

# Sexual Offences since the Sexual Offences (Scotland) Act 2009

James Chalmers

3 May 2016

# **THE 2009 ACT: SOME BACKGROUND**

[A preliminary note: putting the Scottish law of sexual offences into statutory form is not such a modern innovation!]

## Incest Act 1567

ANENT thame that committis incest

ITEM Forsamekle as the abhominabill vile and fylthie lust of incest is swa abhominabill in the presence of God and that the samin eternall God be his expres word hes condampnit the samin and yit nottheles the said vice is swa vsit within this Realme and the word of God is in sic sort contempnit be the vsaris thairof that God be his iust iugementis hes occasioun to plague the Realme quhair the said vice is committit (without God of his mercy be mair gracious and remeid be prouydit that the said vice ceis in tyme cuming) Thaifoir our Souerane Lord with auise and consent of my Lord Regent and thre Estatis of this present Parliament statutis and ordains that quhatsumeuer persoun or personis committeris of the said abhominabill cryme of incest that is to say quhatsumeuer person or personis thay be that abuis thair body with sic personis in degre as Goddis word hes expreslie forbiddin in ony tyme cuming as is contenit in the xvij Cheptour of Leuiticus salbe puneist to the deith

# The 2009 Act: some background

- The Scots law of sexual offences was formerly an unsatisfactory mixture of common law (judicially created) offences and statutory provisions, many of which derived from UK-wide legislation which no longer applied south of the Border. This was increasingly recognised as being problematic for a variety of reasons, including:
  - an extremely narrow definition of rape
  - an unsatisfactory approach to the mental element in consent-based offences: an accused with an “honest but unreasonable” belief in the complainer’s consent was not guilty of any crime.
  - anomalies in sentencing powers available for different offences
  - an unequal age of consent
- In June 2004, the Scottish Ministers asked the Scottish Law Commission “[t]o examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences and to make recommendations for reform.”
- A report was published in 2007 and resulted in the Sexual Offences (Scotland) Act 2009.
- The 2009 Act was brought into force in its entirety on 1 Dec 2010 – *except* for the provisions abolishing existing common law offences!
- Aspects of these reforms have been influenced by, and are worth contrasting with, a similar reform process in England and Wales: the Home Office review *Setting the Boundaries: Reforming the Law on Sex Offences* was published in 2000 and led to the Sexual Offences Act 2003.

## Core concepts and structures in the 2009 Act

- (a) What is “consent”?
- (b) What is “reasonable belief”?
- (c) What is “sexual”?
- (d) The division of most sexual offences into three categories: the main body of offences, “older children” offences and “younger children” offences – why does this matter?

# What is “consent”?

- At common law, there was no definition of consent. See the sheriff’s directions to the jury in *Marr v HM Advocate* 1996 SCCR 696 (“consent is consent”), which were approved by the appeal court.
- England adopted a statutory definition in 2003: “a person consents if he agrees by choice, and has the freedom and capacity to make that choice” (Sexual Offences Act 2003 s 74).
- Thankfully, we have *not* adopted this approach: consent is, instead, “free agreement” (s 12 of the 2009 Act). This is adopted from the law applicable in Victoria (Crimes Act 1958 (Vic) s 36, as amended).

# What is “consent”?

- What does “free agreement” mean as a general test? Some guidance might be obtained from the Victorian approach, which provides default directions for the trial judge (1958 Act s 37AAA(d)-(e)):
  - “...the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person’s free agreement...”
  - ...the jury is not to regard a person as having freely agreed to a sexual act just because –
    - (i) she or he did not protest or physically resist; or
    - (ii) she or he did not sustain physical injury; or
    - (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person”
- Beyond this (if even this is appropriate), the question is probably simply a jury one, except in the special cases dealt with by ss 13 (deemed absence of consent), 14 (persons asleep) and 17 (consent and mental disorder).
- But note requirements for mandatory jury directions (not directly on this point) brought in by 2016 legislation.

# What is “reasonable belief”?

- Under the 2009 Act, the *mens rea* for consent-based offences requires that A acted “without any reasonable belief that B consents” (so overruling the approach taken in *Jamieson v HM Advocate* 1994 JC 88).
- How is “reasonableness” assessed? Section 16 is the starting point:
  - “In determining, for the purposes of Part 1, whether a person's belief as to 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.”
- But this is not a full answer. It was conceived of as a rejection of the English approach (e.g. Sexual Offences Act 2003 s 1(2)):
  - “Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.”
- The Commission thought this was wrong as it was potentially “wholly subjective”, but does the section 16 test avoid this problem?

# What is sexual?

- Does it matter? Isn't it obvious?
- Possibly not. The issue tied up the Canadian courts for three years after they created a new offence of "sexual assault", before the issue was 'resolved' by the Supreme Court in *R v Chase* [1987] 2 SCR 293.
  - (Like Scotland, the Canadian courts had, prior to their own reform, coped happily with an offence of indecent assault which required a jury to consider only whether there were "circumstances of indecency".)
  - The *Chase* court (at para 11) concluded that sexual assault "...is an assault... committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer""? (quoting from *R v Taylor* (1985) 44 CR (3d) 263)

# What is “sexual”?

- Section 60(2) of the 2009 Act:

For the purposes of this Act—

- (a) penetration, touching, or any other activity,
- (b) a communication,
- (c) a manner of exposure, or
- (d) a relationship,

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

- This “definition” (perhaps accidentally) does not seem to apply to “obtaining sexual gratification”, which may form the basis for a voyeurism charge under section 60(2).

# What is “sexual”?

- How did the Scottish Law Commission get here?
  - It suggested there were three principal options (see its report at para 3.42):
    - (1) “Purely objective”
    - (2) Was the accused’s purpose sexual stimulation?
    - (3) Did the victim perceive the attack as sexual?
  - The last two were rejected, and the first is found in the s 60(2) test.
    - However, the Commission thought that a case falling under (2) but not (1) could – if another offence had been committed – still result in the accused being put on the sex offenders’ register on the basis of a “significant sexual aspect” to their behaviour (the test under para 60 of the Sexual Offences Act 2003). If that is correct, the Scottish courts therefore have two different meanings of “sexual” to work with.

# What is “sexual”?

- What can we say about the definition?
  - (1) We still do not know what “sexual” is, other than that it has to be assessed from the standpoint of the reasonable person.
  - (2) Any peculiar predeliction or motivation on the accused’s part is irrelevant (cf the facts of *R v George* [1956] Crim LR 52)
  - (3) There is no requirement of direct contact with genitalia or breasts (cf *R v H* [2005] 1 WLR 2005)
  - (4) A standard dictionary definition would be to say either “pertaining to the sexual organs” or “pertaining to the gratification of sexual appetites”. That seems instinctively more reasonable although it does not necessarily reflect common intuition: compare *R v Leather* (1993) 14 Cr App R (S) 736 with *Re Attorney-General’s Reference (No. 65 of 1999)* [2000] 1 Cr App R (S) 554.

# **SOME KEY CASES UNDER THE 2009 ACT**

# Difficulties in adjusting to the 2009 Act?

- *Mutebi v HM Advocate*, 2014 SCCR 52 at [13]:  
“The critical question argued before us was therefore whether there was sufficient evidence to provide corroboration of the complainer's evidence of withdrawal of consent and the appellant's persistence in the sexual intercourse, knowing of the revocation of consent or recklessness as to whether it continued”
  - This is not the critical question *at all* under the 2009 Act.

# Consent and age

- *WD v McPherson* 2013 SCCR 305
  - Charge of “communicating indecently” under s 7 of the 2009 Act. The complainers were “older children” (aged between 13 and 16).
  - The s 7 offence requires an absence of the complainer’s consent. The sheriff held that the accused was guilty because the complainers could not consent.
  - Held, this was wrong in law: absence of consent is an essential element of the offence.

# Communicating indecently and sexual gratification

- The offence of communicating indecently requires that the accused acted for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the complainer.
- If the Crown aver the first of these purposes, do they have to show that the accused sought gratification from the communication itself, or to obtain it at a future date?
- *Robertson v Cassidy* 2013 SCCR 359 says that either will suffice.
  - The court relies on *R v Abdullahi* [2007] 1 WLR 225: although that case is concerned with the same phrase in the English legislation, it is in respect of a different offence (causing a person under the age of 16 to look at an image of a person engaging in sexual activity).
  - This potentially casts the net of the offence very wide, depending on what the court is willing to accept as consent for these purposes.

# When is something “sexual”?

- Reasons must be given: see *Scott v Dunn* 2013 SCCR 382, where the sheriff convicted the accused of sexual assault without explaining why the sexual nature of his conduct could be inferred from the circumstances.
  - (A charge of sexually assaulting the complainer by seizing the waistband of her pants while she was undressing in a toilet; the accused said to the police that he had moved forward to touch the button on the pants to see if it was “real” – the sheriff did not explain why she had rejected this account.)

# Defence of reasonable belief in age

- A reasonable belief that B has attained the age of 16 may be a defence to an offence against an older child.
- Previously this defence was unavailable if the accused was over the age of 24: a challenge to that restriction failed in *Watson v King* 2009 SLT 228. That restriction no longer exists.
- The defence remains unavailable to persons who have been charged with a “relevant sexual offence”; a challenge to that restriction has failed in the High Court (decision not yet published).

# **ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) ACT 2016**

# Abusive Behaviour and Sexual Harm (Scotland) Act 2016

- Three important developments in this area:
  - The creation of a “revenge porn” offence (“disclosing, or threatening to disclose, an intimate photograph or film”)
  - Mandatory jury directions in sexual offence cases
  - New provisions on jurisdiction over sexual offences committed elsewhere in the United Kingdom

# “Disclosing, or threatening to disclose, an intimate photograph or film”

- An offence under s 2 of the 2016 Act:
- “A person (“A”) commits an offence if—
  - (a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation,
  - (b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
  - (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B’s consent.”
- Largely based on the equivalent English offence (Criminal Justice and Courts Act 2015 s 33), although nb that the English offence requires an intention to cause distress.

# Mandatory jury directions in sexual offence cases

- Two (quasi-)mandatory directions are created.
- If there is evidence of *delayed disclosure/reporting* by the complainant or evidence of *an absence of physical resistance* (or questions about either), the judge must direct the jury that there can be good reasons for either of these two points, and that they “do[] not, therefore, necessarily indicate that an allegation is false”.
- The substance of the direction is specified in the statute, but the exact wording (and context and place in the charge) is at the judge’s discretion.
- The directions need not be given “if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement [which triggers the requirement] would otherwise apply to be material to the question of whether the alleged offence is proved”.

# Extra- (intra?) territorial jurisdiction

- A logical conclusion of developments since the 1990s:
  - Sexual Offences (Conspiracy and Incitement) Act 1996 s 6 (conspiracy or incitement to commit child sexual offences abroad)
  - Sex Offenders Act 1997 s 8 (jurisdiction over child sexual offences committed abroad)
  - Sexual Offences (Scotland) Act 2009 s 55 (“child” now a person under 18 – see Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)).

# Extra- (intra?) territorial jurisdiction

- All this creates a slightly odd situation: Scottish courts have jurisdiction over offences committed in Scotland, or outside the UK by UK citizens/residents (This is also true in homicide). Two problems:
  - (a) What if it is necessary (or desirable) to try charges spanning e.g. Scotland and England together, particularly for corroboration?
  - (b) What if it is unclear where in the UK an offence took place? (Cf Robert Black's (English) trial for the murders of Caroline Hogg and Susan Maxwell, where the point was not taken)
- A partial answer to (a) is provided by s288BA of the 1995 Act (inserted by the Criminal Justice and Licensing (Scotland) Act 2010) (dockets in sexual offence cases)
- Problem (a) is addressed by a new s54A in the 1995 Act; problem (b) by s54C. Consultation with the relevant DPP is required before a prosecution can take place.

# Corroboration and sexual offences after the Carloway and Bonomy Reviews

- Difficulties in proving sexual offences (and domestic abuse) did not form the basis of Lord Carloway's proposals for abolishing the corroboration requirement, but the Government's position shifted to focus on these.
- The abolition of corroboration was put on hold pending the Post-Corroboration Safeguards (Bonomy) Review, and again on hold pending jury research (yet to be commissioned) following that review, but may return at a future date.

# And over the next few years...

- Assuming the SNP win Thursday's election, the following manifesto commitments are developments to watch out for in this area:
  - “We will consider the Evidence and Procedure Review by the Scottish Courts and Tribunal Service. It makes a compelling case for further reforms in our justice system, particularly in relation to how child and vulnerable witnesses give evidence. We will explore the potential of introducing pre-recorded evidence to better protect child and other vulnerable witnesses, whilst maintaining the necessary rights of accused persons.”
  - “We will conduct Jury research ahead of any further proposals to reform the criminal justice system.”
  - “...we will ask the Sentencing Commission to monitor and evaluate the approach to sentencing of sexual offences, particularly those against children, to ensure it is consistent, proportionate and appropriate. We will look at what more can be done to provide appropriate financial, legal and practical support for women victims of sexual and domestic abuse including reviewing the way forensic examinations are undertaken to ensure they are done appropriately and sensitively.
  - “We will put in place sustainable arrangements to protect the interests of individuals when sensitive records and documents are requested by the court.”