

## **SEXUAL OFFENCES (SCOTLAND) ACT 2009**

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### **EXPLANATORY NOTES**

#### **COMMENTARY ON SECTIONS**

#### **Part 4 – Children**

##### **Older Children**

78. Sections 28 to 39 of the Bill make provision in relation to sexual conduct involving “older children”. The Bill uses the term “older child” to refer to a child who is aged 13, 14 or 15 at the time the offence was committed. Therefore, each of the offences under sections 28 to 37 can be committed only against an older child of those ages.

##### ***Section 28 – Having intercourse with an older child***

79. This section creates the offence of “having intercourse with an older child”. It provides that the offence may be committed only by a person aged 16 or over. A person will commit an offence under this section by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of an older child.

##### ***Section 29 – Engaging in penetrative sexual activity with or towards an older child***

80. This section creates the offence of “engaging in penetrative sexual activity with or towards an older child.”. Subsection (1) provides that a person commits this offence by intentionally or recklessly sexually penetrating to any extent, with any part of his or her body, or anything else (i.e. an object), the vagina or anus of an older child. The offence may only be committed by a person aged 16 or over.
81. 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 engaging in penetrative sexual activity with an older child, that which constitutes having intercourse with an older child under section 21 and that which constitutes engaging in sexual activity with an older 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 30 – Engaging in sexual activity with or towards an older child***

82. This section creates the offence of “engaging in sexual activity with or towards an older child”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over.
83. 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 an older child’s vagina, anus or mouth by any means in a sexual way;
  - (b) touching an older child in a sexual way;

- (c) having any other sexual physical contact with an older child, whether directly or through clothing and whether with a body part or with an implement;
  - (d) ejaculating semen onto an older child, and
  - (e) intentionally or recklessly emitting urine or saliva onto a young child in a sexual way.
84. Subsection (3) provides that penetration “by any part of A’s body” for the purposes of subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes the offence of engaging in sexual activity with an older child, that of having intercourse with an older child at section 28 and that of engaging in penetrative sexual activity with an older child at section 29. This is necessary for the same reasons as specified for the overlap between the offences at section 1, 2 and 3 of the Bill (see paragraph 12 above).

### ***Section 31 – Causing an older child to participate in a sexual activity***

85. This section creates the offence of “causing an older child to participate in a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. Further, it provides that the offence is committed only where the perpetrator intentionally causes an older child to participate in a sexual activity.

### ***Section 32 – Causing an older child to be present during a sexual activity***

86. This section creates the offence of “causing an older child to be present during a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. It provides that the two circumstances in which this offence is committed are, first, where the perpetrator intentionally engages in a sexual activity in the presence of an older child or, secondly, where the perpetrator causes an older child to be present while a third party engages in a sexual activity.
87. Subsection (2) provides that the activities at subsection (1) are a crime only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.
88. Subsection (3) provides that, for the purposes of this offence, the requirement that an older child is present when the perpetrator or a third person carried out sexual activity includes situations in which the person engaging in the sexual activity can be observed by an older child (other than by means of an image). It is not essential to prove that the older child actually observed the activity; so long as the older child was in a place where the sexual activity was capable of being observed from.

### ***Section 33 – Causing an older child to look at a sexual image***

89. This section creates the offence of “causing an older child to look at a sexual image”. Subsection (1) provides that the offence is committed where a person over the age of 16 intentionally causes an older child to look at a sexual image.
90. Subsection (2) provides that it is an offence only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.
91. Subsection (3) provides a definition of a “sexual image” for the purposes of this section. It is the same as that used in the offence at section 6 (see paragraph 22).

### ***Section 34 – Communicating indecently with an older child etc.***

92. This section creates two offences, each relating to sexual communication with an older child by a person aged 16 or over.

93. Subsection (1) creates the offence of “communicating indecently with an older child”. It provides that the offence is committed if a person intentionally sends an older child a sexual written communication by whatever means, or directs a sexual verbal communication at an older child, by whatever means.
94. Subsection (2) creates the offence of “causing an older child to see or hear an indecent communication”. It provides that an offence is committed where a person causes an older child to see a sexual written communication or to hear a sexual verbal communication by whatever means in any circumstances other than those specified in subsection (1).
95. 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 older child.
96. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

### ***Section 35 – Sexual exposure to an older child***

97. This section creates the offence of “sexual exposure to an older child”. Subsection (1) provides that the offence is committed if a person intentionally and for a purpose mentioned in subsection (2), exposes his or her genitals in a sexual manner to an older child. The offence may only be committed by a person who is 16 years or over.
98. Subsection (2) provides that an offence is committed only where the accused acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the victim.

### ***Section 36 – Voyeurism towards an older child***

99. This section creates the offence of “voyeurism towards an older child”. Subsection (1) provides that the offence is committed if a person does any of the things mentioned in subsections (2) to (5) in relation to an older child. The offence may only be committed by a person who is 16 years or over.
100. Subsection (2) provides that a person commits an offence if that person observes an older 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 an older child engaging in a private act. Subsection (4) provides that a person commits an offence if that person records an older child engaging in a private act with the intention that he or another person will look at an image of the older 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).
101. 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 37 – Older children engaging in sexual conduct with each other***

102. **Section 37** provides that an older child who participates in certain sexual conduct with another older child commits an offence.
103. Subsections (1), (2) and (3) provide that an older child who intentionally or recklessly penetrates sexually another older child’s vagina, anus or mouth with his penis or intentionally or recklessly touches another older child’s vagina, anus or penis with his

or her mouth commits the offence of “engaging while an older child in sexual conduct with or towards another older child”.

104. Subsection (4) provides that an older child who consents to engaging in the sexual conduct at subsection (3) will also be guilty of an offence; that offence being “engaging while an older child in consensual sexual conduct with another older child”.

### ***Section 38 – Penetration and consent for the purposes of section 37***

105. This section makes further provision as to the meaning of penetration and consent for the purposes of section 37.
106. Subsections (3) to (8) mirror the approach taken in Part 1 of the Bill. Subsections (3) and (4) provide that for the purposes of section 37 “consent” means “free agreement” (as defined in section 12) and that free agreement to sexual conduct is absent in the circumstances specified in section 13(2). Subsection (5) provides that a person is incapable, while asleep or unconscious, of consenting to any conduct (as with section 14).
107. Subsection (6) (like section 15) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.
108. Subsections (7) and (8) (like section 15) deal with the withdrawal of consent. Subsection (7) provides that consent to the sexual conduct may be withdrawn at any time before or during that conduct. Subsection (8) reinforces this by providing that any sexual conduct which takes place after consent is withdrawn takes place without consent.

### ***Section 39 – Defences in relation to offences against older children***

109. This section provides that a defence can be invoked by a person who has criminal proceedings brought against them for an offence against an older child.
110. Subsection (1) provides that an accused person, who has criminal proceedings brought against them for an offence under sections 28 to 37 may make use of a defence in those proceedings that he or she reasonably believed that the older child had attained the age of 16 years at the time the conduct took place.
111. Subsection (2) provides that an accused may not use the defence set out in subsection (1) if he or she has previously been charged by the police with a relevant sexual offence or if there is in force in respect of the accused a Risk of Sexual Harm Order. Subsection (5) provides that a relevant sexual offence is one which is listed in schedule 1. This subsection also defines the term “Risk of Sexual Harm Order.” This definition means that if there is a Risk of Sexual Harm Order in force against a person in Scotland, England, Wales or Northern Ireland, and such a person is charged by the police in Scotland with an offence under sections 28 to 37, the defence of reasonable mistaken belief of age cannot be invoked by that person.
112. Subsections (3) and (4) provide that it shall be a defence to any criminal proceedings relating to the offences in sections 30 to 36 that the difference between the accused’s age and that of the older child did not exceed 2 years. However, this defence is not available to the offences under section 30 where the conduct would constitute an offence under section 37 if both parties were aged 13 to 15.
113. Subsection (6) provides the Scottish Ministers with a power to modify Schedule 1 so as to add an offence against a child which involves sexual conduct, or delete an offence listed there.
114. Subsection (7) provides that a belief that the child was in fact a young child is not a defence to a charge of any of the offences in sections 28 to 37.

***Section 40 – Special provision as regards failure to establish whether child has or has not attained certain ages***

115. The offences in Part 4 of the Bill divide into two distinct groups: those concerning sexual activity with a young child (where the child is under the age of 13 at the time of the conduct - sections 18 to 26), and those concerning sexual activity with an older child (where, at the time of the conduct, the child has attained the age of 13 but is not yet the age of 16 (sections 28 to 37)). The question of which offence is appropriate in any particular case is determined solely by the age of the child accused or victim at the time when the offence is said to have been committed, and not by the accused's belief as to the child's age. Section 40 provides for "deeming of age" provisions in circumstances where it is not possible to establish the age of a child.
116. Subsection (1) provides that "deeming provision 1" applies where the accused is charged with an offence against an older child at sections 28 to 37(1) and it is not possible to establish beyond reasonable doubt that the child had attained the age of 13 at the time the offence is alleged to have been committed, but it is possible to establish that the child had not attained the age of 16 at that time.
117. Subsection (2) provides that "deeming provision 2" applies where the accused is charged with an offence under section 37(4) and there is a failure to establish beyond reasonable doubt that the other child involved in the sexual activity had attained the age of 13 years at the time the offence is alleged to have been committed, but the court is satisfied that that child had not attained the age of 16 at that time.
118. Subsection (3) provides that "deeming provision 3" applies where the accused is charged with an offence under section 37(1) and there is a failure to establish beyond reasonable doubt that the accused was a child who had not attained the age of 16 years at the time the offence is alleged to have been committed, but the court is satisfied that the accused had attained the age of 13 years.
119. Subsection (4) provides that "deeming provision 4" applies where the accused is charged with an offence under section 37(4) and there is a failure to establish beyond reasonable doubt that the accused was a child who had not attained the age of 16 years at the time the offence is alleged to have been committed, but the court is satisfied that the accused had attained the age of 13 years.

***Section 41 – Special provision as regards age: deeming provisions***

120. **Section 41** provides for the "deeming of age" provisions in consequence of section 40. Deeming provision 1 provides that in the circumstances set out in section 40(1), the child is deemed to be a person who has attained the age of 13 years at the relevant time. Deeming provision 2 provides that, in the circumstances set out in section 40(2), the child is deemed to be a person who had attained the age of 13 years at the relevant time. Deeming provision 3 provides that, in the circumstances set out in section 40(3), the accused is deemed to be a child who has not attained the age of 16 years at the relevant time. Deeming provision 4 provides that, in the circumstances set out in section 40(4), the accused is deemed to be a child who has not attained the age of 16 years at the relevant time.