

SEXUAL OFFENCES (AMENDMENT) ACT 2000

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Sexual Offences (Amendment) Act 2000 which received Royal Assent on 30 November 2000. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. The Act makes three changes to the law on sexual offences. First, it reduces the minimum age at which a person, whether male or female, may lawfully consent to buggery (an offence which does not exist in Scotland) and certain homosexual acts. This reduction is from 18 to 16 in England and Wales and Scotland, and from 18 to 17 in Northern Ireland. This equalises the age of consent for sexual activity so that it is the same for male homosexuals as for heterosexuals and lesbians ie 16 in England, Wales and Scotland and 17 in Northern Ireland. Second, in all jurisdictions, a person under the age of consent no longer commits an offence themselves if they engage in buggery (not Scotland) or certain homosexual acts with a person over the age of consent.
4. Third, the Act introduces a new offence where a person aged 18 or over has sexual intercourse or engages in any other sexual activity with or directed towards a person under that age, if the person aged 18 or over is in a position of trust in relation to the younger person in circumstances specified in the Act. A person convicted of such an offence, unless they are under 20 years old, will be subject to the notification requirements under the Sex Offenders Act 1997. Any person convicted of the offence may also be made the subject of an "extended sentence" by the court.

BACKGROUND

Age of consent

5. The age at which a person could lawfully consent to homosexual acts and to buggery (not Scotland) was reduced from 21 to 18 by virtue of the Criminal Justice and Public Order Act 1994. On 22 June 1998, in accordance with an agreement reached in the cases before the European Court of Human Rights of Sutherland and Morris, the House of Commons was given the opportunity to vote on an amendment to the then Crime and Disorder Bill to reduce the age of consent for buggery and homosexual acts to 16. The amendment on the age of consent was passed in the House of Commons on a free vote but rejected by the House of Lords on 22 July. In the subsequent debate in the House of Commons on 28 July the Home Secretary announced that legislation dealing with the age of consent would be introduced in the 1998-99 session (Hansard col.183). As a result the House of Commons agreed not to re-instate the amendment in the Bill.

6. In accordance with the Home Secretary's undertaking, the Sexual Offences (Amendment) Bill, containing provisions on the age of consent and abuse of trust (see paragraphs 7- 8 below) was introduced in the House of Commons on 16 December 1998. At Second Reading on 25 January 1999 it was passed by 313 in favour 130 against. When the Bill was considered at Report Stage on 1 March (Hansard col. 754) a new provision was added so that a person under the age of consent would no longer commit an offence themselves if they engaged in buggery (not Scotland) or certain homosexual acts with a person over the age of consent (now section 2 of the Act, see paragraph 12 below). After Third Reading the Bill passed to the House of Lords on 2 March. On 13 April when Lord Williams of Mostyn, QC, then a Minister of State at the Home Office, moved that the Bill be read a second time, Baroness Young moved an amendment that it be read "this day six months". The amendment was agreed to by 222 to 146 and the Bill therefore fell in that session.

Abuse of trust

7. During the debate on the Crime and Disorder Bill on 22 June 1998 Alun Michael, the then Home Office Minister of State, announced that an inter-departmental group, set up to identify additional safeguards needed to prevent unsuitable people from working with children, would also be looking to identify the measures necessary to protect 16 and 17 year olds who might be vulnerable to abuse by those in a position of trust (Hansard col.787). The inter-departmental working group on preventing unsuitable people working with children and abuse of trust conducted a short consultation exercise in England and Wales in August and September 1998. The Scottish Office conducted a similar consultation exercise in Scotland in October and November 1998. The interim report of the working group was placed in the library of both Houses on 25 November 1998. This proposed a new criminal offence specifically targeted to protect those who may be particularly vulnerable or where the relationship of trust is particularly strong, together with an initiative to strengthen codes of conduct.
8. These recommendations form the basis for the proposed offence of abuse of trust contained in the Bill introduced in December 1998 and in the present Act. The Government also committed itself to strengthening codes of conduct generally to protect 16 and 17 year olds from sexual advances, both homosexual and heterosexual, from those in positions of trust. In accordance with this commitment, on 17 September 1999 the Government produced the booklet "*Caring for young people and the vulnerable? Guidance for preventing abuse of trust*", copies of which were placed in the library of both Houses.

COMMENTARY ON SECTIONS

Sections 1 and 2: Age of consent

9. *Subsections (1) and (2)* of section 1 of the Act deal with the age of consent in England and Wales. They substitute the word "eighteen" with the word "sixteen" where it appears in Section 12 and paragraph 16 of Schedule 2 to the Sexual Offences Act 1956 (as amended) and in section 1 of the Sexual Offences Act 1967. Extracts with the changes shown are set out at the end of these notes. The result is that:
 - consensual buggery with another person is not an offence if the act takes place in private and both have attained the age of 16 (rather than 18 at present);
 - an act of buggery with a man or an act of gross indecency with a man or being a party to the commission of such acts in private is not an offence provided that both parties have consented and have attained the age of 16 (rather than 18);
 - the prosecution will have to show that one of the parties had not attained the age of 16 (rather than 18) at the time of the act;

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- the greater maximum penalty which is available to the courts when a man over 21 commits the offences of (i) indecency between men or (ii) attempting to procure the commission by a man of an act of gross indecency will now apply where the other male is under 16 (rather than 18 at present).

These changes affect the maximum penalty for offences of buggery and attempted buggery contrary to section 12(1) of the 1956 Act which are provided for in paragraph 3 of Schedule 2 to that Act. The maximum penalties for the offence of buggery will now be as follows:

- If committed with a person under the age of 16 or with an animal, life imprisonment. This applies equally whether the offence was committed in public or in private;
- If committed by a person aged 21 or over with a person aged 16 or 17, 5 years imprisonment;
- In any other case, 2 years imprisonment.

The same maximum penalties will apply in respect of the offences of attempted buggery.

Subsection (2) also substitutes the word “sixteen” for the word “twenty-one” in section 8 of the 1967 Act. Extracts with the changes shown are set out at the end of these notes. The effect is that the Director of Public Prosecutions’ consent to the institution of proceedings for gross indecency with another male, buggery with another male or aiding, abetting, counselling, procuring or commanding the commission of these offences, will only be required where one of the males involved is under the age of 16 (rather than 21 at present). This change from 21 to 16 may appear more substantial than the other age changes proposed, but this is because by an oversight no consequential change from twenty-one to eighteen was made in the 1994 Act in line with the other age changes contained in that legislation.

10. *Subsection (3)* makes similar changes to the law in Scotland and substitutes the word “eighteen” with the word “sixteen” where it appears in section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995. Extracts with the changes shown are set out at the end of these notes. The result is that consensual acts in private of sodomy or gross indecency or shameless indecency by one male person with another will not be an offence provided the parties to the act are aged 16 or over.
11. *Subsection (4)* makes similar changes to the law in Northern Ireland. However, the age of heterosexual consent in Northern Ireland is set at 17, so where the number “18” appears in the Homosexual Offences (Northern Ireland) Order 1982 (as amended) the word “17” is substituted for it. Extracts with the changes shown are set out at the end of these notes. The result is that consensual acts in private of buggery with another man, an act of gross indecency with another man or the act of being a party to the commission by a man of such an act, will not be an offence provided the parties to the act are aged 17 or over.
12. *Section 2* provides that no offence is committed in England and Wales under sections 12 and 13 of the Sexual Offences Act 1956 (as amended) by a person under the age of 16 if:
 - he or she engages in buggery with a person over 16;
 - he commits an act of gross indecency with a male over the age of 16;
 - he is a party to the commission of an act of gross indecency with a person over 16.

Extracts with the changes shown are set out at the end of these notes. The section does not affect the liability of a person over the age of 16 who engages in such activities with a person under the age of consent - they continue to commit an offence. Both parties remain liable in the criminal law if they are both under the age of 16. Similar changes

to those mentioned above are also made to the law in Scotland and Northern Ireland to decriminalise a male under 16 (17 in Northern Ireland) who engages in homosexual activities with someone over that age.

Sections 3 to 6: Abuse of position of trust

13. *Sections 3 and 4* create a new offence of abuse of trust, which would apply to the whole of the United Kingdom. It would be an offence for a person aged 18 or over to have sexual intercourse or engage in other sexual activity with a person under that age where they are in a “position of trust” in relation to the younger person. The definition of position of trust is limited to particular circumstances where the young person is particularly vulnerable or the relationship of trust particularly strong.
14. The test as to whether conduct amounts to “sexual activity” is whether a reasonable person would in the circumstances regard the activity as sexual. So for instance, a normal gynaecological examination by a doctor is an activity which it is envisaged a reasonable person would not regard as “sexual activity”. Behaviour which a reasonable person would only regard as sexual activity if he was aware of the parties' intentions, motives or feelings is specifically excluded. Thus, behaviour which is non-sexual in nature, for example a sports trainer tackling a pupil on a rugby pitch, may not be challenged because of alleged hidden motives.
15. A person aged 18 or over is said to be in a “position of trust” in relation to a younger person if one of four conditions is met:
 - the younger person is detained in an institution under a court order or under any enactment and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18. This would include where the young person is detained as a result of the criminal justice system or penal system under the Immigration or Mental Health Acts or under military law;
 - the younger person is resident in and provided with accommodation (or accommodation and maintenance) by a local authority, an equivalent Northern Ireland body or a voluntary organisation in a home or other place, and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18 there. This would apply to the full range of settings in which such young people might be accommodated, including foster care; residential care (local authority, private or voluntary, including secure accommodation); and semi-independent accommodation;
 - the younger person is in any of the following:
 - a) a hospital
 - b) a residential care home, nursing home, mental nursing home or private hospital
 - c) a community home, voluntary home, children’s home or residential establishment
 - d) a home provided under section 82(5) of the Children Act 1989and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18 there. This would include some young people with physical or learning disabilities, mental illness or behavioural problems; it would include NHS and private and voluntary accommodation;
 - the younger person is in full time education in an educational institution and the older person is regularly involved in caring for, training, supervising or being in sole charge of persons under 18 there. Where the younger person is registered as receiving full time education at one establishment but attends another establishment

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as part of his or her course, the older person is treated as in a position of trust at either establishment.

The word ‘persons’ can include a single person, for example where only one child is in the care of foster parents.

16. [Section 4](#) also provides that the four conditions above may be added to by an Order which may be made by the Secretary of State and which would have to be laid before and be approved by both Houses of Parliament. In Scotland, any such order would fall to be considered by the Scottish Parliament, by virtue of section 7(2) of the Act and section 118 of the Scotland Act 1998.
17. It is a defence for a person charged with such an offence if at the time of intercourse or sexual activity:
 - he did not know or could not reasonably have been expected to know that (i) the younger person was under 18 or (ii) that he was in a position of trust in relation to the younger person; or
 - he was lawfully married to the younger person.

In addition, there is a transitional provision to ensure that the offence will not apply where the older person was in a sexual relationship with the younger person at a time when he was in a position of trust in relation to the younger person immediately before the commencement of this Act.

18. A person found guilty at the magistrates’ court in England and Wales or the District Court or Sheriff Court sitting summarily in Scotland of the offence of abuse of trust is liable to a maximum penalty of six months imprisonment and/or the statutory maximum fine (currently £5,000). On conviction at the Crown Court in England and Wales or in the Sheriff Court sitting with a jury or the High Court in Scotland the maximum penalty is five years imprisonment, an unlimited fine, or both.
19. [Section 5](#) makes the offence one that is listed in the Sex Offenders Act 1997, so that anyone convicted of this offence in the UK will be subject to the notification requirements under that Act. However, those under 20 who are convicted of the offence of abuse of trust will not have to register. - - - - -
20. [Section 6](#) includes the offence of abuse of trust as a “sexual offence” listed in section 161(2) of the Powers of Criminal Courts (Sentencing) Act 2000¹ and in section 210A(10) of the Criminal Procedure (Scotland) Act 1995. The courts in England and Wales have a discretion, under sections 58 - 60 of the Crime and Disorder Act 1998, to impose “extended sentences” in respect of such offences. An “extended sentence” under the 1998 Act (which can apply to a person of any age) comprises the normal period of imprisonment and supervision which would apply, followed by an “extension period”, during which the offender continues to be on licence. An extended sentence, including extension period, must remain within the maximum penalty that is available for the offence in question - for abuse of trust, a maximum of 5 years. Section 86-88 of the Crime and Disorder Act 1998 introduced similar provisions for extended sentences in Scotland.
21. [Section 7\(2\)](#) provides that, for the purposes of the Scotland Act 1998, the Act shall be treated as a pre-commencement enactment within the meaning of that Act. One effect of this is that, in relation to Scotland, the power to make orders under section 3 is exercisable by the Scottish Ministers within the meaning of that Act.

¹ Section 6(1) of the Act refers to inserting the abuse of trust offence as a “sexual offence” within the meaning of section 31(1) of the Criminal Justice Act 1991. Section 31 of the 1991 Act was repealed by Schedule 12 to the Powers of Criminal Courts (Sentencing) Act 2000 (PCCA). However, paragraph 1(4) of Schedule 11 to the PCCA has the effect of replacing the definition of “sexual offence” in the 1991 Act with a reference to section 161(2) of the PCCA.

FINANCIAL EFFECTS OF THE ACT

22. The Government believes the overall effect of the changes in the Act will be cost neutral.
23. We expect the offence of abuse of trust will act more as a deterrent than result in a large number of actual prosecutions. There are no accurate figures on which to base estimates. One starting point is in the education area and disciplinary action taken there. The number of teachers whose cases are considered by the Secretary of State as a result of inappropriate conduct against 16 and 17 year olds in relation to the list maintained by the Department for Education and Employment, List 99, is around 5 a year. This covers non-consensual as well as consensual relationships and is an approximate figure only. Nevertheless it provides some indication of possible numbers. For 16 and 17 year olds the education category is very much larger than for those in residential or foster care, or in detention, but the vulnerability in those settings may be more extreme. Based on this, we estimate prosecutions over the wider area covered by the proposed new offence would amount to around 10-15 a year in England and Wales. This results in costs to the criminal justice system of around £77k - £115k a year.
24. The Government believes these costs will be approximately offset by savings from no longer taking action through the criminal justice system against those males engaged in homosexual activity with 16 and 17 year olds, including 16 and 17 year olds themselves. At present there are only a few cautions or prosecutions each year against males aged 16 and 17 for the offences of buggery and gross indecency with males of their own age or older. In 1998 in England and Wales there was 1 caution, 2 prosecutions and 1 conviction of males aged 16 and 17 for gross indecency and 2 cautions and no prosecutions or convictions of 16 and 17 year old males for buggery. In the same year there were no cautions, 5 prosecutions and 8 convictions of those aged 18 and over for buggery with 16 and 17 year olds. Separate figures for gross indecency by those aged 18 and over with 16 and 17 year olds are not available. For males under 16 there were 4 cautions for gross indecency (no prosecutions or convictions) and 5 cautions, 6 prosecutions and no convictions for buggery. It is not possible to determine the age of the other party in these offences and hence whether they would remain able to be prosecuted with the changes the Act makes to the law.

EFFECTS OF THE ACT ON PUBLIC SERVICE MANPOWER

25. None are expected.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

26. No Regulatory Impact Assessment has been prepared as there could be only a negligible impact on business, charities or voluntary bodies.

COMMENCEMENT

27. This Act came into force on 8 January 2001.

HANSARD REFERENCES

28. The following table sets out the dates and Hansard references for each stage of the Bill's passage through Parliament.

<i>Stage</i>	<i>Date</i>	<i>Hansard Reference</i>
House of Commons		
Introduction	16 December 1998	Vol.322. Col. 985
Second Reading	25 January 1999	Vol.324 . Col.20 – 113

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<i>Stage</i>	<i>Date</i>	<i>Hansard Reference</i>
Committee of the Whole House – consideration of clause 1 on the age of consent	10 February 1999	Vol.325 . Col.331 - 383
Standing Committee E	1 st Sitting, 2 February 1999	Col. 1 - 10
	2 nd Sitting, 4 February 1999	Col. 11 - 48
	3 rd Sitting, 4 February 1999	Col. 49 – 50
	4 th Sitting, 9 February 1999	Col. 53 - 90
	5 th Sitting, 9 February 1999	Col. 91 – 130
	6 th Sitting, 11 February 1999	Col. 131 - 172
Report and Third Reading	1 March 1999	Vol 326 Col.754 – 810
House of Lords		
Introduction	2 March 1999	Vol. 594 Col.558
Second Reading	13 April 1999	Vol. 599. Col. 647- 760
1999/2000 Session		
House of Commons		
Reintroduction	28 January 2000	Vol. 343. Col. 685
Debate on motion that no order be made for committal of the Bill	7 February 2000	Vol. 344. Col. 83 - 89
Second Reading	10 February 2000	Vol. 344 Col. 432 – 500
Third Reading	28 February 2000	Vol. 345 Col. 127-130
House of Lords		
Introduction	29 February 2000	Vol. 610. Col 455.
Second Reading	11 April 2000	Vol. 612. Col. 91 - 167
Committee	13 November 2000	Vol. 619. Col. 18 - 122

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The Bill not having been passed by the House of Lords before the end of the session, it was, in accordance with section 2 of the Parliament Act 1911, presented for Royal Assent which was given on 30 November 2000.

House of Lords Hansard Vol 619 Col 1492

House of Commons Hansard Vol 357 Col 1231

27. Extracts from the Sexual Offences Act 1956 showing words changed by the Act

“S 12

Buggery

(1) It is [an offence] for a person to commit buggery with another person otherwise than in the circumstances described in subsection (1A) **or (1AA)** below or with an animal.

(1A) The circumstances **first** referred to in subsection (1) are that the act of buggery takes place in private and both parties have attained the age of eighteen **sixteen**.

(1AA) The other circumstances so referred to are that the person is under the age of sixteen and the other party has attained that age.

(1B) An act of buggery by one man with another shall not be treated as taking place in private if it takes place-

(a) when more than two persons take part or are present; or

(b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.

(1C) In any proceedings against a person for buggery with another person it shall be for the prosecutor to prove that the act of buggery took place otherwise than in private or that one of the parties to it had not attained the age of eighteen **sixteen**.

S.13

Indecency between men

It is an offence for a man to commit an act of gross indecency with another man, **otherwise than in the circumstances described below**, whether in public or in private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man.

The circumstances referred to above are that the man is under the age of sixteen and the other man has attained that age.

Schedule 2, Paragraph 16

TABLE OF OFFENCES, MODE OF PROSECUTION, PUNISHMENTS, ETC

<i>Offence</i>	<i>Mode of Prosecution</i>	<i>Punishment</i>
16.(a) Indecency between men (section 13)	(I) On indictment.	If a man of or over the age of twenty-one with a man under the age of eighteen sixteen , five years, otherwise two years.
	(ii) Summarily.	6 months and/or the statutory maximum.
(b) An attempt to procure the commission	(I) On indictment.	If the attempt is by a man of or over the age of

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Offence	Mode of Prosecution	Punishment
by a man of an act of gross indecency with another man.		twenty-one to procure a man under the age of eighteen sixteen to commit an act of gross indecency with another man, five years, otherwise two years.
	(ii) Summarily.	6 months and/or the statutory maximum.

Extracts from the Sexual Offences Act 1967 showing words changed by the Act

s. 1

Amendment of the law relating to homosexual acts in private.

(1) Notwithstanding any statutory or common law provision,

(a) a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen **sixteen** years **and**

(b) a homosexual act by any person shall not be an offence if he is under the age of sixteen years and the other party has attained that age.

Subsections (2) to (5) are unaffected.

(6) It is hereby declared that where in any proceedings it is charged that a homosexual act is an offence the prosecutor shall have the burden of proving that the act was done otherwise than in private or otherwise than with the consent of the parties or that any of the parties had not attained the age of eighteen **sixteen** years.

s.8

Restrictions on prosecutions

No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions against any man for the offence of buggery with, or gross indecency with, another man or for aiding, abetting, counselling, procuring or commanding its commission where either of those men was at the time of its commission under the age of twenty-one **sixteen**.

Extract from section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 showing words changed by the Act

a) Homosexual Offences

(1) Subject to the provisions of this section, a homosexual act² in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen **sixteen** years.

subsections (2) to (4) are unaffected

(5) Subject to subsection (3) above[a male person suffering from a mental deficiency], it shall be an offence to commit or to be party to the commission of, or to procure or attempt to procure the commission of a homosexual act-

(a) otherwise than in private;

(b) without the consent of both parties to the act; or

² Defined in s13(4) of the 1995 Act as sodomy or an act of gross indecency or shameless indecency by one male person with another male person

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(c) with a person under the age of eighteen **sixteen** years.

subsections (6) and (7) are unaffected

(8) It shall be a defence to a charge of committing a homosexual act under subsection (5) (c) above that the person so charged being under the age of 24 years who had not previously been charged with a like offence, had reasonable cause to believe that the other person was of or over the age of 18 **16** years.

(8)(A) A person under the age of sixteen years does not commit an offence under subsection (5)(a) or (c) above if he commits or is party to the commission of a homosexual act with a person who has attained that age

subsections (9) to (11) are unaffected

Extract from Article 3 of the Homosexual Offences (Northern Ireland) Order 1982 showing words changed by the Act

b)

c) Homosexual acts in private

(1) Subject to Article 4 (mental patients) and notwithstanding any other statutory provision or any rule of law

(a) a homosexual act³ in private shall not be an offence if the parties consent thereto and have attained the age of 18 **17** years **and**

(b) a homosexual act by any person shall not be an offence if he is under the age of seventeen years and the other party has attained that age

c)1.

c)2. Paragraphs (2) to (4) are unaffected

It is hereby declared that where in any proceedings it is charged that a homosexual act is an offence the prosecutor shall have the burden of proving that the act was done otherwise than in private or otherwise than with the consent of the parties or that any of the parties had not attained the age of 18 **17** years.

3 Defined in Article 2(1) of the 1982 Order in relation to a man as “buggery with another man, an act of gross indecency with another man or the act of being a party to the commission by a man of such an act”