

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 7 – Miscellaneous and General

Section 49 – Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

150. *Section 49* makes provision with regard to the “purpose test” used in the offences at sections 5 to 9, 22 to 26 and 32 to 36. Subsection (1) provides that where it is required to prove that the accused acted for the purpose of obtaining sexual gratification, or of humiliating, alarming or distressing the victim, this requirement is satisfied if, in all the circumstances, it may reasonably be inferred that the accused acted for such a purpose. Subsection (2) provides that it is irrelevant whether or not the victim was in fact humiliated, alarmed or distressed by the accused’s act.

Section 50 – Power to convict for offence other than that charged

151. This section provides that, where a charge is brought under certain provisions in the Bill but the court or the jury are not satisfied that the accused committed the offence in the charge, it may be open to convict the accused of a specified alternative offence. Schedule 3 specifies the available alternatives.
152. Subsection (1) provides that this power may be used where the court or jury are not satisfied that the accused committed or attempted to commit the offence which is charged but are satisfied (to the normal criminal standard of proof) that the accused committed or attempted to commit another offence (where the other offence is specified, in schedule 3 to the Bill, as being an available alternative to the offence charged). If these conditions are met, then the court or jury may acquit the accused of the offence charged but may find him or her guilty of the alternative offence.
153. Subsections (2) to (5) provide for circumstances where the accused is charged with an offence against a child and doubt as to the age of either the accused or the victim opens up the possibility of the accused being found guilty of an alternative offence to the offence charged. Subsection (2) provides that where either of conditions 1 or 2 apply, the court or jury may acquit the accused of the charge but find the accused guilty of one of the alternative older child offences listed in subsections (3) and (4).
154. Subsection (3) provides for condition 1 which is that the accused is charged with an offence at sections 18 to 26 against a young child and, but for a failure to establish beyond reasonable doubt that the child victim had attained the age of 13 years at the relevant time, a court or jury would be entitled to find that the accused had committed one of the alternative older child offences set out at section 50(3)(b)(i) to (xii).
155. Subsection (4) provides for condition 2, which is that the accused is charged with an offence under sections 28-30 and, but for a failure to establish beyond reasonable doubt that the accused had not attained the age of 16 at the relevant time, a court or jury would

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be entitled to find that the accused had one of the alternative older child offences set out at section 50(4)(b)(i) or (ii).

156. Subsection (5) provides that for the purposes of this section, “relevant time” is the time when the conduct to which the proceedings relate took place.
157. Subsection (6) provides that references to an offence in section 50 includes attempting, inciting, counselling or procuring the commission of that offence or being involved art and part in that offence.

Section 51 – Exceptions to inciting or being involved art and part in offences under Part 4 or 5

158. This section provides that a person who acts for any of the purposes specified in paragraph (a) will not be guilty of any of the offences contained in Part 4 and Part 5 of the Bill providing that they are not also acting for any of the purposes in paragraph (b).
159. Paragraph (a) of this section specifies purposes including protecting others from sexually transmitted infection or from physical harm, the prevention of pregnancy or promoting their emotional wellbeing.
160. Paragraph (b) of this section specifies the purposes as including obtaining sexual gratification, humiliating, distressing or alarming a person or causing or encouraging the activity which constitutes an offence or a person’s participation in such conduct.

Section 52 – Common law offences

161. This section provides that the common law offences listed in paragraph (a) are abolished (other than in respect of offences committed before this section is commenced).
162. This means that, where conduct which would otherwise have constituted one of those common-law offences is committed on or after this section has been commenced, that common law offence will not have been committed. Instead, the conduct will fall under one of the offences in the Bill. The particular common law offences which are to be abolished are rape, clandestine injury to women, lewd, indecent and libidinous practice or behaviour, and sodomy. All other common law crimes remain in place.
163. Paragraph (b) qualifies this by providing that any conduct which constitutes an offence under one of the provisions of the Bill and which takes place after the commencement of this section must be charged as an offence under the Bill. This means that it will not be competent to bring a charge under the common law nor under any other statutory offence in respect of that sexual conduct. Thus, for example, conduct falling within section 3 must be charged as sexual assault and not as a common law assault aggravated by indecency.

Section 53– Continuity of law on sexual offences

164. This section is intended to provide a smooth transition between the current law in respect of sexual offences and the new offences contained in the Bill. The main purpose of this section is to make allowance for cases in which the sexual conduct in the charge takes place around the time that the offences contained in the Bill come into force. It may not always be possible to prove exactly when the sexual conduct took place and hence whether this occurred before or after the relevant offence in the Bill was commenced.
165. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence specified in subsection (2) and with an offence under the Bill. It provides that the court or jury must be satisfied in all respects that the accused committed the offences charged, other than as to the time on which the sexual conduct took place.

166. Subsection (3) provides that the accused may be found guilty, where the conditions in subsection (1) apply, of whichever of the offences they are charged with has the lower maximum penalty (as defined by subsection (4)). Where the penalties are the same, it provides that the accused may be found guilty of the new offence.
167. Subsection (5) provides that a reference to an offence in this section includes an attempt to commit the offence, inciting its commission, and being involved in part and part in it and to an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995..

Section 54 – Incitement to commit certain sexual acts outside the United Kingdom

168. **Section 54** removes the dual criminality requirement in respect of UK nationals. Therefore, a UK national will commit an offence under this section if he or she incites a sexual act (which is intended to take place outside the UK) that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act which was incited was an offence in the country in which it was intended to take place. This follows, but goes beyond, the requirements of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Abuse which was signed by the UK Government on 8 May 2008. That Convention requires the removal of the dual criminality requirements in relation to offences of child abuse, child pornography and child prostitution. Dual criminality is retained for UK residents and persons other than UK nationals.
169. The section applies to the offences which are listed in part 1 of schedule 4. These include inciting offences under Part 1 of the Act (rape etc.) which are committed against a person under the age of 18, the offences against children in Part 4 and the sexual abuse of trust offences in sections 42 and 46.
170. By way of example, incitement in Scotland to commit rape in Scotland would be an offence by virtue of section 293 of the Criminal Procedure (Scotland) Act 1995. The effect of section 54 is that incitement in Scotland to commit rape in another country is also an offence in Scotland, for non-UK nationals if rape is an offence in that other country. It will be an offence for UK nationals to incite rape (which is an offence in Scotland) outside the UK regardless of whether it is an offence in that other country.

Section 55 – Offences committed outside the United Kingdom

171. As with section 54, this dual criminality requirement is removed in respect of UK nationals, in line with the Council of Europe Convention. Therefore, a UK national will commit an offence under this section if he or she carries out a sexual act outside the UK that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act that was committed is also an offence in the country in which it was intended to take place. The dual criminality test is retained in relation to UK residents.

Section 56 – Continuity of sexual offences committed abroad

172. **Section 56** ensures the continuity of the extraterritorial sexual offences provisions in section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) which are replaced by section 55 of the Bill. It deals with cases where it cannot be proved precisely when the offence occurred, i.e. before or after section 16B of the 1995 Act is repealed.
173. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence as modified by section 16B of the 1995 Act and with the offence as modified by section 55 of the Bill. As with section 53, it provides that the court or jury must be satisfied in all respects that the accused committed the offences charged, other than as to the time on which the sexual conduct took place.

174. Subsection (3) provides that where this section applies the accused may be found guilty, of the offence as modified by section 16B of the 1995 Act.

Section 57 – Offences by bodies corporate etc.

175. Section 57 provides that where an offence is committed by a corporate body, Scottish partnership or an unincorporated body other than a Scottish partnership and it is proven that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of a director, manager, secretary, member of partner of such a body, or any person purporting to act in such a role, that individual also commits the offence and is liable to be proceeded against and punished accordingly.

Section 58 – Ancillary provision

176. This section enables Scottish Ministers to make ancillary provision by statutory instrument which is necessary or expedient, or in consequence of, giving full effect to the Bill.

Section 59 – Orders

177. This section sets out the order making powers which can be exercised by the Scottish Ministers in the Bill and the applicable parliamentary procedure.

Section 60 – Interpretation

178. This section provides definitions of various terms used in the Bill. Subsection (2) provides a definition of the term “sexual” where it is used in the Bill. It provides that a penetration, touching, activity, communication, manner of exposure or relationship is sexual if in all the circumstances of the case, a reasonable person would consider it to be so.

Section 61 – Modification of enactments

179. This section provides for the modification of existing enactments. Subsection (1) introduces schedule 5 to the Bill which provides for modifications of existing enactments in consequence of the Bill. Subsection (2) introduces schedule 6 to the Bill which provides for repeal of certain existing enactments in consequence of the Bill.

Section 62 – Short title and commencement

180. This section provides that the Bill will come into force on a day or days decided by order by Scottish Ministers. Such orders may make different provision for different purposes.

Parliamentary Stages

Bill Stage	Date	Official report
Stage 1: Finance Committee – approach to Financial Memorandum	24 June 2008	http://www.scottish.parliament.uk/s3/committees/equal/or-08/eo08-1302.htm#Col609
Stage 1: Subordinate Legislation Committee - consideration of the Bill	9 September 2008	http://www.scottish.parliament.uk/s3/committees/subleg/or-08/su08-2402.htm#Col345
Stage 1: Equal Opportunities Committee –	30 September 2008	http://www.scottish.parliament.uk/s3/committees/equal/or-08/eo08-1302.htm#Col609

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Bill Stage	Date	Official report
consideration of the Bill at stage 1		
Stage 1: Subordinate Legislation Committee - consideration of the Bill	7 October 2008	http://www.scottish.parliament.uk/s3/committees/subleg/or-08/su08-2802.htm#Col377
Stage 1: Justice Committee evidence session	28 October 2008	http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-2502.htm#Col1221
Stage 1: Subordinate Legislation Committee - consideration of the Bill	28 October 2008	http://www.scottish.parliament.uk/s3/committees/subleg/or-08/su08-2902.htm#Col391
Stage 1: Justice Committee evidence session	4 November 2008	http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-2602.htm#Col1252
Stage 1: Subordinate Legislation Committee - consideration of the Bill	4 November 2008	http://www.scottish.parliament.uk/s3/committees/subleg/or-08/su08-3002.htm#Col402
Stage 1: Justice Committee evidence session	11 November 2008	http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-2702.htm#Col1299
Stage 1: Justice Committee evidence session	18 November 2008	http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-2802.htm#Col1333
Stage 1: Justice Committee evidence session	25 November 2008	http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-2902.htm#Col1403
Stage 1: Justice Committee Report		http://www.scottish.parliament.uk/s3/committees/justice/reports-09/jur09-01.htm
Stage 1: Debate	12 February 2009	http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0212-02.htm#Col15048
After Stage 1: Subordinate Legislation Committee consideration of Scottish Government response to Stage 1 Report	3 March 2009	http://www.scottish.parliament.uk/s3/committees/subleg/or-09/su09-0802.htm#Col510
Stage 2: Justice Committee session 1	17 March 2009	http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-0902.htm#Col1646
Stage 2: Justice Committee session 2	24 March 2009	http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1002.htm#Col1662

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Bill Stage	Date	Official report
Stage 2: Justice Committee session 3	31 March 2009	http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1102.htm#Col1675
After Stage 2: Subordinate Legislation Committee consideration of Bill as amended at Stage 2	2 June 2009	http://www.scottish.parliament.uk/s3/committees/subleg/or-09/su09-1902.htm#Col607
Stage 3: debate	10 June 2009	http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0610-02.htm#Col18165
Royal Assent	14 July 2009	