

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) ACT 2005

EXPLANATORY NOTES

THE ACT – COMMENTARY ON SECTIONS

Section 16 – Indecent photographs of 16 and 17 year olds

44. **Section 16** amends sections 52 and 52A of the Civic Government (Scotland) Act 1982. Sections 52 and 52A of the 1982 Act provide a series of offences in relation to the taking, possession and distribution of indecent photographs of children under 16. Section 16 amends these provisions so that they cover indecent photographs of children under 18.
45. Subsection (3) adds to the 1982 Act a series of exceptions to the indecent photographs offences insofar as they relate to photographs of 16 and 17 year olds. The exceptions relate to the offences at sections 52(1)(a) to (c) and 52A - but not to 52(1)(d) – and work as follows. If the accused raises the issues set out below, the Crown would require to disprove at least one element in order for the offences to be proved. The issues that the accused would require to raise are:
- either the photograph was of a person aged 16 or over or the accused reasonably believed that to be so;
 - at the time of the offence charged, or at the time when the accused obtained the photograph, the accused and the person aged 16 or 17 who is the subject of the photograph were either married to or civil partners of each other or were partners in an established relationship;
 - the person aged 16 or 17 who is the subject of the photograph consented to the photograph being made, taken or in the accused's possession (depending on which offence has been charged) or the accused reasonably believed that to be so; and
 - in relation to the offence at section 52(1)(b) of the 1982 Act (distributing or showing an indecent photograph), that distribution was only to the person aged 16 or 17 who is the subject of the photograph; and in relation to the offence at section 52(1)(c) of the 1982 Act (possessing an indecent photograph with a view to its being distributed or shown), the accused intended to distribute the photograph only to the person aged 16 or 17.
46. Furthermore, in each case, the exception only applies where the photograph shows the person aged 16 or 17 alone or with the accused, but not if it shows any other person.