



# Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

## PART 2

### CRIMINAL LAW

#### *Sexual offences*

#### **40 Certain sexual offences by non-natural persons**

- (1) The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) is amended as follows.
- (2) At the end of each of the following provisions insert “or a fine or both”—
  - (a) subsections (4)(b) and (5)(b) of section 9 (paying for sexual services of a child),
  - (b) subsection (2)(b) of section 10 (causing or inciting provision by child of sexual services or child pornography),
  - (c) subsection (2)(b) of section 11 (controlling a child providing sexual services or involved in pornography), and
  - (d) subsection (2)(b) of section 12 (arranging or facilitating provision by child of sexual services or child pornography).
- (3) After section 14 insert—

#### **“14A Offences by bodies corporate etc.**

- (1) Subsection (2) applies where an offence under sections 10 to 12 committed—
  - (a) by a body corporate, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
    - (i) is a director, manager, secretary or other similar officer of the body corporate, or
    - (ii) purports to act in any such capacity,

- (b) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
    - (i) is a partner, or
    - (ii) purports to act in that capacity,
  - (c) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
    - (i) is concerned in the management or control of the association, or
    - (ii) purports to act in the capacity of a person so concerned.
- (2) The individual (as well as the body corporate, Scottish partnership or, as the case may be, unincorporated association) commits the offence and is liable to be proceeded against and punished accordingly.
- (3) Where the affairs of a body corporate are managed by its members, this section applies in relation to acts and defaults of a member in connection with the member’s function of management as if the member were a director of the body corporate.”.

#### 41 Indecent images of children

- (1) In the 1982 Act—
- (a) in section 52 (indecent photographs etc. of children)—
    - (i) in subsection (2C)(b), for “a pseudo-photograph” substitute “an indecent pseudo-photograph”, and
    - (ii) after subsection (8) add—
 

“(9) In this section, references to a photograph also include a tracing or other image, whether made by electronic or other means (of whatever nature), which is not itself a photograph or pseudo-photograph but which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both).
  - (10) And subsection (2B) applies in relation to such an image as it applies in relation to a pseudo-photograph.”, and
  - (b) in section 52A (possession of indecent photographs of children), in subsection (4), for “and (8)” substitute “and (8) to (10)”.
- (2) In Schedule 1 to the 1995 Act (offences against children under the age of 17 years to which special provisions apply), in paragraph 2B, after “photograph” insert “or pseudo-photograph”.
- (3) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (list of sexual offences for the purposes of Part 2)—
- (a) in paragraph 44, for the words from “the” where it third occurs to the end substitute—
    - “(a) the prohibited goods included indecent photographs or pseudo-photographs of persons under 16 and the offender—
      - (i) was 18 or over, or

- (ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or
- (b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.”, and
- (b) in paragraph 97(b), for “and (8)” substitute “and (8) to (10)”.

## **42 Extreme pornography**

- (1) In section 51 of the 1982 Act (obscene material)—
  - (a) for subsection (3) substitute—
    - “(3) A person guilty of an offence under this section is liable—
      - (a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both, or
      - (b) on conviction on indictment—
        - (i) in a case where the obscene material is or includes an extreme pornographic image, to imprisonment for a period not exceeding 5 years or to a fine or to both, or
        - (ii) in any other case, to imprisonment for a period not exceeding 3 years or to a fine or to both.”, and
  - (b) in subsection (8)—
    - (i) before the definition of “material” insert—
      - ““extreme pornographic image” is to be construed in accordance with section 51A;”, and
    - (ii) the definition of “prescribed sum” is repealed.
- (2) After section 51 of that Act insert—

### **“51A Extreme pornography**

- (1) A person who is in possession of an extreme pornographic image is guilty of an offence under this section.
- (2) An extreme pornographic image is an image which is all of the following—
  - (a) obscene,
  - (b) pornographic,
  - (c) extreme.
- (3) An image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.
- (4) Where (as found in the person’s possession) an image forms part of a series of images, the question of whether the image is pornographic is to be determined by reference to—
  - (a) the image itself, and
  - (b) where the series of images is such as to be capable of providing a context for the image, its context within the series of images,

and reference may also be had to any sounds accompanying the image or the series of images.

- (5) So, for example, where—
- (a) an image forms an integral part of a narrative constituted by a series of images, and
  - (b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal,
- the image may, by virtue of being part of that narrative, be found not to be pornographic (even if it may have been found to be pornographic where taken by itself).
- (6) An image is extreme if it depicts, in an explicit and realistic way any of the following—
- (a) an act which takes or threatens a person’s life,
  - (b) an act which results, or is likely to result, in a person’s severe injury,
  - (c) rape or other non-consensual penetrative sexual activity,
  - (d) sexual activity involving (directly or indirectly) a human corpse,
  - (e) an act which involves sexual activity between a person and an animal (or the carcase of an animal).
- (7) In determining whether (as found in the person’s possession) an image depicts an act mentioned in subsection (6), reference may be had to—
- (a) how the image is or was described (whether the description is part of the image itself or otherwise),
  - (b) any sounds accompanying the image,
  - (c) where the image forms an integral part of a narrative constituted by a series of images—
    - (i) any sounds accompanying the series of images,
    - (ii) the context provided by that narrative.
- (8) A person guilty of an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,
  - (b) on conviction on indictment, to imprisonment for a period not exceeding 3 years or to a fine or to both.
- (9) In this section, an “image” is—
- (a) a moving or still image (made by any means), or
  - (b) data (stored by any means) which is capable of conversion into such an image.

### **51B Extreme pornography: excluded images**

- (1) An offence is not committed under section 51A if the image is an excluded image.
- (2) An “excluded image” is an image which is all or part of a classified work.
- (3) An image is not an excluded image where—

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- (a) it has been extracted from a classified work, and
  - (b) it must be reasonably be assumed to have been extracted (whether with or without other images) from the work solely or principally for the purpose of sexual arousal.
- (4) In determining whether (as found in the person’s possession) the image was extracted from the work for the purpose mentioned in subsection (3)(b), reference may be had to—
- (a) how the image was stored,
  - (b) how the image is or was described (whether the description is part of the image itself or otherwise),
  - (c) any sounds accompanying the image,
  - (d) where the image forms an integral part of a narrative constituted by a series of images—
    - (i) any sounds accompanying the series of images,
    - (ii) the context provided by that narrative.
- (5) In this section—
- “classified work” means a video work in respect of which a classification certificate has been issued by a designated authority,
  - “classification certificate” and “video work” have the same meanings as in the Video Recordings Act 1984 (c.39),
  - “designated authority” means an authority which has been designated by the Secretary of State under section 4 of that Act,
  - “extract” includes an extract of a single image,
  - “image” is to be construed in accordance with section 51A.

### **51C Extreme pornography: defences**

- (1) Where a person (“A”) is charged with an offence under section 51A, it is a defence for A to prove one or more of the matters mentioned in subsection (2).
- (2) The matters are—
- (a) that A had a legitimate reason for being in possession of the image concerned,
  - (b) that A had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image,
  - (c) that A—
    - (i) was sent the image concerned without any prior request having been made by or on behalf of A, and
    - (ii) did not keep it for an unreasonable time.
- (3) Where A is charged with an offence under section 51A, it is a defence for A to prove that—
- (a) A directly participated in the act depicted, and
  - (b) subsection (4) applies.
- (4) This subsection applies—
- (a) in the case of an image which depicts an act described in subsection (6)(a) of that section, if the act depicted did not actually take or threaten a person’s life,

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- (b) in the case of an image which depicts an act described in subsection (6)(b) of that section, if the act depicted did not actually result in (nor was it actually likely to result in) a person’s severe injury,
  - (c) in the case of an image which depicts an act described in subsection (6)(c) of that section, if the act depicted did not actually involve non-consensual activity,
  - (d) in the case of an image which depicts an act described in subsection (6)(d) of that section, if what is depicted as a human corpse was not in fact a corpse,
  - (e) in the case of an image which depicts an act described in subsection (6)(e) of that section, if what is depicted as an animal (or the carcase of an animal) was not in fact an animal (or a carcase).
- (5) The defence under subsection (3) is not available if A shows, gives or offers for sale the image to any person who was not also a direct participant in the act depicted.
- (6) In this section “image” and “extreme pornographic image” are to be construed in accordance with section 51A.”.
- (3) In Schedule 3 to the Sexual Offences Act 2003 (c.42) (sexual offences for the purposes of Part 2 of that Act), after paragraph 44 insert—
- “44A An offence under section 51A of the Civic Government (Scotland) Act 1982 (c.45) (possession of extreme pornography) if—
- (a) the offender—
    - (i) was 18 or over, and
    - (ii) is or has been sentenced in respect of the offence to imprisonment for a term of more than 12 months, and
  - (b) in imposing sentence, the court determines that it is appropriate that Part 2 of this Act should apply in relation to the offender.”.

#### **43 Voyeurism: additional forms of conduct**

- (1) The Sexual Offences (Scotland) Act 2009 (asp 9) is amended as follows.
- (2) In section 9 (voyeurism)—
- (a) after subsection (4), insert—
 

“(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,

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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.",

- (b) in subsection (5)—
  - (i) for "fourth" substitute "sixth", and
  - (ii) for paragraph (b), substitute—
    - "(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).", and
- (c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)".

(3) In section 10(2) (interpretation of section 9), after "section 9(3)" insert "and (4A)".

(4) In section 26 (voyeurism towards a young child)—

- (a) after subsection (4), insert—
  - "(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.",

- (b) in subsection (5)—
  - (i) for "fourth" substitute "sixth", and
  - (ii) for paragraph (b), substitute—
    - "(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).",
- (c) in subsection (7), for "and (4)" substitute ", (4), (4A) and (4B)", and
- (d) in subsection (8)—
  - (i) after "section 9(3)" insert ", (4A)", and
  - (ii) after "subsections (3)" insert ", (4A)".

(5) In section 36 (voyeurism towards an older child)—

- (a) after subsection (4), insert—

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- “(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.”
- (b) in subsection (5)—
- (i) for “fourth” substitute “sixth”, and
  - (ii) for paragraph (b), substitute—
    - “(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).”
- (c) in subsection (7), for “and (4)” substitute “, (4), (4A) and (4B)”, and
- (d) in subsection (8)—
- (i) after “section 9(3)” insert “, (4A)”, and
  - (ii) after “subsections (3)” insert “, (4A)”.

#### **44 Sexual offences: defences in relation to offences against older children**

In section 39 of the Sexual Offences (Scotland) Act 2009 (asp 9) (defences in relation to offences against older children), in subsection (4)(c), after “section 30(2)(d)” insert “or (e)”.

#### **45 Penalties for offences of brothel-keeping and living on the earnings of prostitution**

- (1) The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) is amended as follows.
- (2) In section 11 (trading in prostitution and brothel-keeping)—
- (a) in subsection (1), for the words from “liable” to the end substitute “guilty of an offence and liable to the penalties set out in subsection (1A)”,
  - (b) after that subsection insert—
    - “(1A) A person—
      - (a) guilty of the offence set out in subsection (1)(a) is liable—
        - (i) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,



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- (ii) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,
  - (b) guilty of the offence set out in subsection (1)(b) is liable—
    - (i) on conviction on indictment, to imprisonment for a term not exceeding two years,
    - (ii) on summary conviction, to imprisonment for a term not exceeding 12 months.”,
  - (c) in subsection (4), for “subsection (1)” substitute “subsection (1A)(a)”, and
  - (d) for subsection (6) substitute—
    - “(6) A person guilty of an offence under subsection (5) is liable—
      - (a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,
      - (b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.
- (3) In section 13(9) (living on earnings of another from male prostitution), for paragraphs (a) and (b) substitute—
  - “(a) on conviction on indictment, to imprisonment for a term not exceeding seven years, to a fine, or to both,
  - (b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both.”.