



Sexual Offences (Scotland) Act 2009

2009 asp 9

PART 4

CHILDREN

Older children

28 Having intercourse with an older child

If a person (“A”), who has attained the age of 16 years, with A’s penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child (“B”), who—

- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of having intercourse with an older child.

29 Engaging in penetrative sexual activity with or towards an older child

- (1) If a person (“A”), who has attained the age of 16 years, with any part of A’s body or anything else penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child (“B”) who—

- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in penetrative sexual activity with or towards an older child.

- (2) Without prejudice to the generality of subsection (1), the reference in that paragraph to penetration with any part of A’s body is to be construed as including a reference to penetration with A’s penis.

30 Engaging in sexual activity with or towards an older child

- (1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsection (2), “B” being in each case a child who—

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- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of engaging in sexual activity with or towards an older child.

(2) Those things are, that A—

- (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
- (b) intentionally or recklessly touches B sexually,
- (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,
- (d) intentionally or recklessly ejaculates semen onto B,
- (e) intentionally or recklessly emits urine or saliva onto B sexually.

(3) Without prejudice to the generality of paragraph (a) of subsection (2), the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis.

31 Causing an older child to participate in a sexual activity

If a person (“A”), who has attained the age of 16 years, intentionally causes a child (“B”), who—

- (a) has attained the age of 13 years, but
- (b) has not attained the age of 16 years,

to participate in a sexual activity, then A commits an offence, to be known as the offence of causing an older child to participate in a sexual activity.

32 Causing an older child to be present during a sexual activity

(1) If a person (“A”), who has attained the age of 16 years either—

- (a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”), who—
 - (i) has attained the age of 13 years, but
 - (ii) has not attained the age of 16 years, or
- (b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,

then A commits an offence, to be known as the offence of causing an older child to be present during a sexual activity.

(2) The purposes are—

- (a) obtaining sexual gratification,
- (b) humiliating, distressing or alarming B.

(3) Without prejudice to the generality of subsection (1), the reference—

- (a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and

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- (b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

33 Causing an older child to look at a sexual image

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) causes a child (“B”), who—
 - (a) has attained the age of 13 years, but
 - (b) has not attained the age of 16 years,to look at a sexual image, then A commits an offence, to be known as the offence of causing an older child to look at a sexual image.
- (2) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (3) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—
 - (a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
 - (b) A's genitals or the genitals of a third person or imaginary person.

34 Communicating indecently with an older child etc.

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, a child (“B”) who—
 - (a) has attained the age of 13 years, but
 - (b) has not attained the age of 16 years,then A commits an offence, to be known as the offence of communicating indecently with an older child.
- (2) If, in circumstances other than are as mentioned in subsection (1), a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), causes another person (“B”) who is a child described in paragraphs (a) and (b) of subsection (1) to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing an older child to see or hear an indecent communication.
- (3) The purposes are—
 - (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (4) In this section—

“written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

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“verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—

- (a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
- (b) a communication by means of sign language.

35 Sexual exposure to an older child

- (1) If a person (“A”), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) exposes A’s genitals in a sexual manner to a child (“B”) who—
- (a) has attained the age of 13 years, but
 - (b) has not attained the age of 16 years,
- with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure to an older child.
- (2) The purposes are—
- (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.

36 Voyeurism towards an older child

- (1) If a person (“A”), who has attained the age of 16 years, does any of the things mentioned in subsections (2) to (5) in relation to a child (“B”) who—
- (a) has attained the age of 13 years, but
 - (b) has not attained the age of 16 years,
- then A commits an offence, to be known as the offence of voyeurism towards an older child.
- (2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.
- (3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.
- (4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.
- [^{F1}(4A) The fourth thing is that A operates equipment beneath B’s clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe—
- (a) B’s genitals or buttocks (whether exposed or covered with underwear), or
 - (b) the underwear covering B’s genitals or buttocks,
- in circumstances where the genitals, buttocks or underwear would not otherwise be visible.
- (4B) The fifth thing is that A records an image beneath B’s clothing of—
- (a) B’s genitals or buttocks (whether exposed or covered with underwear), or
 - (b) the underwear covering B’s genitals or buttocks,

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in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.]

- (5) The [^{F2}sixth] thing is that A—
- (a) installs equipment, or
 - [^{F3}(b) constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).]
- (6) The purposes referred to in subsection (2) are—
- (a) obtaining sexual gratification,
 - (b) humiliating, distressing or alarming B.
- (7) The purposes referred to in subsections (3) [^{F4}, (4), (4A) and (4B)] are—
- (a) obtaining sexual gratification (whether for A or C),
 - (b) humiliating, distressing or alarming B.
- (8) Section 10 applies for the purposes of this section as it applies for the purposes of section 9 (the references in that section to section 9(3) [^{F5}, (4A)] and (5) being construed as references to subsections (3) [^{F6}, (4A)] and (5) of this section).

Textual Amendments

- F1** S. 36(4A)(4B) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(a), 206; S.S.I. 2010/357, art. 2(b)
- F2** Word in s. 36(5) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(b)(i), 206; S.S.I. 2010/357, art. 2(b)
- F3** S. 36(5)(b) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(b)(ii), 206; S.S.I. 2010/357, art. 2(b)
- F4** Words in s. 36(7) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(c), 206; S.S.I. 2010/357, art. 2(b)
- F5** Word in s. 36(8) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(d)(i), 206; S.S.I. 2010/357, art. 2(b)
- F6** Word in s. 36(8) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 43(5)(b)(ii), 206; S.S.I. 2010/357, art. 2(b)

37 Older children engaging in sexual conduct with each other

- (1) If a child (“A”), being a child mentioned in subsection (2), does any of the things mentioned in subsection (3), “B” being in each case a child mentioned in subsection (2), then A commits an offence, to be known as the offence of engaging while an older child in sexual conduct with or towards another older child.
- (2) The child is a child who—
- (a) has attained the age of 13 years, but
 - (b) has not attained the age of 16 years.
- (3) The things are that A—
- (a) penetrates sexually, with A's penis and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,

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- (b) intentionally or recklessly touches the vagina, anus or penis of B sexually with A's mouth.
- (4) In the circumstances specified in subsection (1), if B engages by consent in the conduct in question, then B commits an offence, to be known as the offence of engaging while an older child in consensual sexual conduct with another older child.
- (5) In paragraph (b) of subsection (3), the reference to A's mouth is to be construed as including a reference to A's tongue or teeth.

38 Penetration and consent for the purposes of section 37

- (1) This section applies for the purposes of section 37.
- (2) Penetration is a continuing act from entry until withdrawal of whatever is intruded.
- (3) “Consent” means free agreement (and related expressions are to be construed accordingly).
- (4) Without prejudice to the generality of subsection (3), free agreement to conduct is absent in the circumstances set out in section 13(2) (references in that section to A and B being construed in accordance with section 37).
- (5) A person is incapable, while asleep or unconscious, of consenting to any conduct.
- (6) Consent to conduct does not of itself imply consent to any other conduct.
- (7) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.
- (8) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

39 Defences in relation to offences against older children

- (1) It is a defence to a charge in proceedings—
 - (a) against A under any of sections 28 to 37(1) that A reasonably believed that B had attained the age of 16 years,
 - (b) against B under section 37(4) that B reasonably believed that A had attained the age of 16 years.
- (2) But—
 - (a) the defence under subsection (1)(a) is not available to A—
 - (i) if A has previously been charged by the police with a relevant sexual offence,^{F7} . . .
 - [^{F8}(ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16 [^{F9}and the court before which the charge is brought considers it is appropriate for that conviction to have that effect], or]
 - (ii) if there is in force in respect of A a risk of sexual harm order,
 - (b) the defence under subsection (1)(b) is not available to B—
 - (i) if B has previously been charged by the police with a relevant sexual offence,^{F10} . . .

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- [^{F11}(ia) if B has a previous conviction for a relevant foreign offence committed against a person under the age of 16 [^{F12}and the court before which the charge is brought considers it is appropriate for that conviction to have that effect], or]
- (ii) if there is in force in respect of B a risk of sexual harm order.
- (3) It is a defence to a charge in proceedings under any of the sections mentioned in subsection (4) that at the time when the conduct to which the charge relates took place, the difference between A's age and B's age did not exceed 2 years.
- (4) Those sections are—
- (a) section 30(2)(a), but not in so far as the charge is founded on—
 - (i) penetration of B's vagina, anus or mouth with A's penis,
 - (ii) penetration of B's vagina or anus with A's mouth, tongue or teeth,
 - (b) section 30(2)(b) or (c), but not in so far as the charge is founded on sexual touching or other physical activity involving—
 - (i) B's vagina, anus or penis being touched sexually by A's mouth,
 - (ii) A's vagina, anus or mouth being penetrated by B's penis,
 - (iii) A's vagina, anus or penis being touched sexually by B's mouth,
 - (c) section 30(2)(d) [^{F13}or (e)],
 - (d) any of sections 31 to 36.
- (5) In paragraphs (a) and (b) of subsection (2)—
- (a) “a relevant sexual offence” means an offence listed in schedule 1,
 - [^{F14}(aa) “a previous conviction for a relevant foreign offence” means a previous conviction by a court in a member State of the European Union ^{F15}... for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1,]
 - (b) “a risk of sexual harm order” means an order under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9) or section 123 of the Sexual Offences Act 2003 (c. 42).
- [^{F16}(5A) Any issue of equivalence arising in pursuance of subsection (5)(aa) is for the court to determine.
- (5B) For that purpose, an offence may be equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1 even though, under the law of the member State (or part of the member State) in question, it is an offence—
- (a) regardless of the age of the victim, or
 - (b) only if committed against a person under an age other than 16 years.]
- (6) The Scottish Ministers may by order modify schedule 1 so as to add an offence against a child which involves sexual conduct or delete an offence listed there.
- (7) It is not a defence to a charge in—
- (a) proceedings under any of sections 28 to 37(1) against A that A believed that B had not attained the age of 13 years,
 - (b) proceedings under section 37(4) against B that B believed that A had not attained the age of 13 years.

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Textual Amendments

- F7** Word following s. 39(2)(a) repealed (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(2)(a)(i)**; S.S.I. 2010/413, **art. 2**, Sch.
- F8** S. 39(2)(a)(ia) inserted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(2)(a)(ii)**; S.S.I. 2010/413, **art. 2**, Sch.
- F9** Words in s. 39(2)(a)(ia) inserted (31.12.2020) by The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (S.S.I. 2020/339), regs. 1(3), **14(a)** (with reg. 16)
- F10** Word following s. 39(2)(b) repealed (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(2)(b)(i)**; S.S.I. 2010/413, **art. 2**, Sch.
- F11** S. 39(2)(b)(ia) inserted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(2)(b)(ii)**; S.S.I. 2010/413, **art. 2**, Sch.
- F12** Words in s. 39(2)(b)(ia) inserted (31.12.2020) by The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (S.S.I. 2020/339), regs. 1(3), **14(a)** (with reg. 16)
- F13** Word. in s. 39(4)(c) inserted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 44**, 206; S.S.I. 2010/357, **art. 2(b)**
- F14** S. 39(5)(aa) inserted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(3)**; S.S.I. 2010/413, **art. 2**, Sch.
- F15** Words in s. 39(5)(aa) omitted (31.12.2020) by virtue of The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (S.S.I. 2020/339), regs. 1(3), **14(b)** (with reg. 16)
- F16** S. 39(5A)(5B) inserted (13.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss 71(1), 206, **Sch. 4 para. 13(4)**; S.S.I. 2010/413, **art. 2**, Sch.

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