

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 - Criminal Law

Section 42 - Extreme pornography

200. This section creates a new offence of possession of extreme pornography and increases the maximum penalty for the sale etc. of obscene material of that nature. It inserts new sections 51A to 51C into the Civic Government (Scotland) Act 1982, amends section 51 of that Act and inserts new paragraph 44A into Schedule 3 to the Sexual Offences Act 2003.
201. Subsection (1) amends section 51(3) of the 1982 Act to increase the maximum penalty, on conviction on indictment, from 3 to 5 years imprisonment for the offence of displaying, publishing, selling, distributing or possessing etc. with a view to selling or distributing obscene material, where that material contains an extreme pornographic image.
202. Subsection (2) inserts new sections 51A “Extreme pornography”, 51B “Exception to section 51A offence” and 51C “Defences to section 51A offence” into the 1982 Act.
203. New section 51A creates an offence of possession of an extreme pornographic image, defines such images and specifies the maximum penalty which may be imposed for the offence.
204. Subsection (2) provides that an extreme pornographic image must be “obscene”, “pornographic” and “extreme”. The test of “obscene” means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.
205. Subsection (3) defines a “pornographic” image as one which must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Therefore, an image is not pornographic if it can reasonably be assumed that the image has been made principally for another purpose e.g. educational purposes.
206. Subsection (4) provides that where an image forms part of a series of images which can provide a context, then that context and the image itself must be taken into account when determining whether the image is pornographic and reference may also be had to any sounds accompanying the image.
207. Subsection (5) sets out an example of how subsection (4) can work. Where an image forms an integral part of a narrative (e.g. a story), the whole story will be considered for the purposes of determining whether the image in question is pornographic. This could lead to the conclusion that an image is not pornographic, notwithstanding that when considered on its own, the opposite conclusion would be reached. Subsection (5)

*These notes relate to the Criminal Justice and Licensing (Scotland)
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

is only one example of how subsection (4) may operate. The reference to “context” in subsection (4) not only covers a narrative, it can also, for example, include a series of images which do not tell a story, but which have a recurring theme. In addition, subsection (4) may operate so as to have the opposite effect to that described in subsection (5)(b): examination of an image’s context could lead to the conclusion that an image *is* pornographic.

208. Subsection (6) provides that an image is extreme if it depicts in an explicit and realistic way any of the acts set out in subsection (6)(a) to (e). The terms “explicit” and “realistic” require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.
209. Subsection (7) provides that where an image is an integral part of a narrative, the context provided by that narrative may be taken into account in determining whether an image is extreme in terms of subsection (6). In addition, any description or sound accompanying the image can similarly be taken into account.
210. New section 51B makes provision to exclude images in unaltered classified works and defines the circumstances in which such images are not excluded.
211. Subsections (1) and (2) provide that possession of an excluded image is not an offence under section 51A and define an excluded image.
212. Subsection (3) provides that an image extracted from a classified work for the purposes of sexual arousal is not an excluded image.
213. Subsection (4) provides that in determining whether an image has been extracted for the purpose of sexual arousal, account may be taken of the storage, description, accompanying sound and context of the image.
214. Subsection (5) defines terms used in this section including “classified work” and thereby “excluded image” in subsection (2).
215. New section 51C makes provisions for defences to the offence of possession of extreme pornography. It replicates defences provided for possession of indecent images of children under section 52A of the 1982 Act and makes specific provision in relation to extreme images.
216. Subsection (1) provides that the onus is on the accused to prove the matters specified in subsections (2), (3) and (4) in order to use one or more of the defences. The Crown must prove the essential elements of the offence beyond reasonable doubt.
217. Subsection (2) provides that it is a defence for a person to prove that: (a) he/she had a legitimate reason for possession of the image, (b) he/she had no knowledge of the image and no awareness as to the nature of the image or (c) the image was unsolicited and disposed of promptly.
218. Subsection (3) provides a defence for those who directly participated in the act depicted in an extreme pornographic image and can prove the circumstances set out in subsection (4). When read with subsections (4) and (5) this subsection limits the defence to those who directly participate in simulated acts and retain the images for their own private use. The defence does not extend to a person who films or watches an act depicted in an image but who does not participate directly.
219. Subsection (4) provides that a direct participant must be able to demonstrate that the act depicted in the image was simulated i.e. that it did not actually:
 - take or threaten a person’s life;
 - result in nor was it likely to result in severe injury;
 - involve non-consensual activity;

*These notes relate to the Criminal Justice and Licensing (Scotland)
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

- feature a human corpse;
 - feature an animal or carcase.
220. Subsection (5) provides that the defence in subsection (3) is not available if the image in question is shown, given or offered for sale to any person who was not a direct participant in the act depicted in the image.
221. Subsection (6) provides that the terms “image” and “extreme pornographic” image are to be construed in accordance with section 51A.
222. Subsection (3) inserts paragraph 44A into Schedule 3 to the Sexual Offences Act 2003, which lists the offences conviction of which leads to an offender being made subject to the sex offender notification requirement contained at Part 2 of the 2003 Act. It provides that a person convicted of the offence of possession of extreme pornography who is 18 years of age or over at the time of the offence, and is sentenced to a term of imprisonment of more than 12 months, may be made subject to the sex offender notification requirements where the court considers it appropriate.