



SCOTTISH
CHILDREN'S REPORTER
ADMINISTRATION

Practice Direction 31

Sexual Offences (Scotland) Act 2009

Date Issued: 25 April 2018

Date Implemented: 25 April 2018

Date Last Revised:

SUMMARY

- The Sexual Offences (Scotland) Act 2009, the majority of which came into force on 1 December 2010, recasts and codifies the law in Scotland on sexual offences committed against both children and adults. It abolished a number of common law sexual offences, although the provisions abolishing the common law came into force on 16 December 2013.
- The Act adopts a structure whereby it deals with offences in 3 parallel groups, classifying the offences according to the specific type of wrong done to the victim:
 - Offences where the victim did not consent and the accused had no reasonable belief that the victim consented (Part 1 of the Act);
 - Offences where the victim is aged under 13, these children being considered incapable of consenting to any sexual activity (the “young child” offences in Part 4 of the Act); and
 - Offences where the victim is aged 13 or over and under 16 and the accused person is aged 16 or over – these children are considered capable of consenting to sexual activity, but the offences recognise the need to protect them from sexual activity when it involves adults (the “older child” offences in Part 4 of the Act).
- In addition to the older child offences where the accused is aged 16 or over, section 37 of the Act makes it an offence for 2 older children to engage in certain types of sexual activity (such as sexual intercourse). In doing so, it changes the previous law in that girls can also commit the offence and it broadens beyond sexual intercourse the types of sexual activity that are prohibited.
- When a child is referred to the reporter as a result of an allegation that they have committed a sexual offence or have displayed harmful sexual behaviour, the reporter is to register the referral:
 - with the section 67 ground being section 67(2)(j) if the police submit a standard prosecution report stating that the child has committed an offence; or
 - with the section 67 ground being other than section 67(2)(j) if police use a format other than the standard prosecution report to refer the child (or another agency refers the child) and state that child has been involved in some form of sexual behaviour.
- When drafting a statement of grounds that includes an offence under the Act against a child under the age of 13, the reporter is to state the offence as being the appropriate offence under Part 4 of the Act and not an offence under Part 1 of the Act.
- When drafting a statement of grounds that includes an offence under the Act, the victim is an older child, and there is sufficient prima facie evidence to state either:
 - an offence under Part 1 of the Act; or
 - an offence against an older child under Part 4 of the Act,

there is a presumption that the reporter is to state an offence under Part 1 of the Act. The interests of a child (either the subject of the referral or the victim of the offence) will determine whether the presumption is to be overturned.

- There is an overlap within different groups of offences involving penetration. When drafting a statement of grounds that includes an offence under the Act that involves penetration, the reporter is to state the most serious offence that is supported by the evidence.
- When a child is referred by the police in a standard prosecution report stating that the child has committed an offence, and the reporter decides to refer the child to a children's hearing, it may be appropriate for the reporter to select a section 67 ground other than section 67(2)(j).

Contents

1. Introduction	5
2. Structure of the Act	5
3. Specific practice directions for reporters in implementing the Act	7

Appendix 1: Detailed Analysis of Relevant Sections of the Act

Appendix 2: Table of Parallel Offences

1. Introduction

1.1 The Sexual Offences (Scotland) Act 2009 (“the Act”), the majority of which came into force on 1 December 2010, recast and codified the law in Scotland on sexual offences committed against both children and adults. In doing so, the principal features of the Act are that:

- It abolished the common law offences of rape, sodomy, and lewd, indecent or libidinous practice or behaviour and replaced them with statutory offences¹.
- It created new statutory offences to replace both previous statutory offences and sexual offences that would previously have been charged as indecent assault or breach of the peace.
- The element of consent, central to the offences in Part 1 of the Act, was given a statutory definition.
- It does not make distinctions based on either gender or the types of sexual practice in the creation of the offences²; for example, both males and females can be victims of rape.
- It has separate categories of offences that depend on the age of the victim.
- It created new offences in Schedule 1 to the Criminal Procedure (Scotland) Act 1995 with some explicit amendments to the schedule³.

1.2 The Sexual Offences (Scotland) Bill was introduced to Parliament after an extensive period of consultation by the Scottish Law Commission (the “SLC”). In doing so, the remit of the SLC was to make recommendations for the reform of the law of rape and sexual offences in Scotland. Although the final bill is not exactly as proposed by the SLC, the SLC’s report⁴ is helpful in understanding the intention behind many of the key provisions of the Act.

1.3 This Practice Direction provides specific practice direction on how reporters are to apply aspects of the Act. In appendix 1 the Note provides an analysis of the specific sections of the Act that are most relevant to reporters’ practice.

2. Structure of the Act

2.1 The Act adopts a structure whereby it deals with offences in 3 parallel groups, classifying the offences according to the specific type of wrong done to the victim.

¹ Section 52 was not implemented on 1 December 2010, the date when the majority of the remainder of the Act came into force. Instead it came into force on 16 December 2013. Therefore if a sexual offence was committed during the period of 1 December 2010 to 16 December 2013 and it comes within the scope of a common law offence, it could be either a common law offence or an offence under the Act.

² Other than those offences that involve penetration with a penis.

³ Although where the offence is committed against a child, all of the offences in the Act are likely to fall within the “catch-all” provision in Schedule 1.4: Any offence involving the use of lewd, indecent or libidinous practice or behaviour towards a child under the age of 17 years.

⁴ Available here.

- The first group of offences (in Part 1 of the Act) are, in general terms, offences where the victim did not consent and the accused had no reasonable belief that the victim consented.
- The second group of offences (in Part 4 of the Act) are against children aged under 13 (called a “young child” in the Act). Such children are considered incapable of consenting to any sexual activity. The offences against young children do not involve any question of consent and on conviction result in the same maximum penalties as their parallel offences in Part 1 (for example, life imprisonment for rape of a young child and life imprisonment for rape).
- The third group of offences (also in Part 4 of the Act) are against children aged 13 or over but under 16 (called an “older child” in the Act). Although such children are considered capable of consenting to sexual activity, in recognition of the need to protect them from such activity when it involves adults, the Act creates offences where the accused is aged 16 or over. On conviction the maximum penalties for these offences are not as high as their parallel offences in Part 1 or those involving young children (for example, the maximum penalty for sexual intercourse with an older child is 10 years imprisonment).

- 2.2 In addition to the older child offences where the accused is aged 16 or over, section 37 of the Act makes it an offence for 2 older children to engage in certain types of sexual activity (such as sexual intercourse). In doing so, it changes the previous law in that girls can also commit the offence and it broadens beyond sexual intercourse the types of sexual activity that are prohibited.
- 2.3 Although a young child can also be the victim of an offence under Part 1 of the Act, it is presumed that a person accused of engaging in sexual activity with a young child will be charged with a Part 4 offence and not a Part 1 offence. This presumption is reflected in paragraph 3.2.2 below.
- 2.4 When a person is accused of engaging in non-consensual activity with an older child, it is presumed that they will be charged with a Part 1 offence and not a Part 4 offence. This presumption is reflected in paragraph 3.2.3 below.
- 2.5 Parts 2 and 3 of the Act deal with the question of consent. Part 2 provides a statutory definition of consent and Part 3 clarifies when a “mentally disordered person” is incapable of consenting.
- 2.6 Part 5 creates offences that involve an abuse of a position of trust, either towards someone under the age of 18 or a “mentally disordered person”. Part 6 of the Act (together with schedule 2) details the penalties to be imposed on those persons guilty of offences under the Act and Part 7 contains a number of miscellaneous provisions.
- 2.7 Appendix 2 of this note contains a table that shows the offences in Part 4 of the Act that are parallel to those in Part 1.

3. Specific practice directions for reporters in implementing the Act

3.1 Registration

3.1.1 When a child is referred to the reporter as a result of an allegation that they have committed a sexual offence or have displayed harmful sexual behaviour, the reporter is to register the referral as follows:

- If the police submit a standard prosecution report stating that the child has committed an offence under the Act, the reporter is to register the referral with the section 67 ground being section 67(2)(j).
- If police use a format other than the standard prosecution report to refer the child (or another agency refers the child) and state that child has been involved in some form of sexual behaviour, the reporter is to register the referral with the section 67 ground being other than section 67(2)(j).

3.1.2 Reference should be made to Practice Direction 5 regarding the selection of the appropriate section 67 ground, the registration of additional grounds, changing or adding grounds, and the registration of referrals of children who are the victims of offences. Reference should also be made to paragraph 3.2.8 below.

3.2 Decision making and drafting grounds

3.2.1 In this section of the Practice Direction any direction that the reporter is to state a particular offence in a statement of grounds assumes the reporter has assessed that there is sufficient prima facie evidence for there to be a realistic prospect that an offence will be established.

3.2.2 When drafting a statement of grounds that includes an offence under the Act against a young child⁵, the reporter is to state the offence as being the appropriate offence under Part 4 of the Act and not an offence under Part 1 of the Act. The only exception to this is if the reporter requires to state alternative offences under both Parts 1 and 4 of the Act in accordance with paragraph 3.2.8 below.

3.2.3 When drafting a statement of grounds that includes an offence under the Act, the victim is an older child, and there is sufficient prima facie evidence to state either:

- an offence under Part 1 of the Act; or
 - an offence against an older child under Part 4 of the Act,
- there is a presumption that the reporter is to state an offence under Part 1 of the Act and not an offence against an older child under Part 4 of the Act. The interests of a child (either the subject of the referral or the victim of the offence) will determine whether the presumption is to be overturned.

3.2.4 Section 52 of the Act abolishes certain common law offences, in particular:

- the offences of rape, sodomy and lewd, indecent or libidinous practice or behaviour, and

⁵ Whether the section 67 ground is section 67(2)(b), (c), (d), (g) or (j).

- abolishes other common law offences by providing that in so far as the provisions of the Act regulate any conduct, they will replace any rule of law regulating that conduct.

Section 52 was not implemented on 1 December 2010, the date when the majority of the remainder of the Act came into force. Instead it came into force on 16 December 2013. Therefore if a sexual offence was committed during the period of 1 December 2010 to 16 December 2013 and it comes within the scope of a common law offence, it could be either a common law offence or an offence under the Act.

When drafting a statement of grounds that includes an offence under the Act that was committed during the period 1 December 2010 to 16 December 2013, the reporter is to state the offence under the Act and not the common law offence. The only exception to this is where there the reporter requires to state alternative offences under the Act and common law in accordance with paragraph 3.2.8 below.

- 3.2.5 There is an overlap between the offences in sections 1, 2 and 3 (and the equivalent offences in sections 18 – 20 against young children and sections 28 – 30 against older children) in a situation where the offence involves penetration⁶. When drafting a statement of grounds that includes an offence under the Act that involves penetration⁷, the reporter is to state the most serious offence that is supported by the evidence⁸.

However, although the selection of the appropriate offence is important, the most significant consideration is that the reporter ensures that the stated facts reflect the actual behaviour by or towards the child (that is supported by the evidence).

- 3.2.6 Some sections of the Act state more than one method of committing the particular offence (for example section 3 which specifies 5 separate forms of sexual assault in section 3(2)(a)-(e)). In drafting a statement of grounds in terms of section 67(2)(j) that includes such an offence, when stating the name of the offence committed, the reporter is to state the subsection that contains the offence (for example, section 3(2)(b) for an offence of intentionally or recklessly touching someone sexually).
- 3.2.7 In drafting a statement of grounds in terms of section 67(2)(j) the reporter may include more than one offence in a single statement of fact where the 2 offences form part of a single incident involving the same victim.

For example, where A's conduct involved him kissing a younger child and then pulling down her trousers and inserting his finger into her vagina, the reporter

⁶ This overlap is described in the analysis of the relevant sections in the appendix. In *Tait v HMA* 2015 SLT 495, the appeal court said it understood that for reasons of policy and practicality the Scottish Parliament decided to adopt the overlapping structure seen in ss.18–20 (and also in ss.1–3).

⁷ Whether the section 67 ground is section 67(2)(j) or one relating to a Schedule 1 offence.

⁸ On the basis that an offence under section 1 is more serious than an offence under section 2, which is more serious than an offence under section 3 (the position is similar in relation to the parallel offences in sections 18 – 20 and 28 – 30).

may include offences contrary to both sections 19 and 20(2)(c) in a single supporting fact⁹.

3.2.8 At paragraph 3.16.4, Practice Direction 7 says that where there is reason to believe that the evidence may establish either of two offences, it may be necessary to include alternative offences in the supporting facts. However, the reporter must only ever seek to establish one of the alternatives as it is incompetent to seek to establish two or more offences from the same facts. This Practice Direction applies to the drafting of a statement of grounds which includes offences under the Act.

The reporter is to consider stating alternative offences where:

- It is not clear whether the victim was over or under 13 years of age at the date of the offence, and therefore whether the offence is one against a young child or an older child. In such a situation the reporter is to consider stating alternatives of:
 - A Part 4 offence against a young child or alternatively a Part 1 offence (where there is sufficient evidence that the victim did not consent and that the accused did not have a reasonable belief that the victim consented); or
 - A Part 4 offence against a young child or alternatively a Part 4 offence against an older child (where there is not sufficient evidence of an absence of consent and the accused is aged 16 or over)¹⁰.
- It is not clear whether the offence took place before or after 1 December 2010 and therefore whether the offence was contrary to a section of the Act or the previous law. In such a situation the reporter is to consider stating alternatives of an offence under the Act or alternatively an offence under the previous law¹¹.

3.2.9 Both Rule 3.48 and Rule 3.50 of the Act of Sederunt (Child Care and Maintenance Rules) 1997 apply to a statement of grounds that includes offences under the Act. Section 50 of the Act, when read with Schedule 3, enables the court in a trial to convict an accused of an offence under the Act as an alternative to the offence with which the accused was charged. Although section 50 and Schedule 3 do not expressly apply to children's hearings proof proceedings, they lend weight to the argument that sheriffs should find an alternative offence established in a proof under rule 3.50 of the Act of Sederunt.

3.2.10 As with all decisions to refer a child to a children's hearing, the reporter is to specify the section 67 ground or grounds which relevantly reflect the principal

⁹ However, whilst every part of the narrative in the statement of grounds need not be corroborated, the essential elements of each offence must be. This is the case even when the offence involves more than one of the ways in which a sexual assault may be committed (in section 3, 20 or 30) (Tait v HMA 2015 SLT 495). For example, a statement of grounds may say that a child has committed an offence of sexual assault of a young child by touching the child sexually (contrary to section 20(2)(b)) and also engaging in another form of sexual activity involving physical contact with the child (contrary to section 20(2)(c)). The essential elements of both offences (contrary to both sub-paragraphs (b) and (c) require to be corroborated.

¹⁰ Although sections 40 and 41 contain a deeming provision where the age of the victim is not clear, these sections do not expressly apply to proof proceedings under the Children's Hearings (Scotland) Act 2011.

¹¹ Although section 53 provides for the continuity of the law where the date of the offence is not clear, this section does not expressly apply to proof proceedings under the Children's Hearings (Scotland) Act 2011.

concerns regarding the child's welfare and which support constructive and appropriate consideration and decision making by the children's hearing¹².

Where the ground or grounds identified as appropriate for inclusion in the statement of grounds differ from those registered, the reporter is to amend the registration details prior to recording a final decision, in accordance with Section 8 of Practice Direction 5 on Receipt and Registration of Referrals and paragraph 3.7 of Practice Direction 7 on Statement of Grounds – Decision Making and Drafting.

Therefore, if the police have referred the child on the grounds of committing an offence, the reporter may decide to add an additional section 67 ground other than section 67(2)(j) and to select that section 67 ground for the statement of grounds in referring the child to the children's hearing. However, in doing so the reporter is to record an outcome (in this case a "not to arrange a children's hearing" decision) in relation to the offence. That outcome will be reported to the police and will be recorded against the offence in the police's Criminal History System.

3.2.11 In deciding on whether the appropriate section 67 ground for a statement of grounds is section 67(2)(j) or another section 67 ground, the reporter is to consider the following factors:

- Following the decision of the Court of Session in *Constanda v M* 1997 SLT 1396, where the whole basis of the supporting facts is that the child has performed certain acts that constitute criminal offences, the section 67 ground must be section 67(2)(j);
- The more serious the child's behaviour in a specific incident then the more likely that the section 67 ground should be section 67(2)(j);
- The more distinct an incident of a child's sexual behaviour from the other facts for a condition other than section 67(2)(j)¹³, then the more likely that the condition should be section 67(2)(j).

The consequences of the Rehabilitation of Offenders 1974 for a section 67(2)(j) statement of grounds is not a relevant factor for this decision – the reporter is to choose the section 67 ground or grounds which relevantly reflect the principal concerns regarding the child's welfare and which support constructive and appropriate consideration and decision making by the children's hearing.

Although a "young child" as defined in the Act can commit an offence under the Act¹⁴, the reporter is to give particular consideration as to whether a

¹² See paragraph 3.1 of Practice Direction 7.

¹³ For example, if the other supporting facts for a section 67(2)(m) ground relate to the child running away from home and getting drunk, it is more likely that an incident of sexual behaviour should be in grounds with a section 67(2)(j) ground. However, if the other supporting facts for a section 67(2)(m) ground relate to other incidents in a course of sexualised behaviour, it is more likely that an incident of sexual behaviour should be included in the same statement of grounds.

¹⁴ Although the offences against young children are based on the legal premise that a young child lacks the capacity to consent to sexual activity, the key question to be considered in assessing the evidence is whether the young child had the necessary mens rea (either intent or reckless disregard as stated in the particular offence) to commit a particular offence under the Act. Where it is an essential element of the offence that the act was done "sexually" or for the "sexual gratification" of the perpetrator, the reporter must consider the "reasonable person" test in section 60(2) in assessing the evidence.

ground other than section 67(2)(j) is appropriate when deciding to refer a young child to a children's hearing as a result of concerns about their sexual behaviour.