



# Sexual Offences (Scotland) Act 2009

## 2009 asp 9

### PART 1

#### RAPE ETC.

##### *Rape*

## 1 Rape

- (1) If a person (“A”), with A’s penis—
  - (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.
- (2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3).
- (3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.
- (4) In this Act—

“penis” includes a surgically constructed penis if it forms part of A, having been created in the course of surgical treatment, and

“vagina” includes—

  - (a) the vulva, and
  - (b) a surgically constructed vagina (together with any surgically constructed vulva), if it forms part of B, having been created in the course of such treatment.

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

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### Commencement Information

- II** S. 1 wholly in force; s. 1(4) in force at Royal Assent see s. 62(2); s. 1 otherwise in force at 1.12.2010 by S.S.I. 2010/357, art. 2(a)

## *Sexual assault by penetration*

### 2 Sexual assault by penetration

- (1) If a person (“A”), with any part of A's body or anything else—
- (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
- penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.
- (2) For the purposes of this section, penetration is a continuing act from entry to withdrawal of whatever is intruded; but this subsection is subject to subsection (3).
- (3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.
- (4) 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.

## *Sexual assault and other sexual offences*

### 3 Sexual assault

- (1) If a person (“A”)—
- (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
- does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.
- (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,
  - (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) For the purposes of paragraph (a) of subsection (2), penetration is a continuing act from entry until withdrawal of whatever is intruded; but this subsection is subject to subsection (4).

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- (4) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (3) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.
- (5) 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.

#### **4 Sexual coercion**

If a person (“A”)—

- (a) without another person (“B”) consenting to participate in a sexual activity, and
- (b) without any reasonable belief that B consents to participating in that activity, intentionally causes B to participate in that activity, then A commits an offence, to be known as the offence of sexual coercion.

#### **5 Coercing a person into being present during a sexual activity**

(1) If a person (“A”)—

- (a) without another person (“B”) consenting, and
- (b) without any reasonable belief that B consents,

either intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of B or intentionally and for a purpose mentioned in that subsection 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 coercing a person into being 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 in that subsection—

- (a) 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) 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.

#### **6 Coercing a person into looking at a sexual image**

(1) If a person (“A”) intentionally and for a purpose mentioned in subsection (2) causes another person (“B”)—

- (a) without B consenting, and
- (b) without any reasonable belief that B consents,

to look at a sexual image, then A commits an offence, to be known as the offence of coercing a person into looking at a sexual image.

(2) The purposes are—

- (a) obtaining sexual gratification,

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(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.

## 7 Communicating indecently etc.

(1) If a person (“A”), 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, another person (“B”)—

(a) without B consenting to its being so sent or directed, and

(b) without any reasonable belief that B consents to its being so sent or directed, then A commits an offence, to be known as the offence of communicating indecently.

(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 another person (“B”) to see or hear, by whatever means, a sexual written communication or sexual verbal communication—

(a) without B consenting to seeing or as the case may be hearing it, and

(b) without any reasonable belief that B consents to seeing or as the case may be hearing it,

then A commits an offence, to be known as the offence of causing a person 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.

## 8 Sexual exposure

(1) If a person (“A”)—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

intentionally and for a purpose mentioned in subsection (2), exposes A's genitals in a sexual manner to B with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure.

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

## 9 Voyeurism

- (1) A person (“A”) commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

- (2) The first thing is that A—
- (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
- for a purpose mentioned in subsection (6) observes B doing a private act.

- (3) The second thing is that A—
- (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
- 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—
- (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
- 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—
- (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
- 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 B's genitals or buttocks (whether exposed or covered with underwear) or 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—
- (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
- records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or 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—

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- (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.

#### Textual Amendments

- F1** S. 9(4A)(4B) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(2)(a), 206; S.S.I. 2010/357, art. 2(b)
- F2** Word in s. 9(5) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(2)(b)(i), 206; S.S.I. 2010/357, art. 2(b)
- F3** S. 9(5)(b) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(2)(b)(ii), 206; S.S.I. 2010/357, art. 2(b)
- F4** Words in s. 9(7) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(2)(c), 206; S.S.I. 2010/357, art. 2(b)

## 10 Interpretation of section 9

- (1) For the purposes of section 9, a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—
- (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
  - (b) the person is using a lavatory, or
  - (c) the person is doing a sexual act that is not of a kind ordinarily done in public.
- (2) For the purposes of section 9(3) [<sup>F5</sup> and (4A)], operating equipment includes enabling or securing its activation by another person without that person's knowledge.
- (3) In section 9(5), “structure” includes a tent, vehicle or vessel or other temporary or movable structure.

#### Textual Amendments

- F5** Words in s. 10(2) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(3), 206; S.S.I. 2010/357, art. 2(b)

## 11 Administering a substance for sexual purposes

- (1) If a person (“A”) intentionally administers a substance to, or causes a substance to be taken by, another person (“B”)—
- (a) without B knowing, and
  - (b) without any reasonable belief that B knows,
- and does so for the purpose of stupefying or overpowering B, so as to enable any person to engage in a sexual activity which involves B, then A commits an offence, to be known as the offence of administering a substance for sexual purposes.
- (2) For the purposes of subsection (1), if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both)—

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- (a) of a substantially lesser strength, or
  - (b) in a substantially lesser quantity,
- than it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded.

## PART 2

### CONSENT AND REASONABLE BELIEF

#### *Consent*

#### **12 Meaning of “consent” and related expressions**

In Parts 1 and 3, “consent” means free agreement (and related expressions are to be construed accordingly).

#### **13 Circumstances in which conduct takes place without free agreement**

- (1) For the purposes of section 12, but without prejudice to the generality of that section, free agreement to conduct is absent in the circumstances set out in subsection (2).
- (2) Those circumstances are—
  - (a) where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it,
  - (b) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,
  - (c) where B agrees or submits to the conduct because B is unlawfully detained by A,
  - (d) where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct,
  - (e) where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B, or
  - (f) where the only expression or indication of agreement to the conduct is from a person other than B.
- (3) References in this section to A and to B are to be construed in accordance with sections 1 to 9.

#### **14 Consent: capacity while asleep or unconscious**

- (1) This section applies in relation to sections 1 to 9.
- (2) A person is incapable, while asleep or unconscious, of consenting to any conduct.

#### **15 Consent: scope and withdrawal**

- (1) This section applies in relation to sections 1 to 9.
- (2) Consent to conduct does not of itself imply consent to any other conduct.

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- (3) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.
- (4) 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.

*Reasonable belief*

**16 Reasonable belief**

In determining, for the purposes of Part 1, whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were.

**PART 3**

MENTALLY DISORDERED PERSONS

*Mentally disordered persons*

**17 Capacity to consent**

- (1) This section applies in relation to sections 1 to 9.
- (2) A mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to do one or more of the following—
  - (a) understand what the conduct is,
  - (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place),
  - (c) communicate any such decision.
- (3) In this Act, “mental disorder” has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (and related expressions are to be construed accordingly).

**Commencement Information**

**12** S. 17 wholly in force; s. 17(3) in force at Royal Assent see s. 62(2); s. 1 otherwise in force at 1.12.2010 by S.S.I. 2010/357, art. 2(a)



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## 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,
  - (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.

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## **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—
- (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,

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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.

(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>F6</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.

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- (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>F7</sup>sixth] thing is that A—
- (a) installs equipment, or
  - [<sup>F8</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>F9</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>F10</sup>, (4A)] and (5) being construed as references to subsections (3) [<sup>F11</sup>, (4A)] and (5) of this section).

#### Textual Amendments

- F6** 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)
- F7** 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)
- F8** 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)
- F9** 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)
- F10** 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)
- F11** 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,
- (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.

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

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### **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,

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—
- (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—

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- (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>F12</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>F13</sup>sixth] thing is that A—
- (a) installs equipment, or
  - [<sup>F14</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>F15</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>F16</sup>, (4A)] and (5) being construed as references to subsections (3) [<sup>F17</sup>, (4A)] and (5) of this section).

#### Textual Amendments

- F12** 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)



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- F13** 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)**
- F14** 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)**
- F15** 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)**
- F16** 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)**
- F17** 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.
- (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.

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- (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>F18</sup> . . .
    - [<sup>F19</sup>(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16 [<sup>F20</sup>and the court before which the charge is brought considers it is appropriate for that conviction to have that effect], 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>F21</sup> . . .
    - [<sup>F22</sup>(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16 [<sup>F23</sup>and the court before which the charge is brought considers it is appropriate for that conviction to have that effect], 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,
    - (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>F24</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>F25</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<sup>F26</sup>... for an

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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>F27</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

- F18** 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.
- F19** 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.
- F20** Words in s. 39(2)(a)(ia) inserted (31.12.2020) by [The Criminal Justice \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2020 \(S.S.I. 2020/339\)](#), regs. 1(3), **14(a)** (with reg. 16)
- F21** 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.
- F22** 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.
- F23** Words in s. 39(2)(b)(ia) inserted (31.12.2020) by [The Criminal Justice \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2020 \(S.S.I. 2020/339\)](#), regs. 1(3), **14(a)** (with reg. 16)
- F24** 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)**
- F25** 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.
- F26** Words in s. 39(5)(aa) omitted (31.12.2020) by virtue of [The Criminal Justice \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2020 \(S.S.I. 2020/339\)](#), regs. 1(3), **14(b)** (with reg. 16)
- F27** 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.

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### *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—

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*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.

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

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<i>Deeming provision 2</i>	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.
<i>Deeming provision 3</i>	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.
<i>Deeming provision 4</i>	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.

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## 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.
- (5) The fourth condition is that B is receiving education at—

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- (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 [<sup>F28</sup>paragraph 2 of schedule 12 to the Public Services Reform (Scotland) Act 2010 (asp 8) (“the 2010 Act”)],

“further or higher education institution” means a body listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (asp 6) [<sup>F29</sup>or a college of further education which is assigned to a regional strategic body by order made under section 7C(1) of that Act],

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

[<sup>F30</sup>“independent health care service” means any of the following—

- (a) an independent hospital;
- (b) a private psychiatric hospital;
- (c) an independent clinic; or
- (d) an independent medical agency,

as each of those terms is defined in section 10F(2) of the National Health Service (Scotland) Act 1978 (c.29), . ]

“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 [<sup>F31</sup>paragraph 3 of schedule 12 to the 2010 Act], and

“secure accommodation service” has the meaning given by [<sup>F32</sup>paragraph 6 of schedule 12 to the 2010 Act].

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#### Textual Amendments

- F28** Words in s. 44 substituted (1.4.2011) by [The Public Services Reform \(Scotland\) Act 2010 \(Consequential Modifications\) Order 2011 \(S.S.I. 2011/211\)](#), art. 1, **Sch. 1 para. 20(2)(a)**
- F29** Words in s. 44 inserted (31.3.2015) by [The Post-16 Education \(Scotland\) Act 2013 \(Modification of Legislation\) Order 2015 \(S.S.I. 2015/153\)](#), art. 1, **Sch. para. 5**
- F30** Definition in s. 44 substituted (1.4.2011) by [The Public Services Reform \(Scotland\) Act 2010 \(Consequential Modifications\) Order 2011 \(S.S.I. 2011/211\)](#), art. 1, **Sch. 2 para. 11**
- F31** Words in s. 44 substituted (1.4.2011) by [The Public Services Reform \(Scotland\) Act 2010 \(Consequential Modifications\) Order 2011 \(S.S.I. 2011/211\)](#), art. 1, **Sch. 1 para. 20(2)(b)**
- F32** Words in s. 44 substituted (1.4.2011) by [The Public Services Reform \(Scotland\) Act 2010 \(Consequential Modifications\) Order 2011 \(S.S.I. 2011/211\)](#), art. 1, **Sch. 1 para. 20(2)(c)**

#### 45 Sexual abuse of trust: defences

- (1) It is a defence to a charge in proceedings under section 42 that A reasonably believed—
- that B had attained the age of 18, or
  - 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—
- that B was A's spouse or civil partner, or
  - 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”)—
- intentionally engages in a sexual activity with or directed towards a mentally disordered person (“B”), and
  - 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 person providing care services to B,
  - a person who—
    - is an individual employed in, or contracted to provide services in or to, or
    - 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—
- by,

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- (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—

[<sup>F33</sup>“care service” has the meaning given by subsection (1)(a), (b), (d), (f), (g), (j) and (m) of section 47 of the [Public Services Reform \(Scotland\) Act 2010 \(asp 8\)](#) as read with paragraphs 1, 2, 4, 6, 7, 11 and 19 of schedule 12 to that Act,]

“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).

#### Textual Amendments

**F33** Definition in s. 46(4) substituted (1.4.2011) by [The Public Services Reform \(Scotland\) Act 2010 \(Consequential Modifications\) Order 2011 \(S.S.I. 2011/211\)](#), art. 1, [Sch. 1 para. 20\(3\)](#)

#### 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).
- (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.

### PART 6

#### PENALTIES

##### *Penalties*

#### 48 Penalties

- (1) A person guilty of an offence mentioned in the first column of schedule 2 is liable—
- (a) on summary conviction, to the penalty mentioned in the third column,
  - (b) on conviction on indictment, to the penalty mentioned in the fourth column.



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

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- (2) Where an individual is convicted on indictment of rape, sexual assault by penetration, rape of a young child or sexual assault on a young child by penetration, a penalty of imprisonment without a fine may be imposed, but not a penalty of a fine alone; and the power of the court in section 199(2)(b) of the Criminal Procedure (Scotland) Act 1995 (c. 46) (to substitute a fine for imprisonment) is not available.
- (3) Where—
- (a) a body corporate,
  - (b) a Scottish partnership, or
  - (c) an unincorporated association other than a Scottish partnership,
- is convicted on indictment of an offence specified in subsection (2), a penalty of a fine alone may be imposed.

## PART 7

### MISCELLANEOUS AND GENERAL

#### *Miscellaneous*

#### **49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36**

- (1) For the purposes of sections 5 to 9, 22 to 26 and 32 to 36, A's purpose was—
- (a) obtaining sexual gratification, or
  - (b) humiliating, distressing or alarming B,
- if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.
- (2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

#### **50 Power to convict for offence other than that charged**

- (1) If, in a trial—
- (a) on an indictment for an offence mentioned in the first column of schedule 3 the jury are not satisfied that the accused committed the offence charged but are satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, they may, or
  - (b) in summary proceedings for an offence mentioned in the first column of that schedule the court is not satisfied that the accused committed the offence charged but is satisfied that the accused committed the alternative offence (or as the case may be one of the alternative offences) mentioned in the third column, it may,
- acquit the accused of the charge but find the accused guilty of the alternative offence in respect of which so satisfied (the accused then being liable to be punished accordingly).

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

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- (2) Where either of conditions 1 or 2 apply in a trial, the court or jury may acquit the accused of the charge but find the accused guilty of the alternative older child offence (the accused then being liable to be punished accordingly).
- (3) Condition 1 is that—
- (a) A is charged with an offence under sections 18 to 26, and
  - (b) but for a failure to establish beyond reasonable doubt that B had attained the age of 13 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—
    - (i) having intercourse with an older child,
    - (ii) engaging in penetrative sexual activity with or towards an older child,
    - (iii) engaging in sexual activity with or towards an older child,
    - (iv) causing an older child to participate in a sexual activity,
    - (v) causing an older child to be present during a sexual activity,
    - (vi) causing an older child to look at a sexual image,
    - (vii) communicating indecently with an older child,
    - (viii) causing an older child to see or hear an indecent communication,
    - (ix) sexual exposure to an older child,
    - (x) voyeurism towards an older child,
    - (xi) engaging while an older child in sexual conduct with or towards another older child,
    - (xii) engaging while an older child in consensual sexual conduct with another older child.
- (4) Condition 2 is that—
- (a) A is charged with an offence under section 28, 29 or 30, and
  - (b) but for a failure to establish beyond reasonable doubt that A had not attained the age of 16 years at the relevant time, a court or jury would, by virtue of subsection (1), find that A committed an offence (“the alternative older child offence”) of—
    - (i) engaging while an older child in sexual conduct with or towards another older child,
    - (ii) engaging while an older child in consensual sexual conduct with another older child.
- (5) In this section, the “relevant time” is when the conduct to which the proceedings relate occurred.
- (6) A reference in this section to an offence includes a reference to—
- (a) an attempt to commit,
  - (b) incitement to commit,
  - (c) counselling or procuring the commission of, and
  - (d) involvement art and part in,
- an offence.

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

## 51 Exceptions to inciting or being involved art and part in offences under Part 4 or 5

A person (“X”) is not guilty of inciting, or being involved art and part in, an offence under Part 4 or 5 if, as regards another person (“Y”), X acts—

- (a) for the purpose of—
  - (i) protecting Y from sexually transmitted infection,
  - (ii) protecting the physical safety of Y,
  - (iii) preventing Y from becoming pregnant, or
  - (iv) promoting Y’s emotional well-being by the giving of advice, and
- (b) not for the purpose of—
  - (i) obtaining sexual gratification,
  - (ii) humiliating, distressing or alarming Y, or
  - (iii) causing or encouraging the activity constituting the offence or Y’s participation in it.

## 52 Common law offences

For all purposes not relating to offences committed before the coming into force of this section—

- (a) the common law offences of—
  - (i) rape,
  - (ii) clandestine injury to women,
  - (iii) lewd, indecent or libidinous practice or behaviour, and
  - (iv) sodomy,are abolished, and
- (b) without prejudice to paragraph (a), in so far as the provisions of this Act regulate any conduct they replace any rule of law regulating that conduct.

### Commencement Information

**I3** S. 52 in force at 16.12.2013 by [S.S.I. 2013/341](#), [art. 2\(a\)](#)

## 53 Continuity of law on sexual offences

(1) This section applies where, in any trial—

- (a) the accused is charged in respect of the same conduct both with an offence under this Act (“the new offence”) and with an offence specified in subsection (2) (“the existing offence”),
- (b) there is a failure to establish beyond reasonable doubt that—
  - (i) the time when the conduct took place was after the coming into force of the provision providing for the new offence, and
  - (ii) the time when the conduct took place was before the abolishment or replacement of or, as the case may be, the coming into force of the repeal of the enactment providing for, the existing offence, and
- (c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.

(2) The offences referred to in subsection (1)(a) are—

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

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- (a) rape (at common law),
  - (b) clandestine injury to women,
  - (c) lewd, indecent or libidinous practice or behaviour,
  - (d) any other common law offence which is replaced by an offence under this Act,
  - (e) an offence under section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39) (intercourse of person in position of trust with child under 16),
  - (f) an offence under section 5(1), (2) or (3) (intercourse with girl under 16) or 6 (indecent behaviour towards girl between 12 and 16) of that Act,
  - (g) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c. 44) (abuse of position of trust).
- (3) Where this section applies, the accused may be found guilty—
- (a) if the maximum penalty for the existing offence is less than the maximum penalty for the new offence, of the existing offence,
  - (b) in any other case, of the new offence.
- (4) In subsection (3) the reference, in relation to an offence, to the maximum penalty is a reference to the maximum penalty by way of imprisonment or other detention that could be imposed on the accused on conviction of the offence in the proceedings in question.
- (5) A reference in this section to an offence includes a reference to—
- (a) an attempt to commit an offence,
  - (b) incitement to commit an offence,
  - (c) counselling or procuring the commission of an offence,
  - (d) involvement art and part in an offence, and
  - (e) an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39).

#### Commencement Information

- I4** S. 53 partly in force; s. 53 not in force at Royal Assent, see s. 62; s. 53(1)(2)(e)-(g)(3)-(5) in force at 1.12.2010 by [S.S.I. 2010/357](#), [art. 2\(a\)](#)
- I5** S. 53(2)(a)-(d) in force at 16.12.2013 by [S.S.I. 2013/341](#), [art. 2\(b\)](#)

## 54 <sup>[F34]</sup> **Incitement to commit certain sexual acts outside Scotland**

- (1) If a person does an act in Scotland which would amount to the offence of incitement to commit a listed offence but for the fact that what the person had in view (referred to in this section as “the relevant conduct”) is intended to occur in a country outside <sup>[F35]</sup>Scotland], then—
- (a) the relevant conduct is to be treated as the listed offence, and
  - (b) the person accordingly commits the offence of incitement to commit the listed offence.
- <sup>[F36]</sup>(2) However—
- (a) a person who is not a habitual resident of Scotland commits an offence by virtue of subsection (1) in respect of relevant conduct intended to occur elsewhere in the United Kingdom only if, and

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- (b) a person who is not a UK national commits an offence by virtue of subsection (1) in respect of relevant conduct intended to occur outside the United Kingdom only if,  
the condition in subsection (2A) is met.
- (2A) That condition is that the relevant conduct would also involve the commission of an offence under the law in force in the country where the whole or any part of it was intended to take place.]
- (3) Conduct punishable under the law in force in the country is an offence under that law for the purposes of subsection [F37(2A)] however it is described in that law.
- (4) The condition specified in subsection [F38(2A)] is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—
- (a) stating that, on the facts as alleged with respect to the relevant conduct, the condition is not in the accused's opinion satisfied,
  - (b) setting out the grounds for the accused's opinion, and
  - (c) requiring the prosecutor to prove that the condition is satisfied.
- (5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.
- (6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.
- (7) Any act of incitement by means of a message (however communicated) is to be treated as done in Scotland if the message is sent or received in Scotland.
- (8) In this section—
- “country” includes territory,
  - “listed offence” means an offence listed in Part 1 of schedule 4,
  - [F39]“habitual resident of Scotland” means an individual who was at the time the act mentioned in subsection (1) took place habitually resident in Scotland,]
  - “UK national” means an individual who was at the time the [F40]act mentioned in subsection (1)] took place<sup>F41</sup>...—
- (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
  - (b) a person who under the British Nationality Act 1981 is a British subject,  
or
  - (c) a British protected person within the meaning of that Act.

#### Textual Amendments

- F34** S. 54 heading substituted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), **ss. 7(7), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2
- F35** Word in s. 54(1) substituted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), **ss. 7(2), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2
- F36** S. 54(2)(2A) substituted for s. 54(2) (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), **ss. 7(3), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2
- F37** Word in s. 54(3) substituted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), **ss. 7(4), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

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

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- F38** Word in s. 54(4) substituted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), **ss. 7(5)**, 45(2)(3) (with s. 44); S.S.I. 2017/93, reg. 2
- F39** Words in s. 54(8) inserted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), **ss. 7(6)(a)**, 45(2)(3) (with s. 44); S.S.I. 2017/93, reg. 2
- F40** Words in s. 54(8) substituted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), s. 45(2)(3), **sch. 2 para. 6** (with s. 44); S.S.I. 2017/93, reg. 2
- F41** Words in s. 54(8) omitted (24.4.2017) by virtue of [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (asp 22), **ss. 7(6)(b)**, 45(2)(3) (with s. 44); S.S.I. 2017/93, reg. 2

#### [<sup>F42</sup>54A Offences committed outside Scotland

- (1) If a person does an act elsewhere in the United Kingdom which would, if it had been done in Scotland, constitute a listed offence then the person commits that offence.
- (2) However, a person who is not a habitual resident of Scotland commits an offence by virtue of subsection (1) only if the act would also constitute an offence under the law in force in the country where it took place.
- (3) For the purposes of subsection (2), an act punishable under the law in force in the country is an offence under that law however it is described in that law.
- (4) The condition specified in subsection (2) is to be taken to be satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—
  - (a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused's opinion satisfied,
  - (b) setting out the grounds for the accused's opinion, and
  - (c) requiring the prosecutor to prove that the condition is satisfied.
- (5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.
- (6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.
- (7) A person may be prosecuted, tried and punished for any offence to which this section applies—
  - (a) in any sheriff court district in Scotland in which the person is apprehended or in custody, or
  - (b) in such sheriff court district as the Lord Advocate may determine,
 as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.
- (8) In this section—
  - “habitual resident of Scotland” means an individual who was at the time the act mentioned in subsection (1) took place habitually resident in Scotland,
  - “listed offence” means an offence listed in Part 2 of schedule 4,
  - “sheriff court district” is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

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

#### Textual Amendments

**F42** Ss. 54A-54C inserted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016 \(asp 22\)](#), **ss. 8, 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

### **54B Offence committed by virtue of section 54A(1): limitations on prosecution**

- (1) Subject to section 54C, this section applies in relation to a listed offence committed by a person by virtue of section 54A(1).
- (2) Prosecution in respect of the listed offence—
  - (a) is not competent if the person has been, or is being, prosecuted in respect of the act constituting the listed offence, in the country where the act took place, and
  - (b) is competent only if—
    - (i) before the prosecution is initiated, the prosecutor has consulted the relevant director of public prosecutions about the prosecution, and
    - (ii) the person is prosecuted, on the same indictment or complaint, in respect of an act in Scotland constituting a listed offence.
- (3) For the purposes of subsection (2)(a), a person is not to be regarded as having been prosecuted in respect of the act constituting the listed offence, in the country where the act took place, if a prosecution in that country was withdrawn in order to enable the prosecution of the person in Scotland.
- (4) For the purposes of subsection (2)(b)(i)—
  - (a) the prosecution is initiated when the indictment or complaint is served,
  - (b) the relevant director of public prosecutions is—
    - (i) in the case of an act which took place in England and Wales, the Director of Public Prosecutions (that is, the head of the Crown Prosecution Service),
    - (ii) in the case of an act which took place in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.
- (5) In this section, “listed offence” means an offence listed in Part 2 of schedule 4.

#### Textual Amendments

**F42** Ss. 54A-54C inserted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016 \(asp 22\)](#), **ss. 8, 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

### **54C Listed offence: limitations on prosecution if country not specified**

- (1) The indictment or complaint in which a listed offence is charged need not contain information from which the country in the United Kingdom in which the act constituting the listed offence took place can be determined.
- (2) If the indictment or complaint does not contain that information, prosecution in respect of the listed offence—
  - (a) is not competent if the person charged with the offence has been, or is being, prosecuted, in respect of the act constituting the listed offence elsewhere in the United Kingdom, and

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- (b) is competent only if the conditions in subsection (3) which are applicable in the case are met.
- (3) Those conditions are—
- (a) if it can be determined from the indictment or complaint that the act constituting the offence took place—
- (i) either in Scotland or in England and Wales, or
- (ii) either in Scotland or in Northern Ireland,
- that before the indictment or complaint was served, the prosecutor consulted the relevant director of public prosecutions about the prosecution,
- (b) if it can be determined from the indictment or complaint that the act constituting the offence took place either in England and Wales or in Northern Ireland but not in Scotland, that—
- (i) before the indictment or complaint was served, the prosecutor consulted both directors of public prosecutions about the prosecution, and
- (ii) the person is prosecuted, on the same indictment or complaint, in respect of an act in Scotland constituting a listed offence,
- (c) if neither paragraph (a) nor (b) applies, that before the indictment or complaint was served, the prosecutor consulted both directors of public prosecutions about the prosecution.
- (4) For the purposes of subsection (3)—
- (a) the relevant director of public prosecutions is—
- (i) in relation to subsection (3)(a)(i), the Director of Public Prosecutions (that is, the head of the Crown Prosecution Service),
- (ii) in relation to subsection (3)(a)(ii), the Director of Public Prosecutions for Northern Ireland,
- (b) the references to both directors of public prosecutions are to the Director of Public Prosecutions and the Director of Public Prosecutions for Northern Ireland.
- (5) For the purposes of subsection (2)(a), a person is not to be regarded as having been prosecuted in respect of the act constituting the listed offence, elsewhere in the United Kingdom, if a prosecution elsewhere in the United Kingdom was withdrawn in order to enable the prosecution of the person in Scotland.
- (6) In this section, “listed offence” means an offence listed in Part 2 of schedule 4.]

#### Textual Amendments

**F42** Ss. 54A-54C inserted (24.4.2017) by [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016 \(asp 22\)](#), ss. 8, 45(2)(3) (with s. 44); S.S.I. 2017/93, reg. 2

#### [<sup>F43</sup>54D Offences committed outside the United Kingdom: adult victims

- (1) If—
- (a) a person who is a UK national does an act in a country outside the United Kingdom, and
- (b) the act, if done in Scotland, would constitute an offence to which this subsection applies,



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then the person commits that offence.

(2) If—

- (a) a person who is habitually resident in Scotland does an act in a country outside the United Kingdom,
- (b) the act constitutes an offence under the law in force in that country, and
- (c) the act, if done in Scotland, would constitute an offence to which this subsection applies,

then the person commits that offence.

(3) The offences to which subsections (1) and (2) apply are offences under any of sections 1 to 4 where the victim of the offence was 18 or over at the time of the offence.

(4) For the purposes of subsection (2)(b), an act punishable under the law in force in the country is an offence under that law however it is described in that law.

(5) The condition specified in subsection (2)(b) is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—

- (a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused's opinion satisfied,
- (b) setting out the grounds for the accused's opinion, and
- (c) requiring the prosecutor to prove that the condition is satisfied.

(6) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under subsection (5).

(7) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.

(8) A person may be prosecuted, tried and punished for an offence by virtue of this section—

- (a) in any sheriff court district in Scotland in which the person is apprehended or is in custody, or
- (b) in such sheriff court district as the Lord Advocate may determine,

as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.

(9) In this section—

“country” includes territory;

“sheriff court district” is to be construed in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995 (interpretation);

“UK national” means an individual who is—

- (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
- (b) a person who under the British Nationality Act 1981 is a British subject, or
- (c) a British protected person within the meaning of that Act.]

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### Textual Amendments

**F43** S. 54D inserted (29.6.2021) by Domestic Abuse Act 2021 (c. 17), s. 90(6), Sch. 3 para. 5(2); S.S.I. 2021/239, reg. 2

## 55 Offences committed outside the United Kingdom [<sup>F44</sup>: child victims]

(1) If a UK national does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence then the UK national commits that offence.

(2) If—

- (a) a UK resident does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence, and
  - (b) the act constitutes an offence under the law in force in that country,
- then the UK resident commits the listed offence.

[<sup>F45</sup>(2A) If—

- (a) a person who is not a UK national or a UK resident does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence,
  - (b) the act constitutes an offence under the law in force in that country, and
  - (c) the person meets the nationality or residence condition at the relevant time,
- proceedings may be brought against the person in Scotland for that listed offence as if the person had done the act there.

(2B) The person meets the nationality or residence condition at the relevant time if the person is a UK national or a UK resident at the time when the indictment or complaint is served on the person.]

(3) For the purposes of [<sup>F46</sup>subsections (2)(b) and (2A)(b)] , an act punishable under the law in force in the country is an offence under that law however it is described in that law.

(4) The condition specified in subsection (2)(b) [<sup>F47</sup>or (2A)(b)] is to be taken as satisfied unless, not later than such time as may be prescribed by Act of Adjournal, the accused serves on the prosecutor a notice—

- (a) stating that, on the facts as alleged with respect to the act in question, the condition is not in the accused's opinion satisfied,
- (b) setting out the grounds for the accused's opinion, and
- (c) requiring the prosecutor to prove that the condition is satisfied.

(5) But the court, if it thinks fit, may permit the accused to require the prosecutor to prove that the condition is satisfied without the prior service of a notice under that subsection.

(6) In proceedings on indictment, the question whether the condition is satisfied is to be determined by the judge alone.

(7) A person may be [<sup>F48</sup>prosecuted], tried and punished for any offence to which this section applies—

- (a) in any sheriff court district in Scotland in which the person is apprehended or is in custody, or

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(b) in such sheriff court district as the Lord Advocate may determine, as if the offence had been committed in that district; and the offence is, for all purposes incidental to or consequential on trial or punishment, to be deemed to have been committed in that district.

(8) In this section—

“country” includes territory,

“listed offence” means an offence listed in Part 2 of schedule 4,

“sheriff court district” is to be construed in accordance with section 307(1) (interpretation) of the Criminal Procedure (Scotland) Act 1995 (c. 46),

[<sup>F49</sup>“UK national” means an individual who was at the time the act mentioned in subsection (1) or (2A) took place—

(a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 is a British subject, or

(c) a British protected person within the meaning of that Act,]

“UK resident” means an individual who was at the time the act mentioned in subsection (2) [<sup>F50</sup>or (2A)] took place<sup>F51</sup> ..., resident in the United Kingdom.

#### Textual Amendments

**F44** Words in s. 55 heading inserted (29.6.2021) by Domestic Abuse Act 2021 (c. 17), s. 90(6), **Sch. 3 para. 5(3)**; S.S.I. 2021/239, reg. 2

**F45** S. 55(2A)(2B) inserted (24.4.2017) by Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), **ss. 9(2), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

**F46** Words in s. 55(3) substituted (24.4.2017) by Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), **ss. 9(3), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

**F47** Words in s. 55(4) inserted (24.4.2017) by Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), **ss. 9(4), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

**F48** Word in s. 55(7) substituted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 203, 206, Sch. 7 para. 86**; S.S.I. 2010/413, **art. 2, Sch.**

**F49** Words in s. 55(8) substituted (24.4.2017) by Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), **ss. 9(5), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

**F50** Words in s. 55(8) inserted (24.4.2017) by Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), **ss. 9(6)(a), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

**F51** Words in s. 55(8) omitted (24.4.2017) by virtue of Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), **ss. 9(6)(b), 45(2)(3)** (with s. 44); S.S.I. 2017/93, reg. 2

#### 56 [<sup>F52</sup>Section 55: continuity of law]

(1) This section applies where, in any trial—

(a) the accused is charged in respect of the same conduct both—

(i) with an offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), and

(ii) with that offence as modified by section 55,

(b) there is a failure to establish beyond reasonable doubt that—

(i) the time when the conduct took place was after the coming into force of section 55, and

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- (ii) the time when the conduct took place was before the coming into force of the repeal of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995, and
  - (c) the court (or, in the case of a trial of an indictment, the jury) is satisfied in every other respect that the accused committed the offences charged.
- (2) The offences referred to in subsection (1)(a) are—
- (a) an offence under section 52 of the Civic Government (Scotland) Act 1982 (c. 45) (taking and distribution of indecent images of children),
  - (b) an offence under section 52A of that Act (possession of indecent images of children),
  - (c) an offence under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) (paying for sexual services of a child),
  - (d) an offence under section 10 of that Act (causing or inciting provision by child of sexual services or pornography),
  - (e) an offence under section 11 of that Act (controlling a child providing sexual services or involved in pornography),
  - (f) an offence under section 12 of that Act (arranging or facilitating provision by child of sexual services or pornography).
- (3) Where this section applies, the accused may be found guilty of the offence mentioned in subsection (2) as modified by section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.
- (4) A reference in this section to an offence includes a reference to—
- (a) an attempt to commit,
  - (b) incitement to commit,
  - (c) counselling or procuring the commission of, and
  - (d) involvement in and part in,
- an offence.

#### Textual Amendments

**F52** S. 56 heading substituted (29.6.2021) by [Domestic Abuse Act 2021 \(c. 17\)](#), s. 90(6), [Sch. 3 para. 5\(4\)](#); [S.S.I. 2021/239](#), reg. 2

### *General provisions*

#### **57 Offences by bodies corporate etc.**

- (1) Where—
- (a) an offence under this Act has been committed by—
    - (i) a body corporate,
    - (ii) a Scottish partnership, or
    - (iii) an unincorporated association other than a Scottish partnership, and
  - (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of—
    - (i) a relevant individual, or

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

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(ii) an individual purporting to act in the capacity of a relevant individual, that individual (as well as the body corporate, partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.

- (2) In subsection (1), “relevant individual” means—
- (a) in relation to a body corporate (other than a limited liability partnership)—
    - (i) a director, manager, secretary or other similar officer of the body,
    - (ii) where the affairs of the body are managed by its members, a member,
  - (b) in relation to a limited liability partnership, a member,
  - (c) in relation to a Scottish partnership, a partner,
  - (d) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

## **58 Ancillary provision**

- (1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, this Act or any provision of it.
- (2) An order under this section may modify any enactment, instrument or document.

## **59 Orders**

- (1) Any power of the Scottish Ministers to make orders under this Act—
- (a) must be exercised by statutory instrument,
  - (b) may be exercised so as to make different provision for different purposes,
  - (c) includes power to make incidental, supplemental, consequential, transitional, transitory or saving provision.
- (2) A statutory instrument containing an order made under this Act (except an order made under section 62(2)) is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Parliament.
- (3) A statutory instrument containing—
- (a) an order under section 39(6) or section 43(8), or
  - (b) an order under section 58 containing incidental, supplemental or consequential provision,
- is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Parliament.

## **60 Interpretation**

- (1) In this Act—
- “mental disorder” has the meaning given by section 17(3),
  - “penis” and “vagina” have the meanings given by section 1(4).
- (2) For the purposes of this Act—
- (a) penetration, touching, or any other activity,
  - (b) a communication,

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

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- (c) a manner of exposure, or
- (d) a relationship,

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

## **61 Modification of enactments**

- (1) Schedule 5 (which contains modifications of enactments) has effect.
- (2) The enactments mentioned in the first column of schedule 6 are repealed to the extent specified in the second column of that schedule.

## **62 Short title and commencement**

- (1) This Act may be cited as the Sexual Offences (Scotland) Act 2009.
- (2) This Act (other than sections 1(4), 17(3), 58 to 60 and this section) comes into force in accordance with provision made by the Scottish Ministers by order.

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### **Subordinate Legislation Made**

- P1** S. 62(2) power partly exercised: 1.12.2010 appointed for specified provisions by [S.S.I. 2010/357](#), [art. 2\(a\)](#)

**Changes to legislation:**

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