



# Sexual Offences (Scotland) Act 2009

## 2009 asp 9

### PART 4

#### CHILDREN

##### *Older children*

#### **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, 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, 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—

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*Status: This is the original version (as it was originally enacted).*

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- (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),
  - (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,
  - (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).
- (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.