



# Practice Direction 31

## Sexual Offences (Scotland) Act 2009

## Appendices

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## APPENDIX 1

This appendix contains a detailed analysis of those sections of the Act that are most relevant to the practice of reporters<sup>1</sup>.

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<sup>1</sup> Although Appendix 1 refers to some case law on provisions of the Act, it is not intended to be a comprehensive guide to judicial interpretation of the Act. For the current position in relation to case law on the Act, reference should be made to the Act in Westlaw (which can be accessed through Senior Practitioners or the Practice Team).

The Jury Manual is also a useful reference resource.

## Part 1: Offences - sections 1-11

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 1 - Rape	<ul style="list-style-type: none"> <li>A penetrates with A's penis<sup>2</sup> the vagina<sup>3</sup>, anus or mouth of B</li> <li>A does so intentionally or recklessly</li> <li>B does not consent and A has no reasonable belief that B consents<sup>4</sup></li> </ul>	Any person	Any person – but if younger child <sup>5</sup> , section 18 should be used as consent is not an issue	Not explicitly but catch-all applies <sup>6</sup>

The parallel offences in Part 4 are:

- Section 18: rape of a young child, and
- Section 28: having intercourse with an older child.
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This offence significantly differs from the common law offence of rape as both males and females can be victims under section 1. Under section 1(1), penetration to any extent is sufficient to constitute the offence

Section 1(2) provides that penetration is a continuing act from the point of entry to withdrawal of the penis. Where the penetration is initially consented to but consent is later withdrawn, the penetration is to be treated as a continuing act from the time consent is withdrawn until the withdrawal of the penis i.e. any continuing penetration after consent has been withdrawn constitutes the offence.

<sup>2</sup> 'Penis' is defined in s 1(4) as including a surgically constructed penis.

<sup>3</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>4</sup> See page 20 of Appendix 1

<sup>5</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>6</sup> 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

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 2 - Sexual assault by penetration	<ul style="list-style-type: none"> <li>• A penetrates B's vagina<sup>7</sup> or anus with any part of A's body or with anything else</li> <li>• A does so intentionally or recklessly</li> <li>• The penetration is sexual<sup>8</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>9</sup></li> </ul>	Any person	Any person – but if younger child <sup>10</sup> , section 19 should be used as consent is not an issue	Not explicitly but catch-all applies <sup>11</sup>

The parallel offences in Part 4 are:

- Section 19: sexual assault on a young child by penetration, and
- Section 29: engaging in penetrative sexual activity with or towards an older child.

Under section 2(1), penetration to any extent is sufficient to constitute the offence.

Section 2(2) provides that penetration is a continuing act from the point of entry to withdrawal of whatever is inserted. Where the penetration is initially consented to but consent is later withdrawn, the penetration is to be treated as a continuing act from the time consent is withdrawn until the withdrawal of whatever is inserted - i.e. any continuing penetration after consent has been withdrawn constitutes the offence.

This section overlaps significantly with the s.1 and s.3 offences. The legislative intent behind the overlap is to cover the situation where there is clear evidence of penetration, but, for example, B is unsure whether the penetration was with a penis, with another body part or by any other means.

<sup>7</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>8</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual-s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>9</sup> See page 20 of Appendix 1

<sup>10</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>11</sup> 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

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 3 - Sexual assault <sup>12</sup>	<p>A acts in any of the ways set out at (a) to (e):</p> <p>s.3(2)(a)</p> <ul style="list-style-type: none"> <li>• A penetrates<sup>15</sup> the vagina<sup>16</sup>, anus or mouth of B by any means.<sup>17</sup></li> <li>• A does so intentionally or recklessly</li> <li>• The penetration is sexual<sup>18</sup></li> </ul> <p>s.3(2)(b)</p> <ul style="list-style-type: none"> <li>• A touches B sexually<sup>19</sup></li> <li>• A does so intentionally or recklessly</li> </ul> <p>s.3(2)(c)</p> <ul style="list-style-type: none"> <li>• A engages in any other form of sexual<sup>20</sup> activity in which A has physical contact<sup>21</sup> with B</li> </ul>	Any person	Any person – but if younger child <sup>13</sup> , section 20 should be used as consent is not an issue	Not explicitly but catch-all applies <sup>14</sup>

<sup>12</sup> The 5 things listed in subsection (2) are discrete and mutually exclusive behaviours. If more than one is included in a statement of grounds, each one must be corroborated (Tait v HMA [2015] HCJAC 58 2015 SLT 495). However, evidence that is available to corroborate one of the things in subsection (2) (e.g. subsequent distress shown by the alleged victim) may well be available to corroborate another thing (or things) from subsection (2) that are stated.

<sup>13</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>14</sup> 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>15</sup> Under s.3(2)(a), the penetration is 'to any extent.'

<sup>16</sup> 'Vagina' is defined in s.1(4).

<sup>17</sup> S.3(5) provides that penetration 'by any means' includes penetration with a penis – i.e. the offence overlaps with those in ss1 & 2.

<sup>18</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s.60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>19</sup> For the purposes of the Act, touching is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s.60(2).

<sup>20</sup> For the purposes of the Act, activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s.60(2).

<sup>21</sup> Under s.3(2)(c)The offence is committed whether the contact is bodily contact or contact by means of an implement, and whether or not the contact is through B's clothing.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
	s.3(2)(c) (cont.) <ul style="list-style-type: none"> <li>• A does so intentionally or recklessly</li> </ul>			
	s.3(2)(d) <ul style="list-style-type: none"> <li>• A ejaculates semen on to B</li> <li>• A does so intentionally or recklessly.</li> </ul>			
Section 3 - (cont.)	s.3(2)(e) <ul style="list-style-type: none"> <li>• A emits urine or saliva on to B sexually<sup>22</sup></li> <li>• A does so intentionally or recklessly</li> </ul> AND B does not consent and A has no reasonable belief that B consents <sup>23</sup>	Any person	Any person – but if younger child <sup>24</sup> , section 20 should be used as consent is not an issue	Not explicitly but catch-all applies <sup>25</sup>

The parallel offences in Part 4 are:

- Section 20: sexual assault on a young child, and
- Section 30: engaging in sexual activity with or towards an older child.

Although the Act uses the term 'sexual assault', the offence is distinct from common law assault, and the law relating to common law assault is not applied to the new offence created by section 3. Although most of the actions falling foul of section 3 will satisfy the requirements for assault (whether or not aggravated by being committed in circumstances of indecency) at common law, the section 3 offence must always be used where it applies.<sup>26</sup>

The section 3(2)(a) offence overlaps with sections 1 and 2. This is a matter of deliberate legislative intent to deal with situations where B knows that he or she has been penetrated by A, but may not know with what. Penetration is a continuing act from the point of entry to withdrawal whatever is inserted. Where the penetration is initially consented to but consent is later withdrawn, the penetration is to be treated as a continuing act from the time consent is withdrawn until the withdrawal of whatever is inserted - i.e. any continuing penetration after consent has been withdrawn constitutes the offence.

<sup>22</sup> For the purposes of the Act, an activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s.60(2).

<sup>23</sup> See page 20 of Appendix 1

<sup>24</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>25</sup> 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>26</sup> As a result of s.52(b).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 4 - sexual coercion	<ul style="list-style-type: none"> <li>A causes<sup>27</sup> B to participate in a sexual<sup>28</sup> activity</li> <li>A does so intentionally (recklessness is not sufficient)</li> <li>B does not consent to participating in the activity and A has no reasonable belief that B consents to participating<sup>29</sup></li> </ul>	Any person	Any person – but if younger child <sup>30</sup> , section 21 should be used as consent is not an issue	Not explicitly but catch-all applies <sup>31</sup>

The parallel offences in Part 4 (with the removal of any requirement for a coercive element) are:

- Section 21: causing a young child to participate in a sexual activity, and
- Section 31: causing an older child to participate in a sexual activity

Circumstances where this offence might apply would include where B is forced to penetrate A or someone else, or where A compels B to engage in sexual activity with a third party.

<sup>27</sup> There is no requirement that A's conduct is coercive. No definition of "causing" is provided, but the Scottish Law Commission, in recommending the introduction of the offence, expected it to be understood in the sense of proximate cause. (Brown, Sexual Offences (Scotland) Act 1995, Greens Annotated Acts, page 25).

<sup>28</sup>For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual-s.60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>29</sup> See page 20 of Appendix 1

<sup>30</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>31</sup> 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

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 5 - coercing a person into being present during a sexual activity	<p>This offence can be committed in two separate ways.</p> <p>EITHER:</p> <ul style="list-style-type: none"> <li>• A engages in sexual<sup>32</sup> activity in the presence<sup>33</sup> of B.</li> <li>• A does so intentionally (recklessness is not sufficient).</li> <li>• A's actions in engaging in the sexual activity in B's presence are for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>34</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>35</sup></li> </ul> <p>OR</p>	Any person	Any person – but if younger child <sup>36</sup> , section 22 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

<sup>32</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2).

<sup>33</sup> Section 5(3) provides a partial definition of "presence" saying that it *includes* a situation where B can observe A engaging in the sexual activity (but not a situation where B can do so by looking at an image – this is covered by section 6). . This makes it clear that the offence is committed in circumstances where otherwise B might be said not to be 'present' (e.g. if B is in another room and able to observe through open doors, or indoors and able to observe activities in the garden).

<sup>34</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>35</sup> See page 20 of Appendix 1

<sup>36</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 5 - (cont.)	<ul style="list-style-type: none"> <li>A causes B to be present<sup>37</sup> while a third person engages in sexual<sup>38</sup> activity.</li> <li>A does so intentionally (recklessness is not sufficient).</li> <li>A's actions in causing B to be present are for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>39</sup></li> <li>B does not consent and A has no reasonable belief that B consents<sup>40</sup></li> </ul>	Any person	Any person – but if younger child <sup>41</sup> , section 22 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Part 4 are:

- Section 22: causing a young child to be present during a sexual activity, and
- Section 32: causing an older child to be present during a sexual activity

There is no requirement that B in fact observes or is aware of the sexual activity. There is no requirement of coercion in the sense of B's will being overcome - for example, the offence may cover circumstances where A catches B unawares.

Although "sexual" is defined in the legislation, "sexual gratification" is not. The question of whether A acted for the purposes of sexual gratification is to be determined by reasonable inference depending on the facts and circumstances.<sup>42</sup> In order for the section 5 offence to apply, any purpose to obtain sexual gratification must relate to B's presence; the offence is not committed if A is seeking sexual gratification from the sexual activity alone and B's presence is merely incidental.

Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>43</sup>

<sup>37</sup> Section 5(3) provides a partial definition of "presence" saying that it *includes* a situation where B can observe the 3<sup>rd</sup> party engaging in the sexual activity (but not a situation where B can do so by looking at an image – this is covered by section 6). This makes it clear that the offence is committed in circumstances where otherwise B might be said not to be 'present' (e.g. if B is in another room and able to observe through open doors, or indoors and able to observe activities in the garden)

<sup>38</sup> For the purposes of the Act, an activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s.60(2).

<sup>39</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>40</sup> See page 20 of Appendix 1

<sup>41</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>42</sup> See Brown, Sexual Offences (Scotland) Act 1995, Greens Annotated Acts, pages 57-58- it is suggested that 'sexual gratification' has deliberately been left undefined as it is a subjective matter.

<sup>43</sup> S.49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 6 - coercing a person into looking at a sexual image	<ul style="list-style-type: none"> <li>• A causes B to look at a sexual image.<sup>44</sup></li> <li>• A does so intentionally (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>45</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>46</sup></li> </ul>	Any person	Any person – but if younger child <sup>47</sup> , section 23 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Part 4 are:

- Section 23: causing a young child to look at a sexual image, and
- Section 33: causing an older child to look at a sexual image

Note the broad definition of 'sexual image' in s 6(3), which is wide enough to cover computer generated images, broadcasts and recordings. There is no requirement of coercion in the sense of A overcoming B's will - for example, the offence may cover circumstances where A catches B unawares.

In relation to the term "sexual gratification", see the notes on section 5 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>48</sup>

<sup>44</sup> 'Sexual image' is defined in s6(3) as an image, produced by whatever means and whether or not a moving image 1) of A, another person or an imaginary person engaging in sexual activity, or 2) of A's genitals or the genitals of a third person or imaginary person.

<sup>45</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>46</sup> See page 20 of Appendix 1

<sup>47</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>48</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 7 - communicating indecently	<p>Two offences:</p> <p>Section 7(1)</p> <ul style="list-style-type: none"> <li>• A sends a sexual<sup>49</sup> written communication<sup>50</sup> to, or directs a sexual verbal communication<sup>51</sup> at B.</li> <li>• A acts intentionally as to sending or directing the communication to B (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>52 53</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>54</sup></li> </ul>	Any person	Any person – but if younger child <sup>55</sup> , section 24 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

<sup>49</sup> For the purposes of the Act, a communication is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2)

<sup>50</sup> 'Written communication' is defined in section 7(4) as being a communication in whatever written form, and includes writing of a person other than A (e.g. a passage in a book or magazine).

<sup>51</sup> 'Verbal communication' is defined in section 7(4) as being a communication in whatever verbal form, and includes communications comprising sounds of sexual activity, and communications in sign language.

<sup>52</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>53</sup> There is nothing in the language of s.7(1) to suggest that the offence could only be committed if the sexual gratification and the display of the images were simultaneous or contemporaneous or synchronised – having regard to its purpose, a temporal restriction should not be read into the statutory wording (Robinson v Cassidy [2013] HCJAC 45; 2013 GWD 33-650).

<sup>54</sup> See page 20 of Appendix 1

<sup>55</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 7 – (cont.)	<p>Section 7(2)</p> <ul style="list-style-type: none"> <li>• A causes B to see or hear a sexual written communication or sexual verbal communication.</li> <li>• A does so intentionally (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.</li> <li>• B does not consent to seeing or hearing the communication and A has no reasonable belief that B consents</li> </ul>	Any person	Any person – but if younger child <sup>56</sup> , section 24 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Part 4 are:

- Section 24: communicating indecently with a young child, and
- Section 34: communicating indecently with an older child

The s.7 (1)&(2) offences do not overlap. The s7(2) offence can only be committed where 7(1) does not apply<sup>57</sup>, i.e. where A causes B to see or hear the communication by some means other than sending or directing the communication to or at B.

‘Sending’ and ‘directing’ are not defined. The sending and directing can be ‘by whatever means.’ The ordinary meaning of the terms would suggest that A’s act of sending or directing constitutes the offence, and that receipt by B is not required.<sup>58</sup>

In relation to the term “sexual gratification”, see the notes on section 5 above. Where A’s purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>59</sup>

<sup>56</sup> A ‘younger child’ is a child who has not yet attained the age of 13 years.

<sup>57</sup> See the wording of s7(2), ‘If, in circumstances other than are as mentioned in subsection (1)...’

<sup>58</sup> See Brown, Sexual Offences (Scotland) Act 1995, Greens Annotated Acts, page 30.

<sup>59</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 8 - sexual exposure	<ul style="list-style-type: none"> <li>• A exposes his or her genitals to B</li> <li>• A intends B to see the genitals</li> <li>• A acts intentionally as to the exposure</li> <li>• The exposure is in a sexual<sup>60</sup> manner</li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>61</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>62</sup></li> </ul>	Any person	Any person – but if younger child <sup>63</sup> , section 25 should be used as consent is not an issue	Yes, if committed against a person under the age of 17 - new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Part 4 are:

- Section 25: sexual exposure to a young child, and
- Section 35: sexual exposure to an older child

This offence is not intended to deal with public order offences committed by, for example, streakers or males urinating in public (who often will not intend to expose themselves to any particular person, and who are unlikely to have the requisite purpose to obtain sexual gratification, etc). Such offences should continue to be dealt with under the existing law (e.g. as public indecency or breach of the peace).

In relation to the term “sexual gratification”, see the notes on section 5 above. Where A’s purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>64</sup>

<sup>60</sup> For the purposes of the Act, an exposure is ‘sexual’ if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2)

<sup>61</sup> See s.49 on establishment of this purpose – A’s purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>62</sup> See page 20 of Appendix 1

<sup>63</sup> A ‘younger child’ is a child who has not yet attained the age of 13 years.

<sup>64</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 9 - voyeurism	<p>A does one of the following at subsections (2) to (5) below:</p> <p>s.9(2)</p> <ul style="list-style-type: none"> <li>• A observes B doing a private act<sup>65</sup></li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>66</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>67</sup></li> </ul> <p>s.9(3)</p> <ul style="list-style-type: none"> <li>• A operates equipment<sup>68</sup> with the intention of enabling A or a third party (C) to observe B doing the private act.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B<sup>69</sup></li> </ul>	Any person	Any person – but if younger child <sup>70</sup> , section 26 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

<sup>65</sup> S10 provides that a person is doing a 'private act' where the person is in a place which would reasonably be expected to provide privacy AND 1) the person's genitals, buttocks or breasts are exposed or covered only with underwear, or 2) the person is using a lavatory, or 3) the person is doing a sexual act which is not of a kind ordinarily done in public

<sup>66</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>67</sup> See page 20 of Appendix 1

<sup>68</sup> For extent of 'operates equipment' see s9(3).

<sup>69</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

<sup>70</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 9 – (cont.)	<p>s.9(4)</p> <ul style="list-style-type: none"> <li>• A records B doing a private act with the intention that A or C will look at an image of B doing the act.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B.<sup>71</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>72</sup></li> </ul> <p>s.9(4A)</p> <ul style="list-style-type: none"> <li>• A operates equipment beneath B's clothing with the intention of enabling A or C to observe B's genitals or buttocks (whether exposed or covered in underwear), or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B.<sup>73</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>74</sup>.</li> </ul>	Any person	Any person – but if younger child <sup>75</sup> , section 26 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

<sup>71</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>72</sup> See page 20 of Appendix 1

<sup>73</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>74</sup> See page 20 of Appendix 1

<sup>75</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 9 – (cont.)	<p>s.9(4B)</p> <ul style="list-style-type: none"> <li>• A records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.</li> <li>• A records the image with the intention that A or C will look at the image for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B.<sup>76</sup></li> <li>• B does not consent and A has no reasonable belief that B consents<sup>77</sup>.</li> </ul> <p>s.9(5)</p> <ul style="list-style-type: none"> <li>• A installs equipment or constructs or adapts a structure or part of a structure<sup>78</sup> with the intention that A or another person will do any of the acts in subsections (2), (3) or (4).</li> </ul>	Any person	Any person – but if younger child <sup>79</sup> , section 26 should be used as consent is not an issue	Yes, if committed against a person under the age of 17- new paragraph 4A (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Part 4 are:

- Section 26: voyeurism towards a young child, and
- Section 36: voyeurism towards an older child

In relation to the term “sexual gratification”, see the notes on section 5 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>80</sup>

<sup>76</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>77</sup> See page 20 of Appendix 1

<sup>78</sup> For extent of 'structure' see s9(3).

<sup>79</sup> A 'younger child' is a child who has not yet attained the age of 13 years.

<sup>80</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 11 - administering a substance for a sexual purpose	<ul style="list-style-type: none"> <li>• A administers a substance to B OR A causes a substance to be taken by B</li> <li>• A acts intentionally in administering the substance OR A acts intentionally in causing the substance to be taken</li> <li>• A's purpose is to overpower or stupefy B in order that any person may engage in sexual activity which involves B</li> <li>• B does not know<sup>81</sup> that he or she is being given the substance</li> <li>• A has no reasonable belief<sup>82</sup> that B knows that he or she is being given the substance</li> </ul>	Any person	Any person (no equivalent offences available if B is a child)	No.

This offence is committed even where no resulting sexual activity involving B takes place, and there is no requirement that B is in fact stupefied or overpowered as a result of taking the substance.

The Act does not introduce any equivalent offences relating to child victims. However, as with all Part 1 offences it can be committed against a child.

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<sup>81</sup> As a result of s 11(2), if A induces B to reasonably believe that the substance is of substantially lesser quantity or strength than it in fact is, then B is not to be treated as knowing that he or she is being given the substance.

<sup>82</sup> As a result of s 11(5), if A induces B to reasonably believe that the substance is of substantially lesser quantity or strength than it in fact is, then A is not to be treated as having a reasonable belief that B knows that he or she is being given the substance.

## Part 2: consent and reasonable belief: sections 12 – 16

Section	What the section says	Comment
Section 12	“Consent” in Parts 1 (rape, etc) and 3 (offences against mentally disordered persons) means “free agreement”	<p>The definition of consent in the Act is deliberately a departure from the existing law relating to consent in sexual offences, following the recommendation of the SLC, accepted by the Scottish Parliament, that the common law position which had developed was not adequate. Case law relating to consent pre-dating the Act should therefore be treated with caution.</p> <p>Analysis of sections 13 – 15 (especially 13(2) and 15(3)&amp;(4) make it clear that the Act “contemplates an ongoing positive and active attitude of agreement rather than a one-off statement of permission”<sup>83</sup> – it is not analogous to entering into a contract</p> <p>The definition also differs from the English definition of consent.</p>
Section 13	Without prejudice to generality of section 12, free agreement is stated as being absent in the following circumstances:	<p>In every offence where lack of consent is an essential element, the onus is on the reporter to prove lack of consent. The effect of section 13 is that if the reporter proves (with corroborated evidence and beyond reasonable doubt in (j) grounds) that one of these circumstances is present, that will establish the lack of free agreement and the absence of consent.</p> <p>As the list is not exhaustive, there can be a lack of free agreement even if none of these circumstances applies – it is likely that case law will develop on what constitutes free agreement in a general sense.</p>
	(a) Conduct occurs at a time when B is incapable of consenting to it because of the effect of alcohol or some other substance	<p>The focus is on whether B was incapable at the time of the conduct. A prior expression of consent, before getting drunk, is irrelevant.</p> <p>However, a prior expression of consent may provide the starting point for A arguing that he had a reasonable belief that B consented.</p> <p>The court will consider the facts and circumstances in deciding whether B’s level of intoxication was such that:</p> <ul style="list-style-type: none"> <li>• B was incapable of consenting – in which case there is no free agreement; or</li> <li>• B’s choices were changed due to a loss of inhibition but was still able to consent – in which case there is free agreement.</li> </ul>

<sup>83</sup> See Brown, Sexual Offences (Scotland) Act 1995, Greens Annotated Acts p.37.

	<p>(b) B agrees or submits to the conduct because of violence against B or another, or because of threats of violence against B or another</p>	<p>This definition only applies if B has agreed or submitted to the conduct. In the case of threats, the threat must be of violence and not any other harm. The threat need not be of immediate violence. However, there does need to be a causal link between the threat and the agreement or submission. Although the threat must be of violence to meet this definition, if B agrees to the conduct because of other threats, that will be evidence that there is not free agreement in the general sense. This subsection is <i>not</i> saying that there must be violence, or threats of violence, for there to be no free agreement.</p>
	<p>(c) B agrees or submits to the conduct because B is unlawfully detained by A</p>	<p>There must be a causal link between the detention and the agreement or submission. The detention must be carried out by A and must be unlawful – so if the agreement was because B was lawfully detained, this would not apply (although in such a case there might be evidence of lack of free agreement by B in the general sense).</p>
	<p>(d) B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct</p>	<p>There must be a causal link between the deception and the agreement or consent. The deception:</p> <ul style="list-style-type: none"> <li>• must be as to the nature or purpose of the conduct e.g. where A falsely claimed that the conduct is a medical procedure; and</li> <li>• not some other deception e.g. where A falsely claimed to be free of a sexually transmitted disease.</li> </ul>
	<p>(e) B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B</p>	<p>There must be a causal link between the impersonation and the agreement or submission. The impersonation must be of someone personally known to B – therefore this would not apply if B pretended to be a rich person or a celebrity.</p>
	<p>(f) Where the only expression or indication of agreement to the conduct is from a person other than B</p>	<p>This does not prevent an expression of consent by a 3<sup>rd</sup> party, but B requires to consent as well.</p>
<p>Section 14</p>	<p>States that a person is incapable of consenting to any conduct while asleep or unconscious</p>	
<p>Section 15</p>	<p>Clarifies the scope of consent in relation to offences under sections 1-9, providing that:</p> <ol style="list-style-type: none"> <li>1) consent to conduct does not of itself imply consent to any other conduct</li> </ol>	<p>For example, consent to a kiss does not imply consent to sexual intercourse. Consent cannot be withdrawn after the conduct has ended.</p>

	<p>2) consent can be withdrawn at any time before or during conduct</p> <p>3) if the conduct takes place, or continues to take place, once consent has been withdrawn, it takes place without consent.</p>	
Section 16	<p>In determining whether A's belief about B's consent or knowledge was reasonable, the court must have regard to:</p> <ul style="list-style-type: none"> <li>• whether A took any steps to ascertain whether there was consent (or knowledge);</li> <li>• if A did take such steps, what those steps were.</li> </ul>	<p>As the absence of reasonable belief is an essential element of Part 1 offences, the reporter will require to prove it in every case<sup>84</sup>. The court will assess this with regard to the facts and circumstances of the case – section 16 directs that the court must have regard to any steps taken by A to ascertain whether there was consent<sup>85</sup>.</p> <p>The intention of the Scottish Law Commission in recommending this reasonable belief test was to introduce a test not purely subjective (focussing on the mental state of the particular accused), nor purely objective (focussing on whether a reasonable person would have believed there was consent) but a "mixed test":</p> <ul style="list-style-type: none"> <li>• the court has to decide whether the belief was reasonable (the objective element);</li> <li>• in reaching that decision, the court must have regard to any steps taken by the accused to ascertain whether there was consent (the subjective element).</li> </ul> <p>The fact that A does not take any steps to ascertain whether there is consent does not mean that there is necessarily an absence of reasonable belief - this will depend on the facts and circumstances of the case.</p>

<sup>84</sup> However, in *Graham v HMA* [2017] HCJAC 71; 2017 SCCR 497, the appeal court held that where it is alleged that intercourse was achieved by use of force and that is itself proved by corroborated evidence, there is no need for separate proof of the absence of reasonable belief – the court is entitled to hold that the complainor's lack of consent would have been obvious to the accused.

In *Maqsood v HMA* [2018] HCJAC 74; 2019 JC 45, the appeal court held that, while an absence of reasonable belief is an essential element of the crime of rape, it does not require to be established by corroborated evidence. Instead, whether an accused had, or did not have, a reasonable belief is an inference to be drawn from proven fact (eg the use of force or signs of obvious intoxication). Therefore in the crime of rape, it is only intentional penetration and lack of consent that require to be proved by corroborated evidence. Although the decision was in relation to rape, as an absence of reasonable belief is an essential element of all Part 1 offences, it is relevant to all those offences.

## Part 3: Capacity to consent of mentally disordered persons: section 17

Section	What the section says	Comment
Section 17	<p>States that a mentally disordered person is incapable of consenting to conduct if, by reason of the mental disorder, the person is unable to:</p> <ul style="list-style-type: none"> <li>• understand what the conduct is;</li> <li>• form a decision as to whether to engage in the conduct (or as to whether it should take place); or</li> <li>• communicate any such decision.</li> </ul>	<p>The provision seeks to strike a balance between recognising the rights of people with a mental disorder to engage in sexual activity, and protecting vulnerable persons from sexual exploitation.</p> <p>The section applies to the offences in sections 1-9 of the Act. There is 2 stage test – the court must be satisfied that:</p> <ul style="list-style-type: none"> <li>• B has a mental disorder as defined; and</li> <li>• B is unable to do one or more of the things stated.</li> </ul> <p>If the court is so satisfied, the reporter will have established that B did not consent to the conduct.</p> <p>“Mental disorder” is as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 which states:</p> <ol style="list-style-type: none"> <li>(1) Subject to subsection (2) below, ... “mental disorder” means any— <ul style="list-style-type: none"> <li>(a) mental illness;</li> <li>(b) personality disorder; or</li> <li>(c) learning disability,</li> </ul> however caused or manifested; and cognate expressions shall be construed accordingly.</li> <li>(2) A person is not mentally disordered by reason only of any of the following— <ul style="list-style-type: none"> <li>(a) sexual orientation;</li> <li>(b) sexual deviancy;</li> <li>(c) transsexualism;</li> <li>(d) transvestism;</li> <li>(e) dependence on, or use of, alcohol or drugs;</li> <li>(f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person;</li> <li>(g) acting as no prudent person would act.</li> </ul> </li> </ol>

## Part 4: Offences against younger children - sections 18 - 27

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 18 - Rape of a young child	<ul style="list-style-type: none"><li>• A penetrates<sup>86</sup> with A's penis<sup>87</sup> the vagina<sup>88</sup>, anus or mouth of B</li><li>• A does so intentionally or recklessly</li><li>• B is a child under the age of 13.</li></ul>	Any person	Any child under the age of 13	Yes – new paragraph 1A (sched 5 of the Act, paragraph 2(8)(a))

The parallel offences in Parts 1 and 4 are:

- Section 1: rape, and
- Section 28: having sexual intercourse with an older child.

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief in consent on A's part.

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<sup>86</sup> Under s 18(1), the penetration is 'to any extent.'

<sup>87</sup> 'Penis' is defined in s1(4) as including a surgically constructed penis

<sup>88</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 19 - Sexual assault on a young child by penetration	<ul style="list-style-type: none"> <li>• A penetrates<sup>89</sup> with any part of A's body or anything else the vagina<sup>90</sup> or anus of B</li> <li>• A does so intentionally or recklessly</li> <li>• The penetration is sexual<sup>91</sup></li> <li>• B is a child under the age of 13.</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 1B (sched 5 of the Act, paragraph 2(8)(a))

The parallel offences in Parts 1 and 4 are:

- Section 2: sexual assault by penetration
- Section 29: engaging in penetrative sexual activity with or towards an older child

This section overlaps significantly with the s.18 and s.20 offences. The legislative intent behind the overlap is to cover the situation where there is clear evidence of penetration, but, for example, B is unsure whether the penetration was with a penis, with another body part or by any other means.

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief in consent on A's part.

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<sup>89</sup> Under s 19(1), the penetration is 'to any extent.'

<sup>90</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>91</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 20 - Sexual assault <sup>92</sup> on a young child <sup>93</sup>	<p>A acts in any of the ways set out at (a) to (e):</p> <p>s.20(2)(a)</p> <ul style="list-style-type: none"> <li>• A penetrates<sup>94</sup> the vagina<sup>95</sup>, anus or mouth of B by any means.<sup>96</sup></li> <li>• A does so intentionally or recklessly</li> <li>• The penetration is sexual<sup>97</sup></li> </ul> <p>s.20(2)(b)</p> <ul style="list-style-type: none"> <li>• A touches B sexually<sup>98</sup></li> <li>• A does so intentionally or recklessly</li> </ul> <p>s.20(2)(c)</p> <ul style="list-style-type: none"> <li>• A engages in any other form of sexual<sup>99</sup> activity in which A has physical contact<sup>100</sup> with B</li> <li>• A does so intentionally or recklessly</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 1C (sched 5 of the Act, paragraph 2(8)(a))

<sup>92</sup> “The adoption of the nomen juris “sexual assault of a young child” does not import the general law of assault into the new offence.” (Tait v HMA 2015 SLT 495)

<sup>93</sup> The 5 things listed in subsection (2) are discrete and mutually exclusive behaviours. If more than one is included in a statement of grounds, each one must be corroborated (Tait v HMA [2015] HCJAC 58 2015 SLT 495). However, evidence that is available to corroborate one of the things in subsection (2) (e.g. subsequent distress shown by the alleged victim) may well be available to corroborate another thing (or things) from subsection (2) that is stated.

<sup>94</sup> Under s 20(2)(a), the penetration is ‘to any extent.’

<sup>95</sup> ‘Vagina’ is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>96</sup> S20(3) provides that penetration ‘by any means’ includes penetration with a penis – i.e. the offence overlaps with those in ss18 & 19.

<sup>97</sup> For the purposes of the Act, a penetration, touching or any other activity is ‘sexual’ if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A’s motive was sexual.

<sup>98</sup> See s60(2) – a touch is sexual if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>99</sup> See s60(2) – an activity is sexual if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>100</sup> Under s20(2)(c) the offence is committed whether the contact is bodily contact or contact by means of an implement, and whether or not the contact is through B’s clothing.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 20 - (cont.)	<p>s.20(2)(d)</p> <ul style="list-style-type: none"> <li>• A ejaculates semen on to B</li> <li>• A does so intentionally or recklessly</li> </ul> <p>s.20(2)(e)</p> <ul style="list-style-type: none"> <li>• A emits urine or saliva on to B sexually<sup>101</sup></li> <li>• A does so intentionally or recklessly</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• B is a child under the age of 13.</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 1C (sched 5 of the Act, paragraph 2(8)(a))

The parallel offences in Parts 1 and 4 are:

- Section 3: sexual assault
- Section 30: engaging in sexual activity with or towards an older child

Although the Act uses the term 'sexual assault', the offence is distinct from common law assault, and the law relating to common law assault is not applied to the new offence created by section 20. Although most of the actions falling foul of section 20 will satisfy the requirements for assault (whether or not aggravated by being committed in circumstances of indecency) at common law, the section 20 offence must always be used where it applicable.<sup>102</sup>

The section 20(2)(a) offence overlaps with sections 18 and 19. This is a matter of deliberate legislative intent to deal with situations where B knows that he or she has been penetrated by A, but may not know with what.

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief in consent on A's part.

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<sup>101</sup> See s60(2) – an activity is sexual if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>102</sup> As a result of s52(b).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 21 - causing a young child to participate in a sexual activity	<ul style="list-style-type: none"> <li>A causes<sup>103</sup> B to participate in a sexual<sup>104</sup> activity</li> <li>A does so intentionally (recklessness is not sufficient)</li> <li>B is a child under the age of 13</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Parts 1 and 4 are:

- Section 4: sexual coercion
- Section 31: causing an older child to participate in a sexual activity

Examples of circumstances where this offence might apply would include where A causes B to carry out a sexual act, or where A causes B to engage in sexual activity with a third party.

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief in consent on A's part.

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<sup>103</sup> There is no requirement that A's conduct is coercive. No definition of "causing" is provided, but the Scottish Law Commission, in recommending the introduction of the offence, expected it to be understood in the sense of proximate cause. (Brown, Sexual Offences (Scotland) Act 1995, Greens Annotated Acts, page 25).

<sup>104</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 22 - causing a young child to be present during a sexual activity	<p>This offence can be committed in two separate ways.</p> <p>EITHER</p> <p>s. 22(1)(a):</p> <ul style="list-style-type: none"> <li>• A engages in sexual<sup>105</sup> activity in the presence<sup>106</sup> of a child, B.</li> <li>• A does so intentionally (recklessness is not sufficient).</li> <li>• A's actions in engaging in the sexual activity in B's presence are for the purpose of obtaining sexual gratification AND/OR humiliating, distressing or alarming B.<sup>107</sup></li> <li>• B is a child under the age of 13</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

<sup>105</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2).

<sup>106</sup> S.22(3) is a partial definition of the extent of 'presence'- saying that it *includes* a situation where B can observe A engaging in the sexual activity (but not a situation where B can do so by looking at an image- this is covered by section 23). This makes it clear that the offence is committed in circumstances where otherwise B might be said not to be 'present' (e.g. if B is in another room and able to observe through open doors, or indoors and able to observe activities in the garden).

<sup>107</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 22 – (cont.)	<p>s.22(1)(b):</p> <ul style="list-style-type: none"> <li>• A causes B to be present<sup>108</sup> while a third person engages in sexual<sup>109</sup> activity.</li> <li>• A does so intentionally (recklessness is not sufficient)</li> <li>• A's actions in causing B to be present are for the purpose of obtaining sexual gratification AND/OR humiliating, distressing or alarming B.<sup>110</sup></li> <li>• B is a child under the age of 13.</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Parts 1 and 4 are:

- Section 5: coercing a person into being present during a sexual activity
- Section 32: causing an older child to be present during a sexual activity

There is no requirement that B in fact observes or is aware of the sexual activity.

Although “sexual” is defined in the legislation “sexual gratification” is not. The question of whether A acted for the purposes of sexual gratification is to be determined by reasonable inference depending on the facts and circumstances.<sup>111</sup> In order for the s32(1)(a) offence to apply, any purpose to obtain sexual gratification must relate to B's presence; the offence is not committed if A is seeking sexual gratification from the sexual activity alone and B's presence is merely incidental.

Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>112</sup>

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief in consent on A's part.

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<sup>108</sup> S.22(3) is a partial definition of the extent of ‘presence’- saying that it *includes* a situation where B can observe A engaging in the sexual activity (but not a situation where B can do so by looking at an image- this is covered by section 23). This makes it clear that the offence is committed in circumstances where otherwise B might be said not to be ‘present’ (e.g. if B is in another room and able to observe through open doors, or indoors and able to observe activities in the garden).

<sup>109</sup> For the purposes of the Act, a penetration, touching or any other activity is ‘sexual’ if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>110</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>111</sup> See Brown, Sexual Offences (Scotland) Act 1995, Greens Annotated Acts, pages 57-58- it is suggested that ‘sexual gratification’ has deliberately been left undefined as it is a subjective matter.

<sup>112</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 23 - causing a young child to look at a sexual image	<ul style="list-style-type: none"> <li>• A causes B to look at a sexual image.<sup>113</sup></li> <li>• A does so intentionally (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>114</sup></li> <li>• B is a child under the age of 13</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Parts 1 and 4 are:

- Section 6: coercing a person into looking at a sexual image
- Section 33: causing an older child to look at a sexual image

Note the broad definition of 'sexual image' in s.23(3), which is wide enough to cover computer generated images, broadcasts and recordings.

In relation to the term "sexual gratification", see the notes on section 22 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>115</sup>

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief in consent on A's part

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<sup>113</sup> 'Sexual image' is defined in s23(3) as an image, produced by whatever means and whether or not a moving image 1) of A, another person or an imaginary person engaging in sexual activity, or 2) of A's genitals or the genitals of a third person or imaginary person.

<sup>114</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>115</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 24 - communicating indecently with a younger child	<p>Two separate offences:</p> <p>s.24(1)</p> <ul style="list-style-type: none"> <li>• A sends a sexual<sup>116</sup> written communication<sup>117</sup> to, or directs a sexual verbal communication<sup>118</sup> at B.</li> <li>• A acts intentionally as to sending or directing the communication to B (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification<sup>119</sup> AND / OR humiliating, distressing or alarming B.<sup>120</sup></li> <li>• B is under the age of 13</li> </ul> <p>s.24(2)</p> <ul style="list-style-type: none"> <li>• A causes B to see or hear a sexual<sup>121</sup> written communication<sup>122</sup> or sexual verbal communication.<sup>123</sup></li> <li>• A does so intentionally (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.</li> <li>• B is under the age of 13</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

<sup>116</sup> For the purposes of the Act, a communication is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2)

<sup>117</sup> 'Written communication' is defined in section 24(4) as being a communication in whatever written form, and includes writing of a person other than A (e.g. a passage in a book or magazine).

<sup>118</sup> 'Verbal communication' is defined in section 24(4) as being a communication in whatever verbal form, and includes communications comprising sounds of sexual activity, and communications in sign language.

<sup>119</sup> In relation to the parallel offence of s.7(1), the appeal court has said there is nothing in the language of s.7(1) to suggest that the offence could only be committed if the sexual gratification and the display of the images were simultaneous or contemporaneous or synchronised – having regard to its purpose, a temporal restriction should not be read into the statutory wording (Robinson v Cassidy [2013] HCJAC 45; 2013 GWD 33-650).

<sup>120</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>121</sup> See s60(2) – a communication is 'sexual' if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>122</sup> 'Written communication' is defined in section 24(4) as being a communication in whatever written form, and includes writing of a person other than A (e.g. a passage in a book or magazine).

<sup>123</sup> 'Verbal communication' is defined in section 24(4) as being a communication in whatever verbal form, and includes communications comprising sounds of sexual activity, and communications in sign language.

The parallel offences in Parts 1 and 4 are:

- Section 7: communicating indecently
- Section 34: communicating indecently with an older child

The s.24(1)&(2) offences do not overlap. The s24(2) offence can only be committed where s.24(1) does not apply<sup>124</sup>, i.e. where A causes B to see or hear the communication by some means other than sending or directing the communication to or at B.

'Sending' and 'directing' are not defined. The sending and directing can be 'by whatever means.' The ordinary meaning of the terms would suggest that A's act of sending or directing constitutes the offence, and that receipt by B is not required.<sup>125</sup>

In relation to the term "sexual gratification", see the notes on section 22 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>126</sup>

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief in consent on A's part

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<sup>124</sup> See the wording of s24(2), 'If, in circumstances other than are as mentioned in subsection (1)...'

<sup>125</sup> See Brown, Sexual Offences (sc) Act 1995, Greens Annotated Acts, page 30.

<sup>126</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 25 - sexual exposure to a young child	<ul style="list-style-type: none"> <li>A exposes his or her genitals to B</li> <li>A intends B to see the genitals</li> <li>A acts intentionally as to the exposure</li> <li>The exposure is in a sexual<sup>127</sup> manner</li> <li>A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>128</sup></li> <li>B is a child under the age of 13</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

The parallel offences in Parts 1 and 4 are:

- Section 8: sexual exposure
- Section 35: sexual exposure to an older child

This offence is not intended to deal with public order offences committed by, for example, streakers or males urinating in public (who often will not intend to expose themselves to any particular person, and who are unlikely to have the requisite purpose to obtain sexual gratification, etc). Such offences should continue to be dealt with under the existing law (e.g. as public indecency or breach of the peace).

In relation to the term “sexual gratification”, see the notes on section 22 above. Where A’s purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>129</sup>

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B’s part or lack of reasonable belief in consent on A’s part

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<sup>127</sup> For the purposes of the Act, an exposure is ‘sexual’ if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2)

<sup>128</sup> See s.49 on establishment of this purpose – A’s purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>129</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 26 - voyeurism towards a young child	<p>A does one of the following at (2) to (5) below:</p> <p>s.26(2)</p> <ul style="list-style-type: none"> <li>• A observes B doing a private act<sup>130</sup></li> <li>• A acts for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>131</sup></li> </ul> <p>s.26(3)</p> <ul style="list-style-type: none"> <li>• A operates equipment<sup>132</sup> with the intention of enabling A or a third party (C) to observe B doing the private act.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B.<sup>133</sup></li> </ul> <p>s.26(4)</p> <ul style="list-style-type: none"> <li>• A records B doing a private act with the intention that A or C will look at an image of B doing the act.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B.<sup>134</sup></li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

<sup>130</sup> S10 provides that a person is doing a 'private act' where the person is in a place which would reasonably be expected to provide privacy AND 1) the person's genitals, buttocks or breasts are exposed or covered only with underwear, or 2) the person is using a lavatory, or 3) the person is doing a sexual act which is not of a kind ordinarily done in public

<sup>131</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>132</sup> For extent of 'operates equipment' see s10.

<sup>133</sup> S26(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

<sup>134</sup> S26(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?
Section 26 - (cont.)	<p>s.26(4A)</p> <ul style="list-style-type: none"> <li>• A operates equipment beneath B's clothing with the intention of enabling A or C to observe B's genitals or buttocks (whether exposed or covered in underwear), or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND / OR humiliating, distressing or alarming B.<sup>135</sup></li> </ul> <p>s.26(4B)</p> <ul style="list-style-type: none"> <li>• A records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.</li> <li>• A records the image with the intention that A or C will look at the image for the purpose of obtaining sexual gratification whether for A or for C AND/ R humiliating, distressing or alarming B.<sup>136</sup></li> </ul> <p>s.26(5)</p> <ul style="list-style-type: none"> <li>• A installs equipment or constructs or adapts a structure<sup>137</sup> with the intention that A or C will do any of the above acts.</li> </ul>	Any person	Any child under the age of 13	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))

<sup>135</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>136</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>137</sup> For extent of 'structure' see s10.

	<ul style="list-style-type: none"> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND/OR humiliating, distressing or alarming B.<sup>138</sup></li> <li>AND, in each case</li> <li>• B is under the age of 13</li> </ul>			
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The parallel offences in Part 4 are:

- Section 9: voyeurism
- Section 36: voyeurism towards an older child

In relation to the term “sexual gratification”, see the notes on section 22 above. Where A’s purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>139</sup>

Section 27 states that there is no defence of reasonable belief that the child had attained the age of 13. There is no reference to consent as it is not necessary to prove lack of consent on B’s part or lack of reasonable belief in consent on A’s part.

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<sup>138</sup> S26(7). See s.49 on establishment of this purpose – A’s purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>139</sup> S49(2).

## Part 4: Offences against older children - sections 28 – 39

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 28 - Having intercourse with an older child	<ul style="list-style-type: none"> <li>• A penetrates<sup>140</sup> with A's penis<sup>141</sup> the vagina<sup>142</sup>, anus or mouth of B</li> <li>• A does so intentionally or recklessly</li> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 1A (sched 5 of the Act, paragraph 2(8)(a))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years. Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>143</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol>

The parallel offences in Parts 1 and 4 are:

- Section 1: rape, and
- Section 18: rape of a young child.

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part. The offence is committed with or without consent, due to the age of the victim. Where B does not consent<sup>144</sup>, the evidence may also support an offence of rape under s1<sup>145</sup>.

<sup>140</sup> Under s 28(1), the penetration is 'to any extent.'

<sup>141</sup> 'Penis' is defined in s1(4) as including a surgically constructed penis.

<sup>142</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>143</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

<sup>144</sup> As defined by s12.

<sup>145</sup> See paragraph 3.2.3 of the Practice Direction.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 29 - Engaging in penetrative sexual activity with or towards an older child	<ul style="list-style-type: none"> <li>A penetrates<sup>146</sup> with any part of A's body or anything else the vagina<sup>147</sup> or anus of B</li> <li>A does so intentionally or recklessly</li> <li>The penetration is sexual<sup>148</sup></li> <li>A is 16 or over</li> <li>B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 1B (sched 5 of the Act, paragraph 2(8)(a)	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years. Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>149</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol>

The parallel offences in Parts 1 and 4 are:

- Section 2: sexual assault by penetration
- Section 19: sexual assault on a young child by penetration

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part. The offence is committed with or without consent, due to the age of the victim. Where B does not consent<sup>150</sup>, the evidence may also support an offence under Part 1 of the Act<sup>151</sup>.

This section overlaps significantly with the s.28 and s.30 offences. For example the offence can be used where penetration was with a penis. The legislative intent behind the overlap with s28 is to cover the situation where there is clear evidence of penetration, but, for example, B is unsure whether the penetration was with a penis, with another body part or by any other means.

<sup>146</sup> Under s 29(1), the penetration is 'to any extent.'

<sup>147</sup> Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>148</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>149</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

<sup>150</sup> As defined by s12.

<sup>151</sup> See paragraph 3.2.3 of the Practice Direction.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 30 - Engaging in sexual activity with or towards an older child <sup>152</sup>	<p>A acts in any of the ways set out at (a) to (e):</p> <p>s.30(2)(a)</p> <ul style="list-style-type: none"> <li>• A penetrates<sup>153</sup> the vagina<sup>154</sup>, anus or mouth of B by any means.<sup>155</sup></li> <li>• A does so intentionally or recklessly</li> <li>• The penetration is sexual<sup>156</sup></li> </ul> <p>s.30(2)(b)</p> <ul style="list-style-type: none"> <li>• A touches B sexually<sup>157</sup></li> <li>• A does so intentionally or recklessly</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 1C (sched 5 of the Act, paragraph 2(8)(a)	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years. Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>158</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Depending upon the manner in which the offence was committed<sup>159</sup>, there may be a defence under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years</p>

<sup>152</sup> The 5 things listed in subsection (2) are discrete and mutually exclusive behaviours. If more than one is included in a statement of grounds, each one must be corroborated (Tait v HMA [2015] HCJAC 58 2015 SLT 495). However, evidence that is available to corroborate one of the things in subsection (2) (e.g. subsequent distress shown by the alleged victim) may well be available to corroborate another thing (or things) from subsection (2) that is stated.

<sup>153</sup> Under s 30(2), the penetration is 'to any extent.'

<sup>154</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>155</sup> S30(3) provides that penetration 'by any means' includes penetration with a penis – i.e. the offence overlaps with those in ss28 & 29.

<sup>156</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>157</sup> See s60(2) – a touch is 'sexual' if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>158</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

<sup>159</sup> S 39(4) sets out the circumstances in which this defence is available. It is always available for an offence under s30(2)(d), and never available for an offence under s30(2)(e). In relation to offences under ss30(a)(b)&(c), the broad effect of the Act's detailed provision is that the defence is available unless the conduct involves penile penetration of either A or B by the other, or oral sex.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 30 - (cont.)	<p>s.30(2)(c)</p> <ul style="list-style-type: none"> <li>• A engages in any other form of sexual<sup>160</sup> activity in which A has physical contact<sup>161</sup> with B</li> <li>• A acts intentionally or recklessly as to the physical contact</li> </ul> <p>s.30(2)(d)</p> <ul style="list-style-type: none"> <li>• A ejaculates semen on to B</li> <li>• A does so intentionally or recklessly.</li> </ul> <p>s.30(2)(e)</p> <ul style="list-style-type: none"> <li>• A emits urine or saliva on to B sexually<sup>162</sup></li> <li>• A does so intentionally or recklessly</li> </ul> <p>AND:</p> <ul style="list-style-type: none"> <li>• B is 13 or over but under 16</li> <li>• A is 16 or over</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 1C (sched 5 of the Act, paragraph 2(8)(a)	<ul style="list-style-type: none"> <li>• Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</li> <li>• Under s39(2), there are exclusions to the use of this defence: <ul style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>163</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ul> </li> <li>• Depending upon the manner in which the offence was committed<sup>164</sup>, there may be a defence under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years</li> </ul>

The parallel offences in Parts 1 and 4 are:

- Section 3: sexual assault
- Section 20: sexual assault on a young child

<sup>160</sup> See s60(2) – an activity is ‘sexual’ if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>161</sup> Under s30(2)(c) The offence is committed whether the contact is bodily contact or contact by means of an implement, and whether or not the contact is through B’s clothing.

<sup>162</sup> s60(2) – an activity is ‘sexual’ if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>163</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB’s case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

<sup>164</sup> S 39(4) sets out the circumstances in which this defence is available. It is always available for an offence under s30(2)(d), and never available for an offence under s30(2)(e). In relation to offences under ss30(a)(b)&(c), the broad effect of the Act’s detailed provision is that the defence is available unless the conduct involves penile penetration of either A or B by the other, or oral sex.

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part. Where B does not consent<sup>165</sup>, the evidence may also support an offence under Part 1 of the Act<sup>166</sup>.

The s30(2)(a) offence overlaps significantly with the s.28 and s.29 offences.

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<sup>165</sup> As defined by s12.

<sup>166</sup> See paragraph 3.2.3 of the Practice Direction.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 31 - Causing an older child to participate in a sexual activity	<ul style="list-style-type: none"> <li>A causes<sup>167</sup> B to participate in a sexual<sup>168</sup> activity</li> <li>A does so intentionally (recklessness is not sufficient)</li> <li>A is 16 or over</li> <li>B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<ul style="list-style-type: none"> <li>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</li> </ul> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>169</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <ul style="list-style-type: none"> <li>Under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years</li> </ul>

The parallel offences in Parts 1 and 4 are:

- Section 4: sexual coercion
- Section 21: causing a young child to participate in a sexual activity

Examples of circumstances where this offence might apply would include where A causes B to carry out a sexual act, or where A causes B to engage in sexual activity with a third party.

There is no reference to coercion or to consent as it is not necessary to prove lack of consent on B's part or coercion/ lack of reasonable belief of consent on A's part. Where B did not in fact consent, the evidence may also support an offence under Part 1 of the Act<sup>170</sup>.

<sup>167</sup> There is no requirement that A's conduct is coercive. No definition of "causing" is provided, but the Scottish Law Commission, in recommending the introduction of the offence, expected it to be understood in the sense of proximate cause. (Brown, Sexual Offences (sc) Act 1995, Greens Annotated Acts, page 25).

<sup>168</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>169</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

<sup>170</sup> See paragraph 3.2.3 of the Practice Direction.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 32 - Causing an older child to be present during a sexual activity	<p>This offence can be committed in two separate ways.</p> <p>EITHER:</p> <p>s.32(1)(a):</p> <ul style="list-style-type: none"> <li>• A engages in sexual<sup>171</sup> activity in the presence<sup>172</sup> of a child, B.</li> <li>• A does so intentionally (recklessness is not sufficient).</li> <li>• A's actions in engaging in the sexual activity in B's presence are for the purpose of obtaining sexual gratification AND / OR humiliating, distressing or alarming B.<sup>173</sup></li> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul> <p>OR:</p>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>174</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years</p>

<sup>171</sup> For the purposes of the Act, a penetration, touching or any other activity is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>172</sup> S.32(3) provides a partial definition of the extent of 'presence' saying that it *includes* a situation where B can observe A engaging in the sexual activity (but not a situation where B can do so only by looking at an image- this is covered by section 33). This makes it clear that the offence is committed in circumstances where otherwise B might be said not to be 'present' (e.g. if B is in another room and able to observe through open doors, or indoors and able to observe activities in the garden).

<sup>173</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>174</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 32 - (cont.)	<p>s.32(1)(b):</p> <ul style="list-style-type: none"> <li>• A causes B to be present<sup>175</sup> while a third person engages in sexual<sup>176</sup> activity.</li> <li>• A does so intentionally (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND/OR humiliating, distressing or alarming B.<sup>177</sup></li> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>178</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years</p>

The parallel offences in Parts 1 and 4 are:

- Section 5: coercing a person into being present during a sexual activity
- Section 22: causing a young child to be present during a sexual activity

<sup>175</sup> S.32(3) provides a partial definition of the extent of 'presence' saying that it *includes* a situation where B can observe A engaging in the sexual activity (but not a situation where B can do so only by looking at an image- this is covered by section 33). This makes it clear that the offence is committed in circumstances where otherwise B might be said not to be 'present' (e.g. if B is in another room and able to observe through open doors, or indoors and able to observe activities in the garden).

<sup>176</sup> s60(2) – an activity is 'sexual' if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>177</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>178</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part<sup>179</sup>.

There is no requirement for either offence that B in fact observes or is aware of the sexual activity.

Although "sexual" is defined in the legislation "sexual gratification" is not. The question of whether A acted for the purposes of sexual gratification is to be determined by reasonable inference depending on the facts and circumstances.<sup>180</sup> In order for the s32(1)(a) offence to apply, any purpose to obtain sexual gratification must relate to B's presence; the offence is not committed if A is seeking sexual gratification from the sexual activity alone and B's presence is merely incidental.

Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>181</sup>

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<sup>179</sup> See paragraph 3.2.3 of the Practice Direction.

<sup>180</sup> See Brown, Sexual Offences (sc) Act 1995, Greens Annotated Acts, pages 57-58- it is suggested that 'sexual gratification' has deliberately been left undefined as it is a subjective matter.

<sup>181</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 33 - Causing an older child to look at a sexual image	<ul style="list-style-type: none"> <li>• A causes B to look at a sexual image.<sup>182</sup></li> <li>• A does so intentionally (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND/OR humiliating, distressing or alarming B.<sup>183</sup></li> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>184</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s.39(3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years</p>

The parallel offences in Parts 1 and 4 are:

- Section 6: coercing a person into looking at a sexual image
- Section 23: causing a young child to look at a sexual image

<sup>182</sup> 'Sexual image' is defined in s33(3) as an image, produced by whatever means and whether or not a moving image 1) of A, another person or an imaginary person engaging in sexual activity, or 2) of A's genitals or the genitals of a third person or imaginary person.

<sup>183</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>184</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part. Where B did not in fact consent, the evidence may also support an offence under Part 1 of the Act<sup>185</sup>.

Note the broad definition of 'sexual image' in s33(3), which is wide enough to cover computer generated images, broadcasts and recordings.

In relation to the term "sexual gratification", see the notes on section 32 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>186</sup>

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<sup>185</sup> See paragraph 3.2.3 of the Practice Direction.

<sup>186</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 34 - Communicating indecently with an older child	<p>Two offences:</p> <p>s.34(1)</p> <ul style="list-style-type: none"> <li>• A sends a sexual<sup>187</sup> written communication<sup>188</sup> to, or directs a sexual verbal communication<sup>189</sup> at B.</li> <li>• A acts intentionally as to sending or directing the communication to B (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification<sup>190</sup> AND/OR humiliating, distressing or alarming B.<sup>191</sup></li> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>192</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years.</p>

<sup>187</sup> For the purposes of the Act, a communication is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>188</sup> 'Written communication' is defined in section 34(4) as being a communication in whatever written form, and includes writing of a person other than A (e.g. a passage in a book or magazine).

<sup>189</sup> 'Verbal communication' is defined in section 34(4) as being a communication in whatever verbal form, and includes communications comprising sounds of sexual activity, and communications in sign language.

<sup>190</sup> In relation to the parallel offence of s.7(1), the appeal court has said there is nothing in the language of s.7(1) to suggest that the offence could only be committed if the sexual gratification and the display of the images were simultaneous or contemporaneous or synchronised – having regard to its purpose, a temporal restriction should not be read into the statutory wording (Robinson v Cassidy [2013] HCJAC 45; 2013 GWD 33-650).

<sup>191</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>192</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 34 - (cont.)	<p>s.34(2)</p> <ul style="list-style-type: none"> <li>• A causes B to see or hear a sexual<sup>193</sup> written communication<sup>194</sup> or sexual verbal communication.<sup>195</sup></li> <li>• A does so intentionally (recklessness not sufficient)</li> <li>• A acts for the purpose of obtaining sexual gratification AND/OR humiliating, distressing or alarming B.<sup>196</sup></li> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>197</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years.</p>

The parallel offences in Parts 1 and 4 are:

- Section 7: communicating indecently
- Section 24: communicating indecently with a young child.

<sup>193</sup> s60(2) – a communication is 'sexual' if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>194</sup> 'Written communication' is defined in section 34(4) as being a communication in whatever written form, and includes writing of a person other than A (e.g. a passage in a book or magazine).

<sup>195</sup> 'Verbal communication' is defined in section 34(4) as being a communication in whatever verbal form, and includes communications comprising sounds of sexual activity, and communications in sign language.

<sup>196</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>197</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part. Where B did not in fact consent, the evidence may also support an offence under Part 1 of the Act<sup>198</sup>.

The s.34 (1)&(2) offences do not overlap. The s34(2) offence can only be committed where 34(1) does not apply<sup>199</sup>, i.e. where A causes B to see or hear the communication by some means other than sending or directing the communication to or at B.

'Sending' and 'directing' are not defined. The sending and directing can be 'by whatever means.' The ordinary meaning of the terms would suggest that A's act of sending or directing constitutes the offence, and that receipt by B is not required.<sup>200</sup>

In relation to the term "sexual gratification", see the notes on section 32 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>201</sup>

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<sup>198</sup> See paragraph 3.2.3 of the Practice Direction.

<sup>199</sup> See the wording of s34(2), 'If, in circumstances other than are as mentioned in subsection (1)...'

<sup>200</sup> See Brown, Sexual Offences (Scotland) Act 1995, Greens Annotated Acts, page 30.

<sup>201</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 35 - Sexual exposure to an older child	<ul style="list-style-type: none"> <li>• A exposes his or her genitals to B</li> <li>• A intends B to see the genitals</li> <li>• A acts intentionally as to the exposure</li> <li>• The exposure is in a sexual<sup>202</sup> manner</li> <li>• A acts for the purpose of obtaining sexual gratification AND/OR humiliating, distressing or alarming B.<sup>203</sup></li> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>204</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s39 (3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years.</p>

The parallel offences in Parts 1 and 4 are:

- Section 8: sexual exposure
- Section 25: sexual exposure to a young child

<sup>202</sup> For the purposes of the Act, an exposure is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2)

<sup>203</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>204</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part. Where B did not in fact consent, the evidence may also support an offence under Part 1 of the Act<sup>205</sup>.

This offence is not intended to deal with public order offences committed by, for example, streakers or males urinating in public (who often will not intend to expose themselves to any particular person, and who are unlikely to have the requisite purpose to obtain sexual gratification, etc). Such offences should continue to be dealt with under the existing law (e.g. as public indecency or breach of the peace).

In relation to the term "sexual gratification", see the notes on section 32 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>206</sup>

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<sup>205</sup> See paragraph 3.2.3 of the Practice Direction.

<sup>206</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 36 - Voyeurism towards an older child	<p>A does one of the following at subsections (2) to (5) below:</p> <p>s.36(2)</p> <ul style="list-style-type: none"> <li>• A observes B doing a private act<sup>207</sup></li> <li>• A acts for the purpose of obtaining sexual gratification AND/OR humiliating, distressing or alarming B.<sup>208</sup></li> </ul> <p>s.36(3)</p> <ul style="list-style-type: none"> <li>• A operates equipment with the intention of enabling A or a third party (C) to observe B doing the private act.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND/OR humiliating, distressing or alarming B.<sup>209</sup></li> </ul>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>210</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s.39(3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years.</p>

<sup>207</sup> S10 provides that a person is doing a 'private act' where the person is in a place which would reasonably be expected to provide privacy AND 1) the person's genitals, buttocks or breasts are exposed or covered only with underwear, or 2) the person is using a lavatory, or 3) the person is doing a sexual act which is not of a kind ordinarily done in public

<sup>208</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>209</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>210</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 36 - (cont.)	<p>s.36(4)</p> <ul style="list-style-type: none"> <li>• A records B doing a private act with the intention that A or C will look at an image of B doing the act.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND/OR humiliating, distressing or alarming B.<sup>211</sup></li> </ul> <p>s.36(4A)</p> <ul style="list-style-type: none"> <li>• A operates equipment beneath B's clothing with the intention of enabling A or C to observe B's genitals or buttocks (whether exposed or covered in underwear), or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND/OR humiliating, distressing or alarming B.<sup>212</sup></li> </ul> <p>s.36(4B)</p>	Any person aged 16 years or over	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>Under s.39(1), where A had a reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>215</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>Under s.39(3) &amp; (4), where, at the time when the conduct took place, the age difference between A and B did not exceed 2 years.</p>

<sup>211</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>212</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>215</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

<ul style="list-style-type: none"> <li>• A records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.</li> <li>• A records the image with the intention that A or C will look at the image for the purpose of obtaining sexual gratification whether for A or for C AND/OR humiliating, distressing or alarming B.<sup>213</sup></li> </ul> <p>s.36(5)</p> <ul style="list-style-type: none"> <li>• A installs equipment or constructs or adapts a structure with the intention that A or C will do any of the above acts.</li> <li>• A acts for the purpose of obtaining sexual gratification whether for A or for C AND/OR humiliating, distressing or alarming B.<sup>214</sup></li> </ul> <p>AND:</p> <ul style="list-style-type: none"> <li>• A is 16 or over</li> <li>• B is 13 or over but under 16</li> </ul>				
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The parallel offences in Parts 1 and 4 are:

- Section 9: voyeurism
- Section 26: voyeurism towards a young child

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<sup>213</sup> S9(7). See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

<sup>214</sup> See s.49 on establishment of this purpose – A's purpose was to obtain sexual gratification or to humiliate, distress or alarm B if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question. It is irrelevant whether or not B was in fact humiliated, distressed or alarmed.

There is no reference to consent as it is not necessary to prove lack of consent on B's part or lack of reasonable belief of consent on A's part. Where B did not in fact consent, the evidence may also support an offence under Part 1 of the Act<sup>216</sup>.

In relation to the term "sexual gratification", see the notes on section 32 above. Where A's purpose is to humiliate, distress or alarm B, it is irrelevant whether B is in fact humiliated, distressed or alarmed by the conduct in question.<sup>217</sup>

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<sup>216</sup> See paragraph 3.2.3 of the Practice Direction.

<sup>217</sup> S49(2).

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 37 - Older children engaging in sexual conduct with each other	<ul style="list-style-type: none"> <li>A is 13 or over but under 16</li> <li>B is 13 or over but under 16,</li> </ul> <p>A and B can both commit offences</p> <p>A's offence:</p> <p>EITHER –s.37(1) and (3)(a):</p> <ul style="list-style-type: none"> <li>A penetrates<sup>218</sup> sexually<sup>219</sup> with his penis<sup>220</sup> B's vagina<sup>221</sup>, anus or mouth</li> <li>A does so intentionally or recklessly</li> </ul> <p>OR: s37(1) and (3)(b):</p> <ul style="list-style-type: none"> <li>A sexually<sup>222</sup> touches B's vagina, anus or penis with A's mouth<sup>223</sup></li> <li>A does so intentionally or recklessly</li> </ul>	A young person (male or female) aged between 13 and 15 years inclusive	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>It is a defence under s.39(1) that A had reasonable belief B had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where A has previously been charged with a relevant sexual offence<sup>224</sup>,</li> <li>2) where A has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of A.</li> </ol> <p>However, the s.39(3) defence of age difference not exceeding 2 years does not apply.</p>

<sup>218</sup> 'Penetration' is to any extent – s37(3) and is a continuing act from entry until withdrawal- s38(2).

<sup>219</sup> For the purposes of the Act, a penetration is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>220</sup> 'Penis' is defined in s1(4) as including a surgically constructed penis.

<sup>221</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>222</sup> s60(2) – a touching or activity is 'sexual' if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>223</sup> Section 37(5) provides that the reference to A's mouth *for the purposes of this offence only* is to be construed as including A's tongue and teeth.

<sup>224</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

Offence	Evidential requirements?	Committed by?	Committed against?	Schedule 1 offence?	Statutory defences available?
Section 37 - (cont.)	<p>B's offence:</p> <p>EITHER – s37(4) and (3)(a):</p> <ul style="list-style-type: none"> <li>• A penetrates<sup>225</sup> sexually<sup>226</sup> with his penis<sup>227</sup> B's vagina<sup>228</sup>, anus or mouth</li> <li>• A does so intentionally or recklessly</li> </ul> <p>OR: s37(4) and (3)(b):</p> <ul style="list-style-type: none"> <li>• A sexually<sup>229</sup> touches B's vagina, anus or penis with A's mouth<sup>230</sup></li> <li>• A does so intentionally or recklessly</li> </ul> <p>AND:</p> <p><b>B consents</b></p>	A young person (male or female) aged between 13 and 15 years inclusive	A young person (male or female) aged between 13 and 15 years inclusive	Yes – new paragraph 4B (sched 5 of the Act, paragraph 2(8)(b))	<p>It is a defence under s.39(1) that B had reasonable belief that A had attained the age of 16 years.</p> <p>Under s39(2), there are exclusions to the use of this defence:</p> <ol style="list-style-type: none"> <li>1) where B has previously been charged with a relevant sexual offence<sup>231</sup>,</li> <li>2) where B has a previous conviction for a relevant foreign offence (defined in subsection (5)(aa)) committed against a person under the age of 16, or</li> <li>3) there is a risk of sexual harm order in force in respect of B.</li> </ol> <p>However, the s.39(3) defence of age difference not exceeding 2 years does not apply.</p>

The law is now more gender-neutral in that both males and females can commit an offence where they engage in underage sex. Young people of either sex can both be either 'A' or 'B'. Depending on the activity engaged in, it is likely in many cases that both children will be 'A' and both 'B' under section 37.

<sup>225</sup> 'Penetration' is to any extent – s37(3) and is a continuing act from entry until withdrawal- s38(2).

<sup>226</sup> For the purposes of the Act, a penetration is 'sexual' if a reasonable person would, in all the circumstances of the case, consider it to be sexual- s60(2). The test is an objective one - it is not necessary to prove that A's motive was sexual.

<sup>227</sup> 'Penis' is defined in s1(4) as including a surgically constructed penis.

<sup>228</sup> 'Vagina' is defined in s1(4) as including the vulva and a surgically constructed vagina.

<sup>229</sup> s60(2) – a touching or activity is 'sexual' if a reasonable person would consider it to be sexual in all the circumstances of the case.

<sup>230</sup> Section 37(5) provides that the reference to A's mouth *for the purposes of this offence only* is to be construed as including A's tongue and teeth.

<sup>231</sup> Under s39(5), a relevant sexual offence is one listed in Schedule 1 of the 2009 Act- the list includes offences existing prior to the introduction of the 2009 Act as well as the new offences. Note that in AB v HMA 2017 SLT 401 the Supreme Court decided that in the particular circumstances of AB's case, section 39(2)(a)(i) interfered disproportionately with his rights under article 8.

It is not necessary to prove lack of consent or lack of reasonable belief of consent for A's offence. For B's offence, it must be proved that B *did* consent.

There are potential evidential difficulties where both young children in a proof relating to section 67(2)(j) grounds for an offence under section 37. If either A or B gives evidence, warnings against self-incrimination will require to be given.

#### **Part 4: Deeming provisions – sections 40 and 41**

These sections make special provision for cases where the court may not be able to establish the age of A or of B beyond reasonable doubt and create four separate 'deeming provisions' to apply in these circumstances.

These provisions do not apply to proceedings arising from an application by the Reporter in relation to grounds of referral, but apply only to criminal trials.

## APPENDIX 2: Table of Parallel Offences

**TABLE SHOWING THE OFFENCES AGAINST A YOUNGER CHILD AND OLDER CHILD THAT ARE PARALLEL TO THOSE IN PART 1 OF THE ACT**

<b>Part 1</b>	<b>Part 4: Young Child</b>	<b>Part 4: Older Child</b>
s.1: Rape	s.18: Rape of a young child	s.28: Having intercourse with an older child
s.2: Sexual assault by penetration	s.19: Sexual assault on a young child by penetration	s.29: Engaging in penetrative sexual activity with or towards an older child
s.3: Sexual assault	s.20: Sexual assault on a young child	s.30: Engaging in sexual activity with or towards an older child
s.4: Sexual coercion	s.21: Causing a young child to participate in a sexual activity	s.31: Causing an older child to participate in a sexual activity
s.5: Coercing a person into being present during a sexual activity	s.22: Causing a young child to be present during a sexual activity	s.32: Causing an older child to be present during a sexual activity
s.6: Coercing a person into looking at a sexual image	s.23: Causing a young child to look at a sexual image	s.33: Causing an older child to look at a sexual image
s.7: Communicating indecently	s.24: Communicating indecently with a young child	s.34: Communicating indecently with an older child
s.8: Sexual exposure	s.25: Sexual exposure to a young child	s.35: Sexual exposure to an older child
s.9: Voyeurism	s.26: Voyeurism towards a young child	s.36: Voyeurism towards an older child
s.11: Administering a substance for sexual purposes	---	---
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<i>Offences require that B does not consent and A has no reasonable belief that B consents</i>	<i>Consent is not an issue</i>	<i>Apart from section 37, consent is not an issue</i>
<i>Perpetrator is of any age</i>	<i>Perpetrator is of any age</i>	<i>Apart from section 37, perpetrator is aged 16 or over</i>

	<p><i>No defences available if:</i></p> <ul style="list-style-type: none"> <li>• <i>A reasonably believed that B was aged 13 or over</i></li> <li>• <i>Age difference between A and B is less than 2 years</i></li> </ul>	<p><i>Defences available if:</i></p> <ul style="list-style-type: none"> <li>• <i>A reasonably believed that B was aged 16 or over</i><sup>232</sup></li> <li>• <i>Age difference between A and B is less than 2 years (but only for some offences)</i></li> </ul>
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<sup>232</sup> But not where:

- A has previously been charged with a relevant sexual offence , or
- A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or
- there is a risk of sexual harm order in force in respect of A.