



SCOTTISH  
**CHILDREN'S REPORTER**  
ADMINISTRATION

# Practice Direction 31

## Sexual Offences (Scotland) Act 2009

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## 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:
  - If the police submit a standard prosecution report (SPR) stating that the child has committed an offence, the referral will be registered by CSAS as a Standard referral with a section 67(2)(j) ground
  - If the case was initially jointly reported by the police to the Crown Office and Procurator Fiscal Service (COPFS) and reporter, and COPFS decide the reporter is to deal with the case, the referral will be registered by CSAS as a ‘Joint Report to Reporter’ referral (or ‘Custody Report to Reporter’ if the child was kept in custody) with a section 67(2)(j) ground.
  - If police use a format other than the SPR to refer the child (or another agency refers the child), as with all referrals that are not a SPR, the reporter is not to record a section 67 ground. The reporter is only to record a section 67 ground when making a final decision.
- In making a decision on the choice of section 67 ground, the reporter is to adopt the approach in part 1 of Practice Direction 7. 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).

- 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.

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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 offences<sup>1</sup>.
  - 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 offences<sup>2</sup>; 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 schedule<sup>3</sup>.
- 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 report<sup>4</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> Other than those offences that involve penetration with a penis.

<sup>3</sup> 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.

<sup>4</sup> 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 of Referral**

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:

- If the police submit a standard prosecution report (SPR) stating that the child has committed an offence under the Act, the referral will be registered by CSAS as a Standard referral with a section 67(2)(j) ground.
- If the case was initially jointly reported by the police to the Crown Office and Procurator Fiscal Service (COPFS) and reporter, and COPFS decide the reporter is to deal with the case, the referral will be registered by CSAS as a 'Joint Report to Reporter' referral (or 'Custody Report to Reporter' if the child was kept in custody) with a section 67(2)(j) ground.
- If police use a format other than the SPR to refer the child (or another agency refers the child), as with all referrals that are not a SPR, the reporter is not to record a section 67 ground. The reporter is only to record a section 67 ground when making a final decision.

#### **3.2 Choice of ground<sup>5</sup>**

3.2.1 As with all decisions on the choice of section 67 ground, the reporter is to specify the ground or grounds which relevantly reflect the principal concerns regarding the child's welfare and which, were a children's hearing to be arranged, would support constructive and appropriate consideration and decision making by the children's hearing.

3.2.2 In determining which section 67 ground or grounds to include, the reporter is to have regard to:

- the key issues or concerns identified in the original referral, the child's plan and other relevant reports;
- The reason or reasons why the reporter has decided to refer the child to a children's hearing, if so referring; and
- The factors likely to be relevant to consideration and decision making by the children's hearing were the child to be referred to a hearing.

3.2.3 More than one section 67 ground is to be recorded only where:

- there is distinguishable information,
- a single ground does not more appropriately reflect the concerns, and
- each ground reflects significant concerns and
- would be likely to assist with the hearing's decision making in relation to the child, were a hearing arranged.

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<sup>5</sup> This section of the practice direction replicates what is section 2 of Part 1 of Practice Direction 7 on Section 67 Grounds – Decision Making and Drafting the Statement of Grounds, subject to minor amendments to reflect the context of sexual offences.

3.2.4 When making a final decision in relation to an offence ground, the reporter is to record a decision in relation to each charge in the standard prosecution report (SPR). In doing so, the reporter may decide that the offence to be recorded is to be different from the initial offence stated in the SPR. This may be for evidential reasons<sup>6</sup> or because the reporter considers that another offence is more appropriate<sup>7</sup>. The reporter may do so whether or not the final decision is to arrange a hearing. If making this change to the offence, the reporter is to record in the Final Offence field in CSAS the offence in relation to which the reporter made a final decision.

3.2.5 Having received an offence referral and made a final decision to arrange a hearing, the reporter may decide that the ground (or grounds) which relevantly reflects the principal concerns regarding the child's welfare is a non-offence ground (assuming there is sufficient evidence of that ground). This may be in addition to the offence ground (where both grounds reflect significant distinguishable concerns), but is more likely to be an alternative. In order to select a non-offence ground, the reporter is to:

- Create a new non-offence referral in CSAS – the Source of the referral will be the Police and the Receipt Date and Reference the same as the offence referral. The reporter is then to include this referral in the investigation and record a decision in relation to that non-offence referral, selecting the appropriate section 67 ground as described above.
- Record a decision in relation to each offence in the SPR. Unless the reporter is arranging a children's hearing on both the offence ground and the newly-created non-offence ground, the reporter is to select the appropriate "not to arrange a children's hearing" decision<sup>8</sup> in relation to each offence. That outcome will be reported to the police and will be recorded against the offence in the police's Criminal History System.

3.2.6 Where the child was under 12 when the offence was committed, if the reporter decides to arrange a children's hearing for the child, the reporter cannot choose a section 67(2)(j) ground<sup>9</sup>. The reporter is to follow the approach above in adding the non-offence referral and selecting the appropriate non-offence ground for the hearing. As explained above, the reporter still requires to record an outcome of "not to arrange a children's hearing" in relation to the offence.

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<sup>6</sup> For example, the SPR says the child was charged with an offence contrary to section 2, but on assessing the evidence and deciding not to arrange a hearing, the reporter decides there is only evidence of an offence contrary to section 3.

<sup>7</sup> For example, the SPR says the child was charged with an offence involving penetration contrary to section 20, but in drafting the statement of grounds having arranged a hearing, the reporter decides that an offence contrary to section 19 is the more appropriate one to state.

<sup>8</sup> Whether that decision be "insufficient evidence" or "CSO not necessary" (both with or without "refer to LA"), or "current order/measures sufficient". In the "Rationale for Decision" text box, the reporter is to state the reasons why they decided that the non-offence section 67 ground reflected the principal concerns regarding the child's welfare.

<sup>9</sup> Section 3 of the Age of Criminal Responsibility (Scotland) Act 2019 (which came into force on 29 November 2019). Until section 1 of the Act is commenced (raising the age of criminal responsibility), paragraph (a) of section 3 applies as if "before the day on which section 1 came into force" was omitted.



3.2.7 Where the child was under 12 when the offence was committed, if the reporter decides not to arrange a children's hearing for the child, there is no need for the reporter to add an additional ground. The reporter only requires to record the decision not to arrange a children's hearing in relation to the offence.

3.2.8 Where the child was aged 12 or over when the offence was committed<sup>10</sup>, in deciding whether the appropriate section 67 ground for the statement of grounds is section 67(2)(j) or another section 67 ground, the reporter is to consider the following factors<sup>11</sup>:

- 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)<sup>12</sup>;
- The more serious the child's sexual 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)<sup>13</sup>, then the more likely that the condition should be section 67(2)(j);
- The more strongly the social worker or other professionals working with the child consider that identifying the child's behaviour as sexual offending will assist with making their support to the child effective, the more likely that the section 67 ground should be section 67(2)(j).

3.2.9 The consequences of the Rehabilitation of Offenders Act 1974<sup>14</sup> for a section 67(2)(j) statement of grounds will also be a relevant factor to be weighed in the balance, other than where *Constanda v M* applies. Those consequences are unlikely to outweigh the above factors but may do so in some cases. The reporter is to contact the Practice Team if it appears that this factor will change the reporter's decision.

3.2.10 The choice of ground may be section 67(2)(j) for a child aged 12 years even though they are a "young child" as defined in the Act. A child of that age can

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<sup>10</sup> Where the child was under 12 when the offence was committed, if the reporter decides to arrange a children's hearing for the child, the reporter cannot choose a section 67(2)(j) ground – see paragraph 2.11 of Part 1 of Practice Direction 7.

<sup>11</sup> See also paragraph 4.21.8 of Part 2 of Practice Direction 7 on supporting facts for various grounds (including section 67(2)(m): in stating facts regarding the child's behaviour, the reporter is not to use the language of the criminal law (e.g. saying that the child 'punched and kicked x' and not that the child 'assaulted x by punching and kicking him').

<sup>12</sup> Where the child was under 12 when the offence was committed, the decision in *Constanda v M* will not apply as section 3 of the Age of Criminal Responsibility (Scotland) Act 2019 prevents the reporter from selecting a section 67(2)(j) ground. Therefore, in drafting the non-offence grounds, it will be competent to only state a fact that relates to the incident that was the subject of the referral.

<sup>13</sup> 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.

<sup>14</sup> These consequences are described in the Practice Note on Offence grounds, the Rehabilitation of Offenders Act 1974 and Disclosures. In the event of the offence ground being accepted or established, the Rehabilitation of Offenders Act 1974 may or not result in the offence being disclosed. That will depend on a number of factors, including possible future amendment of the act and related legislation.

commit an offence under the Act<sup>15</sup>. However, the reporter is to give particular consideration as to whether a ground other than section 67(2)(j) is appropriate when deciding to refer a 12 year old child to a children's hearing as a result of concerns about their sexual behaviour.

## Drafting grounds

3.2.11 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 evidence for there to be a realistic prospect that an offence will be established.

3.2.12 When drafting a statement of grounds that includes an offence under the Act against a young child<sup>16</sup>, 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.

3.2.13 When drafting a statement of grounds that includes an offence under the Act, the victim is an older child, and there is sufficient 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.

3.2.14 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
- 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.

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<sup>15</sup> 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.

<sup>16</sup> Whether the section 67 ground is section 67(2)(b), (c), (d), (g) or (j).

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 3.2.18 below.

3.2.15 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 penetration<sup>17</sup>. When drafting a statement of grounds that includes an offence under the Act that involves penetration<sup>18</sup>, the reporter is to state the most serious offence that is supported by the evidence<sup>19</sup>.

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).

3.2.16 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)<sup>20</sup>.

3.2.17 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 may include offences contrary to both sections 19 and 20(2)(c) in a single supporting fact<sup>21</sup>.

3.2.18 At paragraph 4.16.4 of Part 2, 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.

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<sup>17</sup> 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).

<sup>18</sup> Whether the section 67 ground is section 67(2)(j) or one relating to a Schedule 1 offence.

<sup>19</sup> 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).

<sup>20</sup> In relation to offences contrary to sections 3, 20 and 30, see the footnote in relation to the case of [Tait v HMA](#) 2015 SLT 495 on page 5 of the separate appendices to this practice direction.

<sup>21</sup> 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.

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)<sup>22</sup>.
- 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 law<sup>23</sup>.

3.2.19 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.

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<sup>22</sup> 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.

<sup>23</sup> 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.