse of trust of a mentally disordered person**

- (1) If a person (“A”)—
- (a) intentionally engages in a sexual activity with or directed towards a mentally disordered person (“B”), and
  - (b) is a person mentioned in subsection (2),
- then A commits an offence, to be known as sexual abuse of trust of a mentally disordered person.
- (2) Those persons are—
- (a) a person providing care services to B,
  - (b) a person who—
    - (i) is an individual employed in, or contracted to provide services in or to, or
    - (ii) not being the Scottish Ministers, is a manager of, a hospital, independent health care service or state hospital in which B is being given medical treatment.
- (3) References in this section to the provision of care services are references to anything done by way of such services—
- (a) by,
  - (b) by an employee of, or
  - (c) in the course of a service provided or supplied by,
- a care service, whether by virtue of a contract of employment or any other contract or in such other circumstances as may be specified in an order made by the Scottish Ministers.
- (4) In this section—
- “care service” has the meaning given by subsection (1)(a), (b), (e), (g), (h), (k) and (n) as read with subsections (2), (3), (6), (9), (10), (16) and (27) of section 2 of the Regulation of Care (Scotland) Act 2001 (asp 8),
  - “hospital” and “independent health care service” have the meanings given in section 44, and
  - “state hospital” means a hospital provided under section 102(1) of the National Health Service (Scotland) Act 1978 (c. 29).

### **47 Sexual abuse of trust of a mentally disordered person: defences**

- (1) It is a defence to a charge in proceedings under section 46 that A reasonably believed—
- (a) that B did not have a mental disorder, or
  - (b) that A was not a person specified in section 46(2).

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- (2) It is a defence to a charge in proceedings under section 46—
- (a) that B was A's spouse or civil partner, or
  - (b) in a case where A was—
    - (i) a person specified in section 46(2)(a), that immediately before A began to provide care services to B, a sexual relationship existed between A and B,
    - (ii) a person specified in section 46(2)(b), that immediately before B was admitted to the hospital (or other establishment) referred to in that provision or (where B has been admitted to that establishment more than once) was last admitted to it, such a relationship existed.