

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – Children

Older Children

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

115. The offences in Part 4 of the Bill divide into two distinct groups: those concerning sexual activity with a young child (where the child is under the age of 13 at the time of the conduct - sections 18 to 26), and those concerning sexual activity with an older child (where, at the time of the conduct, the child has attained the age of 13 but is not yet the age of 16 (sections 28 to 37)). The question of which offence is appropriate in any particular case is determined solely by the age of the child accused or victim at the time when the offence is said to have been committed, and not by the accused's belief as to the child's age. Section 40 provides for "deeming of age" provisions in circumstances where it is not possible to establish the age of a child.
116. Subsection (1) provides that "deeming provision 1" applies where the accused is charged with an offence against an older child at sections 28 to 37(1) and it is not possible to establish beyond reasonable doubt that the child had attained the age of 13 at the time the offence is alleged to have been committed, but it is possible to establish that the child had not attained the age of 16 at that time.
117. Subsection (2) provides that "deeming provision 2" applies where the accused is charged with an offence under section 37(4) and there is a failure to establish beyond reasonable doubt that the other child involved in the sexual activity had attained the age of 13 years at the time the offence is alleged to have been committed, but the court is satisfied that that child had not attained the age of 16 at that time.
118. Subsection (3) provides that "deeming provision 3" applies where the accused is charged with an offence under section 37(1) and there is a failure to establish beyond reasonable doubt that the accused was a child who had not attained the age of 16 years at the time the offence is alleged to have been committed, but the court is satisfied that the accused had attained the age of 13 years.
119. Subsection (4) provides that "deeming provision 4" applies where the accused is charged with an offence under section 37(4) and there is a failure to establish beyond reasonable doubt that the accused was a child who had not attained the age of 16 years at the time the offence is alleged to have been committed, but the court is satisfied that the accused had attained the age of 13 years.