

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – Children

Young Children

54. Sections 18 to 27 of the Bill make provision in relation to sexual conduct involving “young children”. The Bill uses the term “young child” to refer to a child who is under the age of 13 at the time the offence was committed. Therefore, each of the offences under sections 18 to 26 can be committed only against a child who is aged under 13.

Section 18 – Rape of a young child

55. This section creates the statutory offence of “rape of a young child”. It provides that a person will commit this offence by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of a young child. There is no reference to consent of the victim in this section. An offence will be committed irrespective of whether a young child apparently ‘consented’ to the penetration.

Section 19 – Sexual assault on a young child by penetration

56. This section creates the offence of “sexual assault on a young child by penetration”. Subsection (1) provides that a person commits this offence by intentionally or recklessly sexually penetrating, with any part of his or her body, or anything else (i.e. an object) the vagina or anus of a young child.
57. Subsection (2) provides that penetration “by any part of A’s body” in subsection (1) includes with the perpetrator’s penis. This means there is an overlap between the conduct which constitutes sexual assault on a young child by penetration, that which constitutes rape of a young child and that which constitutes sexual assault on a young child. This is necessary for the same reasons as specified for the overlap between the offences at sections 1, 2 and 3 of the Bill (see paragraph 12 above).

Section 20 – Sexual assault on a young child

58. This section creates the offence of “sexual assault on a young child”. Subsection (2) sets out five separate sexual acts, each of which constitute an offence. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The five sexual acts are:
- (a) penetrating a young child’s vagina, anus or mouth by any means in a sexual way;
 - (b) touching a young child in a sexual way;
 - (c) having any other sexual physical contact with a young child, whether directly or through clothing and whether with a body part or with an implement;
 - (d) ejaculating semen onto a young child; and

(e) intentionally or recklessly emitting urine or saliva onto a young child in a sexual way.

59. Subsection (3) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes sexual assault on a young child, that which constitutes sexual assault by penetration on a young child and that which constitutes rape of a young child. This is necessary for the same reasons as specified for the overlap between the offences at sections 1, 2 and 3 of the Bill (see paragraph 12 above).

Section 21 – Causing a young child to participate in a sexual activity

60. This section creates the offence of “causing a young child to participate in a sexual activity”. Subsection (1) provides that the offence is committed if the perpetrator intentionally causes the young child to participate in a sexual activity.

Section 22 – Causing a young child to be present during a sexual activity

61. This section creates the offence of “causing a young child to be present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of a young child or, secondly, that the perpetrator intentionally caused a young child to be present while a third person engaged in a sexual activity.
62. Subsection (2) provides that an offence is committed only where the perpetrator’s purpose in having a young child present is to obtain sexual gratification or to humiliate, distress or alarm the young child.
63. Subsection (3) provides that, for the purposes of subsection (1), the requirement that the young child is present or that the activity is carried out in his or her presence, includes situations in which the person engaging in the sexual activity can be observed by the young child (other than by means of an image). It is not essential that it be proved that the young child actually observed the activity; it is sufficient that the young child was in a place where the sexual activity was capable of being observed from.

Section 23 – Causing a young child to look at a sexual image

64. **Section 23** creates the offence of “causing a young child to look at a sexual image”. Subsection (1) provides that the offence is committed if a person intentionally causes a young child to look at a sexual image.
65. Subsection (2) provides that an offence is committed only if the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.
66. Subsection (3) provides a definition of a “sexual image”. It is the same as that used in the offence at section 6 (see paragraph 22).

Section 24 – Communicating indecently with a young child etc

67. This section creates two offences, each relating to sexual communication with a young child. There are some common features shared by both offences.
68. Subsection (1) creates the offence of “communicating indecently with a young child”. It is committed if a person intentionally sends a young child a sexual written communication by whatever means or directs a sexual verbal communication at a young child, by whatever means.
69. Subsection (2) creates the offence of “causing a young child to see or hear an indecent communication”. It is committed if a person causes the young child to see a sexual

written communication or to hear a sexual verbal communication in circumstances other than as described in subsection (1).

70. Subsection (3) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.
71. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

Section 25 – Sexual exposure to a young child

72. This section creates the offence of “sexual exposure to a young child”. Subsection (1) provides that the offence is committed if a person intentionally exposes his or her genitals in a sexual manner to a child who has not attained the age of 13 years.
73. Subsection (2) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.

Section 26 – Voyeurism towards a young child

74. This section creates the offence of “voyeurism towards a young child”. Subsection (1) provides that it is committed if a person does any of the things mentioned in subsections (2) to (5) in relation to a child who has not attained the age of 13 years.
75. Subsection (2) provides that a person commits an offence if that person observes a young child engaging in a private act. Subsection (3) provides that a person commits an offence if that person operates equipment with the intention of enabling himself or another person to observe a young child engaging in a private act. Subsection (4) provides that a person commits an offence if that person records a young child engaging in a private act with the intention that he or another person will look at an image of the young child doing the act. Subsection (5) provides that a person commits an offence if that person installs equipment (such as a video camera) or constructs, or adapts a structure or part of a structure (e.g. by drilling a “peep hole”) with the intention of enabling himself, or a third person, to commit any of the offences in subsections (2) to (4).
76. Subsections (6) and (7) provide that an offence under subsections (2) to (4) is committed only where the perpetrator’s purpose is to obtain sexual gratification (whether for himself or a third person in the case of the offences at subsections (3) and (4)) or to cause humiliation, distress or alarm to the child. Subsection (8) provides that the definitions of various terms at section 10 apply to this section as they apply to the offence at section 9.

Section 27 – Belief that a child has attained the age of 13 years

77. Section 27 provides that it shall not be defence to a charge of a sexual offence against a young child, under sections 18 to 26 of the Bill, that the accused believed that the young child was aged 13 years or over.