



**EAST AYRSHIRE CHILD PROTECTION COMMITTEE: 06 SEPTEMBER 2011**

**SEXUAL OFFENCES (SCOTLAND) ACT 2009**

**1. PURPOSE OF REPORT**

- 1.1** To advise of the principal provisions of The Sexual Offences (Scotland) Act 2009, and to give consideration to future multi agency training in respect of the implementation of the legislation.

**2. BACKGROUND**

- 2.1** The Sexual Offences (Scotland) Act 2009 received royal ascent in July 2009. The Act came into force on 1 October 2010. A briefing note (Appendix 1) on the principal provisions of the Act is provided for the information of the East Ayrshire Child Protection Committee (EACPC).
- 2.2** A Sexual Offences (Scotland) Act 2009 is a complete recasting and comprehensive codification of the substantive law of sexual offences in Scotland. The guidance in the Act has been provided by the Scottish Government and can be located at [www.scotland.gov.uk/publications/2010/10/sexualoffencesguidance](http://www.scotland.gov.uk/publications/2010/10/sexualoffencesguidance)
- 2.3** In addition given the comprehensive changes to the criminal law, the Adult Protection Co-ordinator recognised that training will be required in a multi-disciplinary, multi-agency basis and in anticipation of the development of “training for trainers” a handout detailing the current statutory provisions together with slides and additional notes for trainers have been provided at Appendix 2 and 3 respectively.

**3. CURRENT POSITION**

- 3.1** Subject to certain transitional provisions the new legislation abolishes the common law offences of rape, clandestine injury, lewd and libidinous practices and behaviour and sodomy. Given the fundamental nature of the changes in the law it is recognised that awareness raising will be required across the disciplines.

**4. LEGAL AND POLICY IMPLICATIONS**

- 4.1** Many victims of sexual violence come under the category of at risk, and therefore it is proposed that training crosscuts the functions of Adult

Protection Committee (APC), Child Protection Committee (CPC) and East Ayrshire Violence Against Women Partnership (EAVAWP).

## **5. FINANCIAL AND RESOURCE IMPLICATIONS**

- 5.1 The costs associated with the delivery and administration of the training will require consideration however it is anticipated these will be limited to staff time to deliver, administration and publicity that could be met within the budgetary resources for the current protection training.
- 5.2 Consideration will require to be given to the most appropriate way to deliver the training and further discussion regarding joint resourcing between the Adult Protection Committee, Child Protection Committee and other partnerships warrant further discussion.

## **6. RECOMMENDATION**

- 6.1 The East Ayrshire Child Protection Committee is asked to
- i) note the changes in the law in relation to sexual offences as detailed in the briefing note appended at Appendix 1; and
  - ii) to request that the Committee give consideration to future implementation of the training and arrangements for any potential delivery;
  - iii) otherwise note the contents of this report.

**Jaine Best  
Solicitor**

**23 August 2011  
JB/NMC**

**Any Person wishing further information on the contents of this report please contact Jaine Best, EAC Solicitor on (01563) 503336 .**

**THE SEXUAL OFFENCES (SCOTLAND) ACT 2009**

The Sexual Offences (Scotland) Act 2009 is a complete recasting and comprehensive codification of the substantive law of sexual offences in Scotland. Subject to certain transitional provisions dealing with uncertainties as to the date when conduct occurs it abolishes the common law offences of rape, clandestine injury, lewd and libidinous practices and behaviour and sodomy (but not indecent assault) and it repeals the existing statutory sexual offences. As the present Act recasts and replaces existing Scots Law sufficiently extensively Scottish Case Law on sexual offences as it stood before the legislation are unlikely to be helpful. Guidance on the Act has been provided by the Scottish Government and can be located at

The Act deals with offences in three parallel parts according to the specific type of wrong which the prohibited Act does to the victim. In Part 1, Section 1 creates the offence of rape and Sections 2 – 11 create offenses in relation to conduct directed primarily against adults of full capacity; sexual assault by penetration, sexual assault, sexual coercion, coercing a person into being present during a sexual activity, coercing a person into looking at a sexual image, communicating indecently, sexual exposure, voyeurism and administering a substance for sexual purposes. In general, those offences require proof that the complainer did not consent and that the accused had not reasonable belief that the complainer consented.

Consent is defined in Part 2 of the Act and should be considered alongside the Act and Guidance relating to non consensual offences. Section 12 provides a definition of ‘consent’ and related expressions such as ‘free agreement’ and section 13 provides a non-exhaustive list of factual circumstances in which ‘free agreement’ is absent. For example there is no free agreement where the conduct takes place when the complainer is incapable by reason of being intoxicated, because of threats or violence towards the complainer or any other person, the complainer is unlawfully detained by the accused, complainer is mistaken as to the nature and purpose of the conduct eg medical digital penetration for self gratification, the complainer agrees or submits to conduct because the accused impersonates a person known personally to the victim or where the only expression of agreement comes from a third party.

Section 16 makes provision regarding factors to be taken into account in determining, for the purposes of Part 1, whether a person’s belief as to consent was reasonable. The absence of such a ‘reasonable belief’ will therefore require to be proved by the Crown in every case.

Part 3 concerns capacity to consent by persons with a mental disorder. ‘Mental Disorder’ has the same meaning as section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 17 provides that a person is incapable of consenting where, by reason of mental disorder, he or she is unable to do one or more of the following:-  
understand what the conduct is;  
form a decision as to whether or not to engage in the conduct or as to whether the conduct should take place; or communicate any such decision.

Abuses of trust are provided for in section 47 and applies irrespective of whether the victim’s mental disorder renders them incapable of consenting.

Part 4, Sections 18- 26 create offences in relation to essentially the same conduct as Part 1, directed against young children (those under 13). Consent and reasonable believe that there was consent are not issues in relation to these offences. Broadly speaking, if the age of the child, the conduct and any necessary purpose are proved, the crime is established. The offences are;\_

Rape

Sexual assault by penetration

Sexual assault causing a young child to participate in a sexual activity

Causing a young child to be present during a sexual activity

Causing a young child to look at sexual imagery

Communicating indecently with a young child

Sexual exposure to a young child

Voyeurism towards a young child

It should be noted that section 27 provides that it is not a defence that the accused believed the child had attained the age of 13 years which should be contrasted with the provisions for older children.

Section 39 provides a defence, in certain circumstances, where the accused reasonable believed the young person to have attained the age of 16 years. It doesn't apply to accused persons previously charged with a relevant sexual offence or where there is a risk of sexual harm order in force.

Sections 40 and 41 appear to be intended to address historic sexual abuse cases where the precise dates of offences/age of the complainer cannot be established to the criminal standard. These sections are intended to operate to deem the child to be within the scope of the "older child" offences with the result that the accused stands to be convicted of the alternative "older child" offence and not acquitted altogether. The older child offences are themselves set out in Sections 28-37. In relation to these offences, consent and reasonable belief are not in general an issue but it must also be established that the complainer was at least 13 years old and under 16 and that the accused was over 16 (except for the somewhat anomalous offence in Section 37 of consensual activity between older children).

Section 37 has been heavily criticised. For example, if a 15 year old girl has consensual sexual intercourse with a 15 year old boy she commits an offence. If however she has consensual sexual intercourse with an 18 year old boy she does not! Evidential difficulties may arise due to self incrimination and a child giving evidence for the Crown will have immunity from prosecution.

Section 50 and Schedule 3 makes specific provisions for accused persons to be convicted of alternative charges. This may occur where the court or jury is not satisfied beyond a reasonable doubt that the accused committed the offence charged but is satisfied that the accused committed the alternative offence (or one of the alternative offences listed in schedule 3. Sections 48 and Schedule 2 regulate the penalties which are available.

Section 51 provides that a person is not guilty of inciting or being involved Art and Part in an offence under Part 4 or 5 (sexual offences against children and sexual abuse of trust) if as regards another person he acts to:

Protect that other person from sexual transmitted infection

Protecting that person's physical safety

Preventing that person from becoming pregnant; or

Promoting that person's emotional well being by the giving of advice;

This provision allows sexual health advice, counselling and contraception provided that person does not act for the purpose of:

Obtaining sexual gratification

Humiliating, alarming or distressing that person; or

Causing or encouraging the activity constituting the offence or that person's participation in it.

Section 74 abolishes the common law offences of rape, clandestine injury to women, lewd, indecent or libidinous practice or behaviour and sodomy.

Section 54 is aimed at, for example child sex tourism and trafficking in that it creates an offence where a person incites a criminal act out with Scotland however where the incitement is committed by someone who is not a UK national it will be an offence only if the conduct is also an offence in the country in which the conduct was intended to take place. However, where a UK national commits an act abroad which is a criminal act in the UK he may be charged and convicted in the UK even if the conduct does not constitute a criminal offence in the country where it took place.

# **Sexual Offences (Scotland) Act 2009**

**New legislation effective from  
1st December, 2010**



# Sexual Offences (Scotland) Act 2009

2009 asp 9

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Explanatory Notes have been produced to assist in the  
understanding of this Act and are available separately

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# Main Areas of Change

- Offences are now non gender specific;
- Definition of crime of Rape widened;
- Definition of Consent created;
- New separate Protective Offences; and
- Section 52 abolished the common law offences of Rape, Clandestine Injury, Lewd, Libidinous and Indecent Practices and Sodomy.

# Age of Victim

- Age of victim is categorised as either Adult, Young Children or Older Children;
- The term 'Young Child' refers to a child who is under the age of 13 at the time of the offence; and
- The term 'Older Child' refers to a child who is aged 13, 14 or 15 at the time of the offence.

# Consent and Free Agreement

**Consent**: - Section 12 Consent means 'Free Agreement'

**Free Agreement** – Section 13

- Where the conduct occurs at a time when (B) is incapable because of the effects of alcohol or any other substance of consenting to it;
- Where (B) agrees or submits to the conduct because of violence used against (B) or any other person, or because of threats of violence made against (B) or any other person;
- Where (B) agrees or submits to conduct because (B) is unlawfully detained by (A);

# Consent and Free Agreement Cont/

- Where (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;
- Where (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); and
- Where the only expression or indication of agreement to the conduct is from a person other than (B).

# Sexual and Reasonable Belief

- **Sexual**: - For the purposes of the act something is 'Sexual' if a reasonable person would, in all circumstances of the case, consider it to be sexual.
- **Reasonable Belief**: - Section 16 – In determining whether a person's belief as to the consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge: and if so, to what those steps were.

# Mentally Disordered Persons

- Section 17 – A mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to do one or more of the following:
  - Understand what the conduct is;
  - Form a decision as to whether to engage in the conduct (or as to whether the conduct should take place); or
  - Communicate any such decision.

# Section 1

## Rape

- If a person (A) with (A's) penis
- Without another person (B) consenting and without any reasonable belief that (B) consents **penetrates to any extent**, either intending to do so or is reckless as to whether there is penetration, the vagina, anus or mouth of (B) then (A) commits an offence.
- **Penetration to Any Extent** does away with the idea of 'Partial Penetration'. There is either penetration or there isn't and the extent of penetration is not a factor.

# Section 2 - Sexual Assault by Penetration

- If a person (A) with any part of A's body (also includes a penis) or anything else, without another person (B) consenting and without any reasonable belief that (B) consents; penetrates sexually to any extent, either intending to do so or is reckless as to whether there is penetration of the vagina or anus of (B) then (A) commits an offence.
- The penis is included again to cover instances where the victim (B) is unaware as to what (A) used to penetrate them.

# Section 3 – Sexual Assault

- If a person (A) with or without another person (B) consenting and without reasonable belief that (B) consents, does any of the things mentioned in Subsection (2) then (A) commits an offence.
- Penetrates sexually, by any means to any extent, either intending to do so or is reckless as to whether there is penetration, the vagina, anus or mouth of (B);
- Intentionally or recklessly touches (B) sexually;
- Engages in any other form of sexual activity in which (A), intentionally or recklessly, has physical contact (whether by bodily contact or by means of an implement and whether or not through clothing with (B);
- Intentionally or recklessly ejaculates semen onto (B);
- Intentionally or recklessly emits urine or saliva onto (B) 'sexually'.

# Section 8

## Sexual Exposure

### **Section 8 – Sexual Exposure**

- If a person (A) without another person (B) consenting, and without any reasonable belief that (B) consents intentionally exposes (A's) genitals in a sexual manner to (B) with the intention that (B) will see them, then (A) commits an offence.

# Section 9

## Voyeurism

- If a person (A) without another person (B) consenting and/or without reasonable belief that (B) consents for the purposes of obtaining sexual gratification or the humiliation, distress and Alarm of (B): -
- Observes (B) doing a private act;
- Operates equipment with the intention of enabling (A) or another person (C) to observe (B) doing a private act;
- Records (B) doing a private act with the intention that (A) or another person (C) will look at an image of (B) doing the act;
- Installs equipment or constructs or adapts a structure with the intention of enabling (A) or another person (C) to do any of the above acts.

# Section 9 Voyeurism

Although not specifically mentioned in the Act the Crown Office have created charges for the following circumstances;

- Operates equipment beneath (B's) clothing with the intention of enabling A or another person (C) to observe (B's) genitals or buttocks or underwear in circumstances where the genitals, buttocks or underwear would not be visible;
- Records an image beneath (B's) clothing with the intention that (A) or another person (C) will look at the image.

## Section 11

### Administering a Substance for Sexual Purposes

- If a person (A) intentionally administers a substance to or causes a substance to be taken by, another person (B):
- Without (B) knowing; and
- Without any reasonable belief that (B) knows and does so for the purpose of stupefying or overpowering (B), so as to enable any person to engage in a sexual activity which involves (B), then (A) commits an offence.

# Young Children

## Section 18 – Rape of a Young Child

- If a person (A), with A's penis, penetrates to any extent, either intending to do so or is reckless as to whether there is penetration of the vagina, anus or mouth of a child (B) who has not attained the age of 13 years, then A commits an offence.

## Section 19 – Sexual assault on a Young Child by penetration

- If a person (A), with any part of (A's) body or anything else, penetrates sexually to an extent, either intending to do so or is reckless as to whether there is penetration of the vagina or anus of a child (B) who has not attained the age of 13 years, then (A) commits an offence.

## Section 20

# Sexual Assault on a Young Child

- If a person (A) does any of the things mentioned in subsection (2) (B)\* being in each case a child who has not attained the age of 13 years), then (A) commits an offence.
- \*Exactly the same examples as included in Section 3 – Sexual Assault\*

# Sections 21 -25

## **Section 21** – Causing a Young Child to participate in sexual activity

- If a person (A) intentionally causes a child (B) who has not attained the age of 13 years to participate in a sexual activity, then (A) commits an offence.

## **Section 22-25**

- Subsections (2) or (3) contained in these acts state that if the conduct of (A) is for the purpose of obtaining sexual gratification or humiliating, distressing or alarming (B).

# Section's 22 & 23

## **Section 22** - Causing a Young Child to be present during a sexual activity

- If a person (A) either intentionally engages in a a sexual activity and for a purpose mentioned in subsection (2), does so in the presence of a child (B) who has not attained the age of 13 years, or intentionally and for a purpose mentioned in subsection (2) causes (B) to be present while a third person engages in such activity, then (A) commits an offence.

## **Section 23** – Causing a Young Child to look at a sexual image

- If a person (A) intentionally and for the purpose mentioned in subsection (2) causes a child (B) who has not attained the age of 13 years to look at a sexual image, then (A) commits and offence.

# Sections 24 & 25

## **Section 24** – Communicating Indecently with a Young Child

- If a person (A) intentionally and for the purpose mentioned in subsection (3) sends by whatever means, a sexual written communication to, or directs by whatever means, a sexual verbal communication at a child (B) who has not attained the age of 13 years, then (A) commits an offence.

## **Section 25** – Exposure towards a Young Child

- If a person (A) intentionally and for the purpose mentioned in subsection (2) exposes (A's) genitals in a sexual manner to a child (B) who has not attained the age of 13 years, with the intention that (B) will see them, then (A) commits an offence.

# Defence

## Sections 18 – 26

- It is not a defence to a charge in proceedings under Section 18 – 26 that (A) believed that (B) had attained the age of 13 years.

# Section's 28 & 29

## **Section 28** – Intercourse with an older child

- If a person (A), who has attained the age of 16 years, with (A's) penis penetrates to any extent, either intending to do so or is reckless as to whether there is penetration of the vagina, anus or mouth of a child (B) who has attained the age of 13 years but has not attained the age of 16 years, then (A) commits an offence.

## **Section 29** – Penetrative sexual activity with or towards an older child

- If a person (A), who has attained the age of 16 years, with any part of (A's) body or anything else, penetrates sexually to an extent, either intending to do so or is reckless as to whether there is penetration of the vagina or anus of a child (B) who has attained the age of 13 years but has not attained the age of 16 years, then (A) commits an offence.

# Section 30

## Engaging in sexual activity with or towards an older child

- If a person (A) who has attained the age of 16 years, does any of the things mentioned in subsection (2)\*, (B) being in each case a child who has attained the age of 13 years but has not attained the age of 16 years then (A) commits an offence.
- \*Exactly the same examples as included in Section 3 – Sexual Assault\*

# Sections 31-36

- Section 31 – causing an older child to participate in sexual activity;
- Section 32 – causing an older child to be present during a sexual activity;
- Section 33 – causing an older child to look at a sexual image;
- Section 34 – communicating indecently with an older child;
- Section 35 – sexual exposure to an older child; and
- Section 36 – voyeurism towards an older child.

# Section 37

## Subsection 1

Older children engaging in sexual conduct with each other

- If a child (A) penetrates (B) sexually, with (A's) penis and to any extent intending to do so or is reckless as to whether there is penetration of the vagina, anus or mouth of (B) or intentionally or recklessly touches the vagina, anus or penis of (B) with (A's) mouth, then (A) commits an offence.
- \* If (B) engages by consent in the conduct in question then (B) commits an offence.

# Defence

Defence to a charge in proceedings: -

- That (A) reasonably believed that (B) had attained the age of 16 years and
- That (A) has not previously been charged by the Police with a relevant sexual offence, or does not have in Force, a risk of sexual harm order;
- If at the time when the conduct to which the charge relates took place, the difference between (A's) age and (B's) age did not exceed 2 years.

# Section 42

## Sexual Abuse of Trust

- If a person (A) who has attained the age of 18 years intentionally engages in a sexual activity with or directed towards another (B) who is under 18 years and is in a position of trust in relation to (B) then (A) commits an offence.
- **Section 43** – Positions of trust
- (B) is detained by virtue of an order of Court or under an enactment in an institution and (A) looks after persons under 18 in that institution;
- (B) is resident in a home or other place which accommodation is provided by a local authority and (A) looks after persons under 18 in that place;

# Section 43 Cont/

(B) is accommodated and cared for in:

- A hospital;
- Accommodation provided by an independent Health Care Service;
- Accommodation provided by a Care Home Service;
- A residential establishment; or
- Accommodation provided by a School Care Accommodation Service, or a Secure Accommodation Service

and (A) looks after persons under 18 in that place.

# Section 43 Cont/

(B) is receiving Education at: -

- A school and (A) looks after persons under 18 in that school; or
- A further or Higher Education Institution and (A) looks after (B) in that institution.
- Is that (A)
- Has any parental responsibilities or parental rights in respect of (B);
- Fulfils any such responsibilities or exercises any rights under arrangement with a person who has such responsibilities or rights;
- Had any such responsibilities or rights but no longer has such responsibilities or rights; or
- Treats (B) as a child of (A's) family

And (B) is a member of the same household as (A).

# Section 45

## Sexual Abuse of Trust – Defence

- It is a defence to a charge that (A) reasonably believed that (B) had attained the age of 18 years, or that (B) was not a person in relation to whom (A) was in a position of trust; or
- That (B) was (A's) spouse or civil partner or that immediately before the position of trust came into being, a sexual relationship existed between (A) and (B).

# Section 46

Sexual abuse of trust of a mentally disordered person

If a person (A)

- Intentionally engages in a sexual activity with or directed towards a mentally disordered person (B) and
- Is a person mentioned in subsection Sec 46 (2)

Then (A) commits an offence.

# Section 47

## Defence

- It is a defence to a charge in proceedings that (A) reasonably believed that (B) did not have a mental disorder, or that (A) was not a person specified in subsection 46 (2); or
- That (B) was (A's) spouse or civil partner, or in a case where immediately before they began to provide care services to (B), a sexual relationship existed between (A) and (B), being a person that immediately before (B) was admitted to the hospital, such a relationship existed.

The act is silent on power of arrest.

All the offences under the act are punishable by imprisonment.

# Attempts

## Criminal Procedure (Scotland) Act 1995 – Section 294

- Any attempt to commit any indictable crime is itself an indictable crime.
- Any attempt to commit any offence punishable on complaint shall itself be an offence punishable on complaint.

# Charge Styles

- Did on date and locus, grab hold of (B), push her to the ground, touch her naked breasts, insert an implement into her vagina and did insert your penis into her anal passage, all without her consent and without any reasonable belief that she consented. Contrary to sexual offences (Scotland) Act 2009 Sections 1,2 and 3.

Questions?

## NOTES FOR TRAINERS

SLIDE NO. 1	Intro- Housekeeping-Mobiles etc Put back since October 2010 Training not prescriptive-won't significantly change the way we investigate crimes but will create more opportunities to charge offenders.
SLIDE NO. 2	
SLIDE NO. 3	<p>The Scottish Law Commission published a report in December 2007.</p> <p>As a result it was decided that the law regarding sexual offences required to be codified to bring together statutory and common law offences into the one Act. The new Act is based to some degree on the English Act of 2003 – this was intentional to prevent discrepancies which may result in potential offenders crossing borders to commit crime.</p> <p>The Act was passed on 10th June 2009. Implementation was delayed to permit time for police and prosecutors to be trained.</p> <p>Intention was to implement on 1 October 2010 however legal technicalities in laying matters before Parliament has led to it being delayed until 1 December 2010.</p> <p>The common law crimes will remain live for a transitional period of 3 years as a fall back position for any unanticipated events.</p> <p>The purpose of this section of the training is to look at some of the main themes and definitions which run throughout the Act. The common law crimes will remain live for a transitional period of 3 years. This will provide continuity to ensure a smooth transition and whilst we would aim to use the new Act at all times it allows for the use of the old offences if a set of illegal circumstances does not seem to fit into any of the Sections of the new Act. Where this</p>

	<p>situation arises it would be advisable to discuss the situation with the Sexual Offences Unit at the Procurator Fiscal's Office.</p> <p>We also still have the Common Law crime of Assault with intent to Ravish - but as you will see, as we go through the new Act, it is highly unlikely that any circumstance will not be covered and therefore we are not likely to use this.</p> <p>If the 3 year rule is applied the Lord Advocate would have to notify the Scottish Government in writing that an offence is being libelled which lies out-with the Act.</p> <p>Existing Case law still stands where relevant. A new body of case law, specific to the Act, will also be developed.</p> <p>In essence however all relevant offences should be libelled under the new Act. The idea of having access to old offences for the three year period is simply to cover for any circumstances which may technically not be covered. It is a safety net for the prosecutors and should never become a 'get out clause' which covers for us not taking the time and trouble to understand the new Act.</p> <p>Section 52 (b) of the Act itself clarifies that "in so far as the provisions of this Act regulate any conduct they replace any rule of law regulating that conduct."</p> <p>Sections 1 and 2 of the Criminal Law (Consolidation) (Scotland) Act 1995 relating to incest and sexual relations with a step-child are not repealed.</p>
<p>SLIDE NO. 4</p>	<p>The use in offences of the age of puberty (females under 12, males under 14) is abolished.</p> <p>Some of the crimes have been categorised into the above type of victims.</p> <p>The category of "Adult " is not defined any</p>

	<p>differently to previous acts and will still relate to any person 16 or over.</p>
<p>SLIDE NO. 5</p>	<p>The Act defines CONSENT as meaning FREE AGREEMENT</p> <p>Section 13 provides a list of examples in which there is no free agreement. This is not exhaustive so it is not the case that the absence of one of the described scenarios implies that there necessarily is free agreement. One way of looking at this is to think that at court the jury does not need to satisfy themselves on the issue of consent specifically; instead they can give consideration to whether any of the scenarios apply and if they do then they can conclude that free agreement was not present.</p> <p>(2)(a) Covers conduct whilst the victim is too intoxicated to consent – the exact point at which the victim reaches this level of intoxication will be a matter to be decided by the court but once it has been reached then anything done or said by the victim will not amount to consent. This also covers drug facilitated rape. Although ‘the point of intoxication’ might be difficult to prove this section of the Act is designed to send out a message of what is not acceptable.</p> <p>(2)(b) just as it says – duress due to violence or threats of violence negates consent. Where there is a course of conduct in which numerous threats are made over a period of time prior to the sexual act itself, this can be relied upon as it may be accepted that the victim knew the persistent threats were still in force at the time.</p> <p>(2)(c) The detention need not necessarily involve the use of direct force or violence.</p>
<p>SLIDE NO. 6</p>	<p>(2)(d) This covers deception in respect of the action rather than impersonation which is covered later.</p>

	<p>One example would be a sexual act perpetrated in circumstances where it appears justified such as a medical examination.</p> <p>(2)(e) note that the impersonation is of ‘a person known personally’ to the victim. I don’t think it counts if the guy in the pub chatting to you all night says he is George Clooney!</p> <p>This is an extension of the existing law under the Criminal Law (Consolidation) (Scotland) Act 1995 in respect of the husband being impersonated.</p> <p>(2)(f) possibly cover for example ‘enforced prostitution’ or rape of someone at a party where the offender is told by a third party “she’s waiting for you upstairs. She says she wants to do it”. If the offender then forces himself on the victim there is no free agreement from the victim herself.</p>
SLIDE NO. 7	<p>It will be for a court or the jury to determine in each particular case what amounts to reasonable belief.</p> <p>However in determining whether such belief is reasonable, regard can be had to whether the accused took any steps to ascertain whether there was consent, or, as the case may be, knowledge, and if so, to what those steps were.</p> <p>Absence of such steps will not be fatal to the defence but can be taken as a significant factor.</p> <p>Reasonable Belief looks at the mens rea of the suspect.</p> <p>‘Prior Consent’ does not affect consideration in respect of ‘Free Agreement’ but may be relevant to ‘Reasonable Belief’ as put forward by the defence.</p>
SLIDE NO. 8	<p>With the exception of sexual abuse of trust of a mentally disordered person the Act does not create separate offences relating to sexual</p>

	<p>activity with persons with a mental disorder. Instead, the general offences apply and special provision is made relating to their capacity to consent.</p> <p>Outline the wording of the Section.</p> <p>This does not take away the necessity to show that A did not have a reasonable belief that B consented.</p> <p>The meaning of “mentally disordered” still has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) act 2003</p> <p><b>328 Meaning of “mental disorder”</b></p> <p>(1) Subject to subsection (2) below, in this Act “mental disorder” means any—</p> <ul style="list-style-type: none"> <li>(a) mental illness;</li> <li>(b) personality disorder; or</li> <li>(c) learning disability,</li> </ul> <p>however caused or manifested; and cognate expressions shall be construed accordingly.</p> <p>(2) A person is not mentally disordered by reason only of any of the following—</p> <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>
SLIDE NO. 9	<p>Penetration is a continuing act from entry until withdrawal of the penis</p> <ul style="list-style-type: none"> <li>- Penis includes a surgically constructed penis if it forms part of (“A”) having been created in the course of surgical treatment <ul style="list-style-type: none"> <li>- Vagina includes the vulva and a surgically constructed vagina (together with any surgically constructed vulva) if it forms part of (“B”), having been created in the course of such treatment. “Vagina” is mentioned specifically in the act, hence is defined so that there is no</li> </ul> </li> </ul>

	<p>dubiety as to whether the penis penetrated fully into the vagina or partially into the vulva</p> <p>This removes the issue of gender from the definition as clearly the victim can be male or female and by virtue of being involved in the offence ‘Art &amp; Part’ or there being penetration by a surgically constructed penis whereby the person in question has not yet had their new sexual orientation defined in law, the suspect can be female as well as male.</p>
SLIDE NO. 10	<p>Reference to any part of A’s body is to be construed as including a reference to penetration with A’s penis.</p> <p>This is in case there is any dubiety as to what was used to penetrate the victim. eg, if the victim is blindfolded and not sure what was used but there is evidence of penetration.</p> <p>“Sexually” defined under sec 60 to mean that a reasonable person considers it to be sexual</p>
SLIDE NO. 11	<p>Note that (a) covers the same as rape and sexual assault by penetration. This covers for every eventuality, ie. victim not sure whether or not they have been penetrated or not, but there may be medical (or other) evidence to prove penetration.</p> <p>The starting point will be to identify an appropriate part of subsection 2 under the Act which covers the reported illegal sexual act. If not covered within the act then Indecent Assault may be libelled. But it would be unusual for anything not to be covered by one of these subsections. In particular subsection 2 ( c ) represents a description which is a ‘catch all’ for most if not all offences.</p> <p>To date no-one has come up with an example of sexual assault which would not be covered by the terms of the new Act.</p> <p>Subsection 2 ( e ) was added as the Bill</p>

	<p>passed through Parliament, this being the only example they could think of which wasn't covered.</p>
<p>SLIDE NO. 12</p>	<p>Replaces indecent exposure This is for the purposes only for sexual gratification or humiliating, distressing or alarming the victim.</p> <p>It is clear that it does not cover circumstances where a man exposes his genitals for the purpose of urinating.</p> <p>This must be exposure of the genitals. No other part of the body is included even if done in a sexual manner. It also doesn't cover CCTV images, where the person is unaware that anyone is watching</p> <p><b>Recent change.</b> If you cannot establish which group the exposure is aimed at you will prefer a charge for each group present I.e. 1x adults 1x Older Ch 1x young ch</p> <p>In discussion between The Scottish Government, Crown Office and ACPOS it has become clear that in circumstances where there is exposure in the presence of persons of a variety of ages then the charge labelled should be a contravention of Section 8 rather than any of the related child offences, or even multiple charges. The 'child offences' (sections 25 and 35) should only be labelled where there is evidence to indicate that the perpetrator intended to target the younger person.</p>
<p>SLIDE NO. 13</p>	<p>Until now, in Scotland, voyeurism, if discovered and complained of, would probably have been dealt with as a sexual breach of the peace. This would now be difficult for three reasons...</p> <ul style="list-style-type: none"> <li>• A's behaviour would have to have been likely to have been discovered at the time;</li> <li>• A conviction would not necessarily clearly indicate in records the</li> </ul>

	<p>significance of the sexual element; and/or</p> <ul style="list-style-type: none"> <li>• The recent decision in respect of the charge requiring a ‘public element’ is unlikely to be met.</li> </ul> <p>The Law Commission did not include voyeurism in their recommendations however the Government chose to pick up on the comparable section within the Sexual Offences Act 2003 and included it in the new Act.</p> <p>Section 10 explains private act –</p> <p>(1) if the person is in a place which in the circumstances would reasonably be expected to provide privacy and</p> <ul style="list-style-type: none"> <li>(a) The person’s genital, buttocks or breasts are exposed or covered only with underwear. (The term ‘breasts’ does not include an exposed male chest)</li> <li>(b) the person is using a lavatory, or</li> <li>(c) The person is doing a sexual act that is not of a kind ordinarily done in public.</li> </ul> <p>(2) Operate equipment includes enabling or securing its activation by another person without that person’s knowledge (so the offence would be committed if a person used a camera designed to be activated automatically by the presence of another person in the room).</p> <p>(3) Structure includes a tent, vehicle or vessel or other temporary or movable structure. This does not cover persons employed to install cameras but some companies refuse to install cameras in toilets and bedrooms.</p> <p>There may be circumstances whereby B expects to be seen by certain people (e.g. those changing in a room alongside B) but this does not negate the illegality of the act of voyeurism by A. The question therefore appears to be whether B reasonably expected privacy from observation by the method utilised by A.</p>
SLIDE NO. 14	
SLIDE NO. 15	It is immaterial whether or not any sexual activity actually takes place.

	<p>“Substance” is not defined but can mean drugs or alcohol</p> <p>If “A” whether by act or omissions, induces in B a reasonable belief that the substance administered is (either or both)</p> <ul style="list-style-type: none"> <li>(a) of a substantially lesser strength, or</li> <li>(b) in a substantially lesser quantity</li> </ul> <p>than it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded. It must be remembered however that to complete the offence administering a stronger substance in this way still requires that it is intended to lead to the high threshold of ‘stupefying or overpowering’.</p> <p>This section of the Act was created to</p> <ul style="list-style-type: none"> <li>• mark out that the conduct concerned is clearly wrong (i.e. affect public attitudes); and</li> <li>• ensure that there was criminal liability even where there was no resulting sexual contact.</li> </ul> <p>It should be noted that since Section 11 is based on B’s lack of knowledge forcing B to take a substance, although clearly criminal, does not constitute an offence under Section 11.</p>
SLIDE NO. 16	<p>This replaces the common law crime of rape. Adult and young child rape has been separated.</p> <p>There is no reference to consent of the victim in this section. An offence will be committed irrespective of whether a young child apparently “consented” to the penetration. Act considers a young child incapable of consenting</p> <p>Section 1 is not an alternative charge</p> <p>Subsection 2 of the act states that reference is made to penetration with any part of A’s body to be construed as including a reference to penetration with A’s penis (again to cover every eventuality)</p>

SLIDE NO. 17	
SLIDE NO. 18	<p>The element of ‘causing’ B to participate in the activity is not defined.</p> <p>Case law is likely to develop our understanding of this and similar sections however it seems likely that it can be taken as sufficient that B’s conduct would not have occurred but for A’s actions.</p> <p>Examples of an adult causing or inciting a child to engage in a sexual activity could be promising a reward, persuading the child that it is perfectly acceptable behaviour that other children engage in all the time and that he or she would be abnormal not to agree. It is not intended to cover health professionals, or anyone else, who provides sex education to children.</p>
SLIDE NO. 19	<p>Subsection (3) – the requirement that the young child is present or that the activity is carried out in his or her presence, includes situations in which the person engaging in sexual activity can be observed by the young child (other than by means of an image). It is not essential that it be proved that the young child actually observed the activity; it is sufficient that the young child was in a place where the sexual activity was capable of being observed from.</p> <p>Could be a child hiding behind a chair or putting their hands over their eyes</p> <p>Remember subsection 2 - this is for the purposes of</p> <p>Obtaining sexual gratification</p> <p>Humiliating, distressing or alarming (“B”)...</p> <p>... and that purpose must have been established in relation to B’s presence. For example it is not sufficient that A is obtaining sexual gratification from the act, from B’s presence.</p> <p>A sexual image is an image (produced by whatever means and whether or not a moving image) of –</p> <p>(a) A engaging in a sexual activity or of a third person or imaginary person so engaging</p>

	<p>(b) A's genitals or the genitals of a third person or imaginary person</p> <p>Remember subsection 2 - this is for the purposes of  Obtaining sexual gratification  Humiliating, distressing or alarming ("B")</p> <p>There is no requirement that B is "coerced" into looking at the image, it would be sufficient, for example, for A to take B by surprise in presenting the image to B.</p>
<p>SLIDE NO. 20</p>	<p>Subsection (4) describes "written communication" to mean a communication in whatever written form, and includes writing of a person other than A (e.g. a passage in a book or magazine) and "verbal communication" means communication in whatever verbal form which comprises sounds of sexual activity (whether actual or simulated) and communication by means of sign language "Sends" and "Directs" is not defined under the Act. Victim does not have to have received the communication, offence is committed by the sending</p> <p>Remember subsection 3 - this is for the purposes of  Obtaining sexual gratification  Humiliating, distressing or alarming ("B")</p> <p>Remember subsection 2 - this is for the purposes of  Obtaining sexual gratification  Humiliating, distressing or alarming ("B")</p> <p>This offence can be libelled if the child is the only person present  Note that this offence will only be libelled in circumstances where it can be established that A intended to 'target' a young child, where the exposure is in the presence of a group of people of various ages. If the intent in respect of a young child cannot be established then libel a charge contrary to Section 8.</p>

SLIDE NO. 21	<p>Section 26 covers voyeurism towards a young child.</p> <p>Belief as to age is irrelevant as A is clearly aware that B is a child.</p>
SLIDE 22	<p>This offence may only be committed by a person aged 16 or over.</p> <p>This replaces CLC(S) Act 1995 sec 5(3) and also includes male victims</p> <p>If there is not consent then Part 1 crimes are relevant (section 1- rape)</p>
SLIDE 23	
SLIDE 24	<p>All these offence mirror the offences against young children.</p> <p>It should also be noted that all these offences can only be committed by persons who have attained the age of 16 years</p>
SLIDE 25	<p>Mouth is to be construed as including a reference to A's tongue or teeth</p>
SLIDE 26	<p>The defence of - not yet attained the age of 24 years - has been abolished.</p> <p>The 2 year gap refers to offences which, if committed by persons under the age of 16 would not be criminal. This does not refer to penile penetrative or oral crimes. i.e. two 15 year olds consensually sexually touching each other and the older of the 2 turns 16. This could be used as a defence if less than 2 year difference.</p> <p>If acts not penetrative or oral, between 2 consenting older children, there is no crime RSHOs can be applied for by a Chief Constable in respect of an adult of 18 or more who has displayed sexual behaviour in relation to a child of under 16. The sexual behaviour would need to have taken place on at least two occasions and would need to fall within one of the following categories: engaging in sexual activity involving, or in the presence of, a child; causing a child to watch a person engaging in</p>

	<p>sexual activity - including still or moving images;  giving a child anything that relates to a sexual activity; and  communicating with a child where any part of the communication is sexual.</p> <p>The criteria for making an order will be that the court must be satisfied that it is necessary to protect the child. The person in question does not need to have been convicted of any offence. The RSHO will apply for a minimum of two years. Unlike the previous Sex Offender Orders or SOPOs, and have a five-year minimum period, RSHOs can be made in relation to someone not convicted of any offence. RSHOs will set out specific activities that the person in question must not do. This might include contacting a particular child or going to particular locations. Breach of the RSHO would be a criminal offence and carry a maximum penalty of five years' imprisonment.</p>
<p>SLIDE 27</p>	<p>“A” is in a position of trust in relation to another person “B” if any of the 5 conditions set out are fulfilled.</p> <p>The first 2 are on this slide <b>Highlight 18yr threshold.</b> Victim 16 or 17 yrs report as sec 42. If younger consider sec1 -36</p> <p>“Local Authority” is defined under section 2 of Local Government (Scotland) Act 1994 - <b>Constitution of councils</b></p> <p>(1) For every local government area there shall be a council consisting of a convener and councillors.</p> <p>(2) Subject to any provision of this Act, the council for each local government area shall on and after 1st April 1996 have all the functions exercised immediately before that date in relation to their area by any existing regional, islands or district council.</p> <p>(3) The council for each local government area shall be a body corporate by the name “The Council” with the addition of the name of the particular area, and shall have a common seal.</p>

The third condition is on this slide  
“**Hospital**” means a health service hospital as defined in Section 108 of the National health service (Scotland) Act 1978 - hospital" means—

- (a) any institution for the reception and treatment of persons suffering from illness,
  - (b) any maternity home, and
  - (c) any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and any institution for providing dental treatment maintained in connection with a dental school,
- and includes clinics, dispensaries, and out-patient departments maintained in connection with any such home or institution, and “hospital accommodation” shall be construed accordingly;

**Independent health care service** is defined in Section 2(5) of the Regulation of Care (Requirements as to Independent Healthcare Services) (Scotland) Regulations

An independent healthcare service is defined in the Act as any of the following:

- (a) an independent hospital;
- (b) a private psychiatric hospital;
- (c) an independent clinic; and
- (d) an independent medical agency

“**Care home service**” is covered under section 2(3) of the Regulation of Care (Scotland) Act 2001 –

A “care home service” is a service which provides accommodation, together with nursing, personal care or personal support, for persons by reason of their vulnerability or need; but the expression does not include—

- (a) a hospital;
- (b) a public, independent or grant-aided school;
- (c) an independent health care service; or
- (d) a service excepted from this definition by regulations.

**Residential Establishment** is as per Section 93 of the children (Scotland) Act 1995 - means an establishment (whether managed by

	<p>a local authority, by a voluntary organisation or by any other person) which provides residential accommodation for children</p> <p><b>“School care accommodation service”</b> defined by section 2(4) of regulation of Care (Scotland) Act 2001 - is a service which is provided to a pupil by an education authority or the managers of an independent or grant-aided school, or by any person under arrangements made by any such authority or managers—</p> <p>(a) for the purpose of the pupil being in attendance at a public, independent or grant-aided school; and</p> <p>(b) which consists of the provision, in a place in or outwith the school, of residential accommodation</p> <p><b>Secure Accommodation</b> defined under section 2(9) of Care (Scotland) Act 2001 - A “secure accommodation service” is a service which provides accommodation approved by the Scottish Ministers</p>
<p>SLIDE 29</p>	<p>The fourth condition set out in this slide <b>“School”</b> has the same meaning as in the Education (Scotland) Act 1980, Sec 135 - school” means an institution for the provision of primary or secondary education or both primary and secondary education being a public school, a grant-aided school [F19, a self-governing school] or an independent school, and includes a nursery school and a special school; and the expression “school” where used without qualification includes any such school or all such schools as the context may require</p> <p><b>“further or higher education institution”</b> means a body listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 – which provides a list of colleges and universities in Scotland which are funded by the Scottish Further Education Funding</p>

	<p>Council</p> <p>Some sections cover “look after persons” whether or not A has direct responsibility for B the complainer. Some other sections cover “look after B” which must be direct. e.g. colleges and universities</p> <p>The fifth condition is on this slide “parental responsibilities” and “parental rights” have the same meaning as in the Children (Scotland) Act 1995</p> <p><b>Parental responsibilities</b></p> <p>(1) Subject to section 3(1)(b) and (3) of this Act, a parent has in relation to his child the responsibility—</p> <ul style="list-style-type: none"> <li>(a) to safeguard and promote the child’s health, development and welfare;</li> <li>(b) to provide, in a manner appropriate to the stage of development of the child— <ul style="list-style-type: none"> <li>(i) direction;</li> <li>(ii) guidance, to the child;</li> </ul> </li> <li>(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and</li> <li>(d) to act as the child’s legal representative, but only in so far as compliance with this section is practicable and in the interests of the child.</li> </ul> <p><b>Parental rights</b></p> <p>(1) Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—</p> <ul style="list-style-type: none"> <li>(a) to have the child living with him or otherwise to regulate the child’s residence;</li> <li>(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child’s upbringing;</li> <li>(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and</li> <li>(d) to act as the child’s legal representative.</li> </ul>
SLIDE 30	<p>Defence does not apply for offences under sec 43(6)</p> <p>if “A” has any parental responsibilities or parental rights in respect of “B” etc</p>

<p>SLIDE 31</p>	<p>Use sec 46 for victims over 16 who ‘consent’ for victims under 16 or those not consenting default to sec 1-.</p> <p>There may be mentally disordered people who are able to give consent but fall under the position of trust protection.</p> <p>Subsection 2 covers those persons</p> <p>(a) A person providing care services to B</p> <p>(b) a person who –</p> <p>(i) is an individual employed in, or contracted to provide services in or to, or</p> <p>(ii) not being the Scottish Ministers, is a manager of,</p> <p>A hospital, independent health care service or state hospital in which B is being given medical treatment</p>
<p>SLIDE 32</p>	<p>Sec 46(2)</p> <p>A person providing care services to B</p> <p>(b) a person who –</p> <p>(i) is an individual employed in, or contracted to provide services in or to, or</p> <p>(ii) not being the Scottish Ministers, is a manager of,</p> <p>A hospital, independent health care service or state hospital in which B is being given medical treatment</p>
<p>SLIDE 33</p>	<ul style="list-style-type: none"> <li>• therefore revert to Common Law powers of arrest.</li> <li>• Therefore section 14 Detention applies to all offences under the Act.</li> </ul>
<p>SLIDE 34</p>	<p>This section of the Criminal Procedure (Scotland) Act 1995 applies to offences under this Act and therefore attempts to commit any of the statutory offences outlined are themselves criminal.</p> <p>The Act itself does not refer to ‘attempts’.</p> <p>When reporting attempt offences COPFS</p>

	<p>have agreed for the time being that they will be libelled under the relevant substantive section.</p> <p>i.e. words to the effect of ‘you did attempt to insert your penis into the vagina of B and by such means did attempt to rape her contrary to the Sexual Offences (Scotland) Act 2010, Section 1.’</p>
<p>SLIDE 35</p>	<p>Agreement has been reached following discussions involving senior representatives of the Scottish Government, Crown Office and ACPOS that where charges are being prepared in respect of these offences we will follow the convention of preparing a charge which outlines the actions of A in a narrative and ends by identifying the particular sections which have been contravened.</p> <p>Refers to charges under Sections 1,2,3 and 11.</p> <p>Also associated charges in respect of younger and older children.</p> <p>i.e. Sections 18, 19, 20, 28, 29 and 30.</p> <p>Charges will be formulated in prose style and reference made to contraventions of the relevant sections.</p> <p>if the penetration using the bottle did not take place then...</p> <p>“On date at locus you did grab hold of B push her to the ground, rip open her upper clothing, intentionally and sexually touch her naked breasts, remove her underwear and thereafter did insert your penis into her anus all without consent and without any reasonable belief that B had consented contrary to the Sexual Offences (Scotland) Act 2009 Sections 1 and 3.”</p> <p>In respect of all other sections charges will be prepared and read over to the accused individually.</p> <p>For example if someone is engaged in an act of voyeurism and when discovered proceeds to expose their genitalia to the witness who discovered them then two separate charges</p>

	<p>would be libelled.</p> <p>Where similar illegal acts are separated in time then we would read over separate charges.</p> <p>e.g. If someone was to rape a neighbour and then returned at a later time and/or date to commit the same crime then separate charges would be read over and libelled.</p> <p>If a statutory offence under the new Act is perpetrated along with an offence covered by another statute or a common law offence such as common assault then we will charge with individual charges and report in similar terms to the P.F..</p>
SLIDE 36	