These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

SEXUAL OFFENCES (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 17 June 2008:

   • Explanatory Notes;
   • a Financial Memorandum;
   • a Scottish Government Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 11–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. The Bill repeals the common law offences of rape, sodomy and clandestine injury to women and a number of statutory sexual offences in addition to creating new statutory offences relating to sexual conduct, in particular where that takes place without consent. It provides a general definition of consent as “free agreement” and supplements this with a non-exhaustive list of factual circumstances in which free agreement, and therefore consent, is not present.

5. The Bill creates new statutory offences of rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure and administering a substance for a sexual purpose. The Bill also creates new “protective offences” which criminalise sexual activity with a person whose capacity to consent to sexual activity is either entirely absent or not fully formed either because of their age or because of a mental disorder. Separate “protective” offences are provided for in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15). In addition, the Bill makes it an offence of “abuse of position of trust” for a person in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person.

COMMENTARY ON SECTIONS

PART ONE – RAPE ETC.

Section 1 – Rape

6. This section creates a statutory offence of “rape”. Subsection (1) provides that a person will commit the offence of rape by intentionally or recklessly penetrating, with their penis, the victim’s vagina, anus or mouth, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.

7. Subsection (2) defines “penetration” for the purposes of this section. It is defined as a continuing act from entry of the penis until its withdrawal.
8. Subsection (3) provides that there may be circumstances where penetration is initially consented to but consent is subsequently withdrawn. In these circumstances, a person will have committed rape only if the penetration of the victim’s vagina, anus or mouth takes place (or continues to take place) after the point at which consent is withdrawn.

9. Subsection (4) defines the terms “penis” and “vagina”.

Section 2 – Sexual assault

10. This section creates a statutory offence of “sexual assault”. The constituent elements of the offence are set out in subsections (1) and (2).

11. Subsection (1) provides that such an offence is committed only if the victim did not consent to the sexual conduct in question and the perpetrator had no reasonable belief that the victim was consenting.

12. Subsection (2) sets out four separate sexual acts, each of which constitute the offence of sexual assault. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The four sexual acts are:
   (a) penetrating the victim’s vagina, anus or mouth by any means in a sexual way;
   (b) touching the victim in a sexual way;
   (c) having any other sexual physical contact with the victim, whether directly or through clothing and whether with a body part or implement; and
   (d) ejaculating semen onto the victim.

13. Subsection (3) sets out the test for determining whether an activity under subsection (2) is sexual. It provides that an activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

14. Subsections (4), (5) and (6) deal with penetration. Subsections (4) and (5) define penetration as a continuing activity and provide for circumstances where penetration is initially consented to but consent is then withdrawn before penetration has ended. This is similar to section 1(2) and (3) (see paragraph 7 and 8 above). Subsection (6) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means there is an overlap with the between the conduct which constitutes sexual assault under this section and that which constitutes rape under section 1. This is deliberate and is intended to cover circumstances where the victim knows that he or she was penetrated, but is unable to say whether penetration was penile or not (for example due to being blindfolded).

Section 3 – Sexual coercion

15. This section creates the offence of “sexual coercion”. Subsection (1) provides that the offence is committed if the perpetrator intentionally causes the victim to participate in a sexual
activity without the victim’s consent and without any reasonable belief that the victim was consenting.

16. Subsection (2) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 4 – Coercing a person into being present during a sexual activity

17. This section creates the offence of “coercing a person into being present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of the victim or, secondly, that the perpetrator intentionally caused the victim to be present while a third person engaged in a sexual activity. In either instance, the offence is committed only if the victim did not consent to being present during the sexual activity and the perpetrator did not have any reasonable belief that the victim consented.

18. Subsection (2) provides that an offence is committed only where the perpetrator has acted for the purpose obtaining sexual gratification or humiliating, distressing or alarming the victim.

19. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

20. Subsection (4) provides that, for the purposes of this offence, the requirement that the victim is present, or that an activity is carried out in his or her presence, includes situations other than in which the person engaging in the sexual activity can be observed by means of an image (such as an image on a screen which is generated by a webcam). It is not essential that it be proved that the victim can be proved to have actually observed the activity; it is enough that the activity was in a place where it was capable of being observed by the victim.

Section 5 – Coercing a person into looking at an image of a sexual activity

21. This section creates the offence of “coercing a person into looking at an image of a sexual activity”. Subsections (1) and (2) provide that an offence is committed if a person intentionally (and for the purpose of obtaining sexual gratification or for the purpose of humiliating, distressing or alarming the victim) causes the victim to look at an image of a person engaging in a sexual activity.

22. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).
Section 6 – Communicating indecently etc.

23. This section creates two offences, each relating to unwanted sexual communication. Both subsections (1) and (2) provide that the offences are committed only where the victim did not consent to the activity and the perpetrator had no reasonable belief that the victim consented.

24. Subsection (1) creates the offence of “communicating indecently”. It is committed if a person, in the circumstances set out in paragraph 23 above, intentionally sends the victim a sexual written communication by whatever means, or directs a sexual verbal communication at the victim, by whatever means.

25. Subsection (2) creates the offence of “causing a person to see or hear an indecent communication”. It is committed if, in circumstances other than specified in subsection (1), a person causes the victim to see a sexual written communication or to hear a sexual verbal communication, in each case by whatever means and in the circumstances described in paragraph 23 above.

26. Subsection (3) provides that an offence under subsection (1) or (2) is committed only where the perpetrator’s purpose is to obtain sexual gratification, or to humiliate, distress or alarm the victim.

27. Subsection (4) defines “written communication” and “verbal communication” for the purpose of this section.

28. Subsection (5) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 – see paragraph 13 above.

Section 7 – Sexual exposure

29. This section creates the offence of “sexual exposure”. Subsection (1) provides that the offence of sexual exposure is committed if a person intentionally exposes his or her genitals in a sexual manner to another person with the intention that the person will see them. In addition, the perpetrator must either intend that the victim will be caused alarm or distress as a result of the exposure, or must be reckless as to whether alarm or distress will be caused.

30. Subsection (2) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

31. Subsection (3) provides that it shall be a defence to a charge under this section that the person who exposed their genitals in breach of this section did so in the course of a performance or play. It is a further requirement that the director or presenter of the production must have directed the actor to expose his or her genitals in this way. Subsection (4) defines “play” for the purpose of subsection (3).
Section 8 – Administering a substance for sexual purposes

32. This section creates the offence of “administering a substance for sexual purposes” where a person intentionally gives a victim an intoxicant, or otherwise causes an intoxicant to be taken by the victim without the victim knowing, and without reasonable belief that the victim knows, for the purpose of stupefying or overpowering the victim in order that the perpetrator may engage in a sexual activity with the victim. It is immaterial whether or not any sexual activity actually takes place.

33. Subsection (2)(a) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above). Subsection (2)(b) extends the offence to apply to certain situations in which the victim does in fact know that he or she is taking the intoxicating substance. In such a situation, a person will commit an offence if he or she intentionally induces in the victim a reasonable belief that the substance is either substantially weaker than it really is, or is of a substantially smaller quantity than it really is. The fact that the victim knows that he or she is taking an intoxicant is to be disregarded.

PART 2 – CONSENT AND REASONABLE BELIEF

Section 9 – Meaning of “consent” and related expressions

34. This section defines consent as “free agreement”. The definition applies to Parts 1 and 3 of the Act.

Section 10 – Circumstances in which conduct takes place without free agreement

35. This section builds on the general definition of consent in section 9. It provides that, in the particular situations which are set out in subsection (2), there is no free agreement to sexual activity by a victim, and hence no consent. It is a non-exhaustive list and therefore does not imply that in situations which are not listed in subsection (2) there is free agreement.

36. Subsection (2)(a) provides that there is no consent if the victim’s only indication or expression of consent to sexual activity is given at a time when he or she is so intoxicated through alcohol or any other substance that he or she is incapable of giving 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 any acting by the victim will not amount to consent.

37. Subsection (2)(b) provides that there is no consent if the victim is asleep or unconscious (for whatever reason) except in circumstances where the victim has freely agreed, prior to falling asleep or becoming unconscious, to sexual activity taking place while he or she is in that state.

38. Subsection (2)(c) provides that there is no consent in situations in which the victim agrees or submits to sexual activity because of violence used against him or her or another person, or because of threats of violence against him or her or another person.
39. Subsection 2(d) provides that there is no consent if the victim agrees or submits to sexual activity because he or she is unlawfully detained by the accused. The detention need not necessarily involve the use of direct force or violence.

40. Subsection 2(e) provides that the victim does not consent to sexual activity when the accused has deceived him or her and, as a result, the victim is mistaken as to the nature or the purpose of the activity.

41. Subsection 2(f) provides that there is no consent if the victim agrees or submits to sexual activity with the perpetrator as a result of the perpetrator impersonating someone whom the victim knows personally.

42. Subsection (2)(g) provides that there is no consent if the only expression or indication of the victim’s consent to sexual activity is from someone other than the victim.

43. Subsection (3) provides that in each of the paragraphs of subsection (2), the references to “A” and “B” are to be read in the same way as they are read in sections 1 to 6. Therefore, “A” is the person accused of the offence and “B” is the victim or complainer.

Section 11 – Consent: scope and withdrawal

44. This section makes further provision as to the meaning of consent for sections 1 to 6 of the Bill. It deals with two separate aspects of consent.

45. Subsection (2) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.

46. Subsections (3) and (4) deal with the withdrawal of consent. Subsection (3) provides that consent may be withdrawn at any time before or during that sexual activity. Consent may therefore be withdrawn before the activity begins or while the sexual activity is taking place. Subsection (4) provides that, if consent is withdrawn, the activity takes place without consent.

Section 12 – Reasonable belief

47. This section makes further provision in respect of determining, for the purposes of Part 1 of the Bill, whether a person’s belief as to consent or knowledge, in relation to the sexual activity that has taken place, was reasonable.

48. It will be for a court or the jury to determine in each particular case what amounts to reasonable belief but this section provides that, in determining whether such belief is reasonable, regard is to 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.
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

PART 3 – MENTALLY DISORDERED PERSONS

Section 13 – Capacity to consent

49. This section deals with the capacity of those with a mental disorder to consent to sexual activity. Subsection (1) provides that it relates to the offences in sections 1 to 6, where lack of consent is an essential element.

50. Subsection (2) states that a mentally disordered person is incapable of consenting to conduct (i.e. any conduct which falls within sections 1 to 6) where, by reason of the mental disorder, he or she is unable to do any of the things listed in sub-paragraphs (a) to (c). This test for capacity mirrors the one set out in section 311(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

PART 4 – CHILDREN

51. Part 4 of the Bill provides for a range of “protective offences”, which prohibit sexual contact with children. It makes separate provision for offences involving sexual activity with “young” and “older” children.

YOUNG CHILDREN

52. Sections 14 to 20 of the Bill make provision in relation to sexual conduct involving “young children”. The Bill uses the term “young child” to refer to a child who is under the age of 13 at the time the offence was committed. Therefore, each of the offences under sections 14 to 19 can be committed only against a child who is aged under 13.

Section 14 – Rape of a young child

53. This section creates the statutory offence of “rape of a young child”. It provides that a person will commit this offence by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of a young child. 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.

Section 15 – Sexual assault on a young child

54. This section creates the offence of “sexual assault on a young child”. Subsection (2) sets out four separate sexual acts, each of which constitute an offence. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The four sexual acts are:

(a) penetrating a young child’s vagina, anus or mouth by any means in a sexual way;
(b) touching a young child in a sexual way;
(c) having any other sexual physical contact with a young child, whether directly or through clothing and whether with a body part or with an implement; and
(d) ejaculating semen onto a young child.
55. Subsection (3) provides a test for determining whether an activity under subsection (2) is sexual. This is effectively the same as the test used in section 2 (see paragraph 13 above).

56. Subsection (4) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes sexual assault on a young child and that which constitutes rape of a young child. This is necessary for the same reasons as specified for the overlap between the offences at section 1 and 2 of the Bill (see paragraph 14 above).

Section 16 – Causing a young child to participate in a sexual activity

57. This section creates the offence of “causing a young child to participate in a sexual activity”. Subsection (1) provides that the offence is committed if the perpetrator intentionally causes the young child to participate in a sexual activity.

58. Subsection (2) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 17 – Causing a young child to be present during a sexual activity

59. This section creates the offence of “causing a young child to be present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of a young child or, secondly, that the perpetrator intentionally caused a young child to be present while a third person engaged in a sexual activity.

60. Subsection (2) provides that an offence is committed only where the perpetrator’s purpose in having a young child present is to obtain sexual gratification or to humiliate, distress or alarm the young child.

61. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

62. Subsection (4) provides that, for the purposes of subsection (1), 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 the 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.

Section 18 – Causing a young child to look at an image of a sexual activity

63. Section 18 creates the offence of “causing a young child to look at an image of a sexual activity”. Subsection (1) provides that the offence is committed if a person intentionally causes a
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

young child to look at an image of the perpetrator, a third person or an imaginary person engaging in a sexual activity.

64. Subsection (2) provides that an offence is committed only if the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.

65. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 19 – Communicating indecently with a young child etc.

66. This section creates two offences, each relating to sexual communication with a young child. There are some common features shared by both offences.

67. Subsection (1) creates the offence of “communicating indecently with a young child”. It is committed if a person intentionally sends a young child a sexual written communication by whatever means or directs a sexual verbal communication at a young child, by whatever means.

68. Subsection (2) creates the offence of “causing a young child to see or hear an indecent communication”. It is committed if a person causes the young child to see a sexual written communication or to hear a sexual verbal communication in circumstances other than as described in subsection (1).

69. Subsection (3) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the young child.

70. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

71. Subsection (5) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 20 – Belief that a child has attained the age of 13 years

72. Section 20 provides that it shall not be defence to a charge of a sexual offence against a young child, under sections 14 to 19 of the Bill, that the accused believed that the young child was aged 13 years or over.

OLDER CHILDREN

73. Sections 21 to 29 of the Bill make provision in relation to sexual conduct involving “Older Children”. The Bill uses the term “older child” to refer to a child who is aged 13, 14 or 15 at the time the offence was committed. Therefore, each of the offences under sections 21 to 27 can be committed only against an older child of those ages.
Section 21 – Having intercourse with an older child

74. This section creates the offence of “having intercourse with an older child”. It provides that the offence may be committed only by a person aged 16 or over. A person will commit an offence under this section by intentionally or recklessly penetrating, with their penis, the vagina, anus or mouth of an older child.

Section 22 – Engaging in sexual activity with or towards an older child

75. This section creates the offence of “engaging in sexual activity with or towards an older child”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over.

76. Subsection (2) sets out four separate sexual acts, each of which constitute an offence. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The four sexual acts are:

   (a) penetrating an older child’s vagina, anus or mouth by any means in a sexual way;
   (b) touching an older child in a sexual way;
   (c) having any other sexual physical contact with an older child, whether directly or through clothing and whether with a body part or with an implement; and
   (d) ejaculating semen onto an older child.

77. Subsection (3) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

78. Subsection (4) provides that penetration “by any means” for the purposes of subsection (2) includes with the perpetrator’s penis. This means that there is an overlap between the conduct which constitutes sexual assault on an older child under this section and that of having intercourse with an older child (under section 21). This is necessary for the same reasons as specified for the overlap between the offences at section 1 and 2 of the Bill (see paragraph 14 above).

Section 23 – Causing an older child to participate in a sexual activity

79. This section creates the offence of “causing an older child to participate in a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. Further, it provides that the offence is committed only where the perpetrator intentionally causes an older child to participate in a sexual activity.

80. Subsection (2) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).
Section 24 – Causing an older child to be present during a sexual activity

81. This section creates the offence of “causing an older child to be present during a sexual activity”. Subsection (1) provides that the offence may be committed only by a person aged 16 or over. It provides that the two circumstances in which this offence is committed are, first, where the perpetrator intentionally engages in a sexual activity in the presence of an older child or, secondly, where the perpetrator causes an older child to be present while a third party engages in a sexual activity.

82. Subsection (2) provides that the activities at subsection (1) are a crime only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

83. Subsection (3) provides a test for whether an activity is sexual for the purposes of subsection (1). This is effectively the same as the test used in section 2 (see paragraph 13 above).

84. Subsection (4) provides that, for the purposes of this offence, the requirement that an older child is present when the perpetrator or a third person carried out sexual activity includes situations in which the person engaging in the sexual activity can be observed by an older child (other than by means of an image). It is not essential to prove that the older child actually observed the activity; so long as the older child was in a place where the sexual activity was capable of being observed from.

Section 25 – Causing an older child to look at an image of a sexual activity

85. This section creates the offence of “causing an older child to look at an image of a sexual activity”. Subsection (1) provides that the offence is committed where a person over the age of 16 intentionally causes an older child to look at an image of the perpetrator, a third person or an imaginary person engaging in a sexual activity.

86. Subsection (2) provides that it is an offence only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

87. Subsection (3) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 26 – Communicating indecently with an older child etc.

88. This section creates two offences, each relating to sexual communication with an older child by a person aged 16 or over.

89. Subsection (1) creates the offence of “communicating indecently with an older child”. It provides that the offence is committed if a person intentionally sends an older child a sexual written communication by whatever means, or directs a sexual verbal communication at an older child, by whatever means.
90. Subsection (2) creates the offence of “causing an older child to see or hear an indecent communication”. It provides that an offence is committed where a person causes an older child to see a sexual written communication or to hear a sexual verbal communication by whatever means in any circumstances other than those specified in subsection (1).

91. Subsection (3) provides that an offence is committed only where the perpetrator acts for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the older child.

92. Subsection (4) defines “written communication” and “verbal communication” for the purposes of this section.

93. Subsection (5) provides a test for whether an activity is sexual for the purposes of this section. This is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 27 – Older children engaging in penetrative sexual conduct with each other

94. Section 27 provides that an older child who participates in penetrative sexual conduct with another older child commits an offence, whilst making clear that the Lord Advocate continues to have discretion to issue instructions to chief constables of police forces in Scotland on the reporting of such offences, for example, to the Children’s Reporter.

95. Subsections (1), (2) and (3) provide that an older child who intentionally or recklessly penetrates sexually another older child’s vagina or anus commits the offence of “engaging while an older child in penetrative sexual conduct with or towards another older child”.

96. Subsection (4) provides that an older child who consents to penetrative sexual conduct will also be guilty of an offence; that offence being “engaging while an older child in consensual penetrative sexual conduct with another older child”.

97. Subsections (5) and (6), when read with subsection (3) provide that penetration, for the purposes of this section, includes penetration with a penis (but penetration of or by the mouth is not an offence).

98. Subsections (7) and (8) declare that the Lord Advocate has discretion to issue instructions to chief constables of police forces in Scotland about reporting offences under this section. They make clear that the discretion which the Lord Advocate exercises in issuing instructions to chief constables about reporting offences (including sexual offences involving children) is not affected by these subsections.

Section 28 – Penetration and consent for the purposes of section 27

99. This section makes further provision as to the meaning of penetration and consent for the purposes of section 27.
100. Subsection (2) provides a test for whether penetration is sexual (effectively the same as the test used in section 2 (see paragraph 13 above)) while subsection (3) provides that it is a continuing act until withdrawal.

101. Subsections (4) to (8) mirror the approach taken in Part 1 of the Bill. Subsections (4) and (5) provides that for the purposes of section 27 “consent” means “free agreement” (as defined in section 9) and that free agreement to sexual conduct is absent in the circumstances specified in section 10(2).

102. Subsection (6) (like section 11) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.

103. Subsections (7) and (8) (like section 11) deal with the withdrawal of consent. Subsection (7) provides that consent to the sexual conduct may be withdrawn at any time before or during that conduct. Subsection (8) reinforces this by providing that any sexual conduct which takes place after consent is withdrawn takes place without consent.

Section 29 – Defences in relation to offences against older children

104. This section provides the defences which can be invoked by a person who is charged with an offence against an older child. Subsection (1) provides that it is a defence for an accused person who is charged with offence under sections 21 to 27 that he or she reasonably believed that the older child had attained the age of 16 years at the time the conduct took place.

105. Subsection (2) requires that an accused may not use the defences set out in subsection (1) if he or she has previously been charged by the police with a relevant offence. Subsection (5) provides that relevant offences may be specified in subordinate legislation.

106. Subsections (3) and (4) provide that it shall be a defence to a charge relating to the offences in sections 22(2)(b), (c) and (d) and sections 23 to 26 that the difference between the accused’s age and that of the older child did not exceed 2 years. It is also a defence to a charge under section 21 if the charge provides that there was penetration of the mouth. It is also a defence to a charge under section 22(2)(a) if the charge provides that there was penetration of or by the mouth.

107. Subsection (6) provides that a belief that the victim was in fact a young child is not a defence to a charge of any of the offences in sections 21 to 26 and that a belief that the other child was in fact a young child is not a defence to a charge of any offence in section 27.

Section 30 – Special provision as regards failure to establish whether child has or has not attained age of 13 years

108. The offences in Part 4 of the Bill divide into two distinct groups: those concerning sexual activity with a young child (where the child is under the age of 13 at the time of the conduct (sections 14 to 19)), and those concerning sexual activity with an older child (where, at the time of the conduct, the child has attained the age of 13 but is not yet the age of 16 (sections 21 to 27)). The question of which offence is appropriate in any particular case is determined solely by
the age of the child at the time when the offence is said to have been committed, and not by the accused’s belief as to the child’s age. Section 30 provides for circumstances where the Crown is unable to prove the age of the child at the time when the offence was said to have been committed.

109. Subsection (1) deals with charges under sections 21 to 26, which relate to older children. If the Crown is unable to prove, beyond reasonable doubt, that the child had attained the age of 13 at the time when the offence was said to have been committed, this subsection provides that the child will be deemed to have attained the age of 13. The Crown must be able to prove that the child was under the age of 16 at the relevant time.

110. Subsections (2) and (3) deal with charges under sections 14 to 19, which relate to sexual conduct involving a young child. If the Crown is unable to prove, beyond reasonable doubt, that the child was under the age of 13 at the relevant time but can establish that, in every other respect, the accused committed or attempted to commit the offence which is charged (and can prove that the child was under 16) then the accused may be acquitted of that charge but found guilty of the corresponding offence relating to an older child (as specified in subsection (3)).

111. Subsections (4) to (6) deal with situations where, but for a failure to prove that the victim was under 13, a person charged with an offence against a young child may be convicted of an alternative offence specified in schedule 2, as provided by section 38. These subsections set out the circumstances in which the person can be convicted of an alternative offence and which alternative offence the person can be convicted of.

PART 5 – ABUSE OF POSITION OF TRUST

Section 31 – Sexual abuse of trust

112. Section 31 creates the offence of “sexual abuse of trust”. Subsection (1) provides that a person commits the offence of sexual abuse of trust if they are aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 32 defines what is meant by “a position of trust.”

113. Subsection (2) provides a test for whether penetration is sexual. The test is effectively the same as the test used in section 2 (see paragraph 13 above).

Section 32 – Positions of trust

114. This section defines “position of trust” for the purposes of the offence of sexual abuse of trust in section 31. Definitions of the terms used in this section are provided in section 33.

115. Subsection (1) states that person A is in a position of trust in relation to person B if any of the five conditions set out in subsection (2) to (6) is fulfilled. It also creates a power for the Scottish Ministers to make an order (subject to negative resolution procedure) specifying other conditions which constitute a position of trust.
116. Subsection (2) provides that a position of trust is constituted if A looks after B, where B is detained in an institution by virtue of a court order or under an enactment.

117. Subsection (3) provides that a position of trust is constituted if A looks after B, when B resides in accommodation provided by a local authority under section 26(1) of the Children (Scotland) Act 1995.

118. Subsection (4) provides that a position of trust is constituted if A looks after B, when B is accommodated in any of the places described in paragraphs (a) to (e) of this subsection.

119. Subsection (5) provides that a position of trust is constituted if A looks after B, when B is receiving education at an educational establishment.

120. Subsection (6) provides that a position of trust is constituted if A and B are members of the same household and A has (or had, or fulfils) parental rights or parental responsibilities in respect of B, or if A treats B as a child of A’s family.

121. Subsection (7) provides that A “looks after” B for the purposes of this section if A cares for, trains, supervises or is in sole charge of B, so long as A does so regularly.

**Section 33 – Interpretation of section 32**

122. This section defines the meaning of certain terms for the purposes of section 32.

**Section 34 – Sexual abuse of trust: defences**

123. This section provides for the defences which can be invoked by a person who is charged with an offence under section 31 (sexual abuse of trust).

124. Subsection (1)(a) provides that it is a defence if the accused reasonably believed that, at the time the sexual conduct took place, the person with whom it took place (or towards whom it was directed) was aged 18 or over.

125. Subsection (1)(b) provides that it is a defence if the accused reasonably believed, at the time of the sexual conduct, that the person with whom it took place (or towards whom it was directed) was not a person in relation to whom the accused was in a position of trust.

126. Subsection (2)(a) provides that it is a defence for the accused to show that the other party was his or her spouse or civil partner at the time of the conduct they are charged with.

127. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim was in existence immediately before the particular position of trust with the victim was established. This defence has been provided in order that those who were already in a sexual relationship (but who are not married to, or in civil partnership with, each other) at the time that a position of trust arises should be free to continue that relationship while a position of trust persists without committing a criminal offence.
128. Subsection (3) provides that the defences under subsection (3) do not apply where the position of trust is as described in section 32(6). In other words, they do not apply where the position of trust is within a family setting.

129. Subsection (4) provides a test for whether sexual activity is sexual for the purposes of subsection (2). The test is effectively the same as the test used in section 2 (see paragraph 15 above).

Section 35 – Sexual abuse of trust of a mentally disordered person

130. This section creates the offence of “sexual abuse of trust of a mentally disordered person”. The definition of “mental disorder” is provided at section 47. It is the same definition as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

131. Subsection (1) states that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in a sexual activity with, or directed at, a mentally disordered person.

132. Subsection (2) defines those classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in (or contracted to provide services in, or who manage), a hospital in which a mentally disordered person is receiving medical treatment.

133. Subsection (3) provides a test for whether sexual activity is sexual for the purposes of subsection (1). The test is effectively the same as the test used in section 2 (see paragraph 13 above).

134. Subsection (4) defines the meaning of “providing care services” for the purpose of subsection (2) and provides that the Scottish Ministers may set out further circumstances which fall within this term by order (subject to negative resolution procedure).

135. Subsection (5) defines certain terms used elsewhere in this section.

Section 36 – Sexual abuse of a mentally disordered person: defences

136. This section provides for the defences which can be invoked by a person who is charged with an offence under section 35 (sexual abuse of trust of a mentally disordered person).

137. Subsection (1)(a) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that the person with whom that conduct took place (or towards whom it was directed) did not have a mental disorder.

138. Subsection (1)(b) provides that it is a defence that the accused reasonably believed, at the time of the sexual conduct, that he or she was not a person who fell within any of the classes of person specified in section 35(2).
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

139. Subsection (2)(a) provides that it is a defence for the accused to show that the victim was his or her spouse or civil partner at the time the sexual conduct in the charge was said to have taken place.

140. Subsection (2)(b) provides that it is a defence for the accused to show that a sexual relationship with the victim existed immediately before the time when the accused is considered to have fallen within either of the classes of person specified in section 35(2).

141. Subsection (3) provides a test for whether a relationship is sexual for the purposes of subsection 2(b). The test is effectively the same as the test used in section 2 (see paragraph 13 above).

PART 6 – PENALTIES

Section 37 – Penalties

142. This section introduces schedule 1, which sets out the maximum penalties which may be imposed for each of the offences created by the Bill. For those offences which may be tried under either summary or solemn procedure the maximum penalties are as specified in the third and fourth column of schedule 1 respectively. Two offences, rape and rape of a young child, may only be tried under solemn procedure.

PART 7 – MISCELLANEOUS AND GENERAL

Section 38 – Power to convict for offence other than that charged

143. This section provides that, where a charge is brought under certain provisions in the Bill but the court or the jury are not satisfied that the accused committed the offence in the charge, it may be open to convict the accused of a specified alternative offence. Schedule 2 specifies the available alternatives.

144. Subsection (1) provides that this power may be used where the court or jury are not satisfied that the accused committed or attempted to commit the offence which is charged but are satisfied (to the normal criminal standard of proof) that the accused committed or attempted to commit another offence (where the other offence is specified, in schedule 2 to the Bill, as being an available alternative to the offence charged). If these conditions are met, then the court or jury may acquit the accused of the offence which was charged but may find him or her guilty of the alternative offence.

145. Subsection (2) provides that fair notice must be provided to the accused of the possibility of being convicted of the alternative offence (as per subsection (1)), while subsections (3) and (4) provide for the procedure by which that requirement to give fair notice may be met.

146. Subsection (5) provides that those charged with attempting, inciting, counselling or procuring the commission of an offence, or with being art and part involved in an offence, may be convicted of an appropriate alternative offence.
Section 39 – Exceptions to inciting or being involved art and part in offences under Part 4 or 5

147. This section provides that a person who acts for any of the purposes specified in paragraph (a) will not be guilty of any of the offences contained in Part 4 and Part 5 of the Bill providing that they are not also acting for any of the purposes in paragraph (b).

148. Paragraph (a) of this section specifies purposes including protecting others from sexually transmitted infection or from physical harm, the prevention of pregnancy or promoting their emotional wellbeing.

149. Paragraph (b) of this section specifies the purposes as including obtaining sexual gratification, humiliating, distressing or alarming a person or causing or encouraging the activity which constitutes an offence or a person’s participation in such conduct.

Section 40 – Common law offences

150. This section provides that the common law offences listed in paragraph (a) are abolished (other than in respect of offences committed before this section is commenced).

151. This means that, where conduct which would otherwise have constituted one of those common-law offences is committed on or after this section has been commenced, that common law offence will not have been committed. Instead, the conduct will fall under one of the offences in the Bill. The particular common law offences which are to be abolished are rape, clandestine injury to women, lewd, indecent and libidinous practice or behaviour, and sodomy. All other common law crimes remain in place.

152. Paragraph (b) qualifies this by providing that any conduct which constitutes an offence under one of the provisions of the Bill and which takes place after the commencement of this section must be charged as an offence under the Bill. This means that it will not be competent to bring a charge under the common law nor under any other statutory offence in respect of that sexual conduct. Thus, for example, conduct falling within section 2 must be charged as sexual assault and not as a common law assault aggravated by indecency.

Section 41 – Continuity of sexual offences

153. This section is intended to provide a smooth transition between the current law in respect of sexual offences and the new offences contained in the Bill. The main purpose of this section is to make allowance for cases in which the sexual conduct in the charge takes place around the time that the offences contained in the Bill come into force. It may not always be possible to prove exactly when the sexual conduct took place and hence whether this occurred before or after the relevant offence in the Bill was commenced.

154. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence specified in subsection (2) and with an offence under the Bill. It provides that the court or jury must be satisfied in all respects that the accused
committed the offences charged, other than as to the time on which the sexual conduct took place.

155. Subsection (3) provides that the accused may be found guilty, where the conditions in subsection (1) apply, of whichever of the offences they are charged with has the lower maximum penalty (as defined by subsection (4)). Where the penalties are the same, it provides that the accused may be found guilty of the new offence.

156. Subsection (5) provides that a reference to an offence in this section includes an attempt to commit the offence, inciting its commission, and being involved art and part in it and to an offence as modified by section 16A or 16B of the Criminal Law (Consolidation) (Scotland) Act 1995.

Section 42 – Incitement to commit certain sexual acts outside the United Kingdom

157. Section 42 re-enacts section 16A of the Criminal Law (Consolidation) (Scotland) Act 1995 (with amendments). Section 16A provides that incitement to commit certain sexual acts that would amount to an offence in Scotland is itself an offence even where the sexual acts are intended to occur outside the UK. That provision is currently subject to a “dual criminality” requirement, i.e. for a person to be guilty of an offence the act incited must be both an offence in Scots law and in the law of the country or territory where it was to take place.

158. Section 42 removes the dual criminality requirement in respect of UK nationals. Therefore, a UK national will commit an offence under this section if he or she incites a sexual act (which is intended to take place outside the UK) that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act which was incited was an offence in the country in which it was intended to take place. This follows, but goes beyond, the requirements of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Abuse which was signed by the UK Government on 8 May 2008. That Convention requires the removal of the dual criminality requirements in relation to offences of child abuse, child pornography and child prostitution. Dual criminality is retained for UK residents and persons other than UK nationals.

159. The section applies to the offences which are listed in part 1 of schedule 3. These include inciting offences under Part 1 of the Act (rape etc.) which are committed against a person under the age of 18, the offences against children in Part 4 and the sexual abuse of trust offences in sections 31 and 35.

160. By way of example, incitement in Scotland to commit rape in Scotland would be an offence by virtue of section 293 of the Criminal Procedure (Scotland) Act 1995. The effect of section 42 is that incitement in Scotland to commit rape in another country is also an offence in Scotland, for non-UK nationals if rape is an offence in that other country. It will be an offence for UK nationals to incite rape (which is an offence in Scotland) outside the UK regardless of whether rape it is an offence in that other country.
Section 43 – Offences committed outside the United Kingdom

161. Section 43 re-enacts section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995, which currently makes it an offence for a UK national or UK resident to commit certain sexual acts outside the UK, if these acts would be an offence if they had taken place in Scotland. As with section 16A, described above in connection with section 42 of the Bill, section 16B is subject to a dual criminality requirement. Therefore, in order for it to be an offence under section 16B, the sexual act which has been carried out must also be an offence in the country in which it took place.

162. As with section 42, this dual criminality requirement is removed in respect of UK nationals, in line with the Council of Europe Convention. Therefore, a UK national will commit an offence under this section if he or she carries out a sexual act outside the UK that would constitute an offence in Scotland. It is no longer necessary to show that the sexual act that was committed is also an offence in the country in which it was intended to take place. The dual criminality test is retained in relation to UK residents.

Section 44 – Continuity of law on sexual offences committed outside the United Kingdom

163. Section 44 ensures the continuity of the extraterritorial sexual offences provisions in section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) which are replaced by section 43 of the Bill. It deals with cases where it cannot be proved precisely when the offence occurred, i.e. before or after section 16B of the 1995 Act is repealed.

164. Subsection (1) provides that this section applies where a person is charged, in respect of the same conduct, with an existing offence as modified by section 16B of the 1995 Act and with the offence as modified by section 43 of the Bill. As with section 41, it provides that the court or jury must be satisfied in all respects that the accused committed the offences charged, other than as to the time on which the sexual conduct took place.

165. Subsection (3) provides that where this section applies the accused may be found guilty, of the offence as modified by section 16B of the 1995 Act.

Section 45 – Ancillary provision

166. This section enables Scottish Ministers to make ancillary provision by statutory instrument which is necessary or expedient, or in consequence of, giving full effect to the Bill.

Section 46 – Orders

167. This section sets out the order making powers which can be exercised by the Scottish Ministers in the Bill and the applicable parliamentary procedure.

Section 48 – Modification of enactments

168. This section provides for the modification of existing enactments. Subsection (1) introduces schedule 4 to the Bill which provides for modifications of existing enactments in
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

consequence of the Bill. Subsection (2) introduces schedule 5 to the Bill which provides for repeal of certain existing enactments in consequence of the Bill.

Section 49 – Short title and commencement

169. This section provides that the Bill will come into force on a day or days decided by order by Scottish Ministers. Such orders may make different provision for different purposes.

FINANCIAL MEMORANDUM

INTRODUCTION

170. This document relates to the Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 17 June 2008. It has been prepared the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

BACKGROUND

171. The Sexual Offences (Scotland) Bill provides for a statutory framework for sexual offences in Scots law. The Bill provides for statutory offences relating to sexual conduct which takes place without consent. It contains offences of rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently and sexual exposure. The Bill contains a statutory definition of consent, which it defines as *free agreement*, and supplements this with a non-exhaustive list of factual circumstances in which consent is definitely not present. The Bill contains “protective offences” which criminalise sexual activity with a person whose capacity to consent to sexual activity is either entirely absent or not fully formed either because of their age or because of a mental disorder. Separate “protective” offences apply in respect of sexual activity with younger and older children. The Bill provides sexual offences of “abuse of position of trust” which criminalise a person in a position of trust over a child or person with a mental disorder who engages in sexual activity with that person.

172. The Bill does not contain substantive provisions relating to the management of sex offenders, or to policy on prostitution or pornography. Full details of the background, objectives and effect of the Bill’s provisions can be found in the accompanying Policy Memorandum and in the preceding Explanatory Notes (supplemented by the Delegated Powers Memorandum).

CONSULTATION

173. The main consultation document for this Bill, *Consultation on Scottish Law Commission Report on rape and sexual offences* was issued by the Scottish Government¹, following

¹ http://www.scotland.gov.uk/Topics/Justice/criminal/17543/Scottishgovtconsultation

22
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the
Scottish Parliament on 17 June 2008

publication of the Scottish Law Commission’s (SLC) report on rape and other sexual offences2 in December 2007. The SLC earlier undertook a public consultation on a discussion paper, seeking views on their emerging findings, in January 2006. The outcome of that consultation helped to inform their final report.

174. The Scottish Government consultation specifically asked consultees whether they had any comments with regard to the financial implications of the SLC’s proposals for the Scottish Administration, local authorities and other bodies, individuals or businesses. Where respondents to the consultation made comments about resource implications, these are reflected in this memorandum.

COSTS ON THE SCOTTISH ADMINISTRATION

175. The Bill is intended to clarify and modernise the existing mix of common-law and statutory provision in this area. For the most part, it does not criminalise conduct which is not currently criminal. For example, the conduct criminalised by the proposed statutory offence of rape could currently be prosecuted either as the common law offence of rape, the common law offence of indecent assault or the common law offence of sodomy. Conduct criminalised by the proposed statutory offence of “sexual exposure” could currently be prosecuted at common law either as public indecency or as breach of the peace. For these reasons, we believe that the provisions in the Bill should not, in and of themselves, lead to a significant increase in the number of sexual offences cases investigated by the police or prosecuted by Crown Office and Procurator Fiscal Service (COPFS). However, clarifying the law in this area should encourage victims to feel more confident in reporting crimes to the police. COPFS and the Association of Chief Police Officers in Scotland (ACPOS) do not think this is likely to result in a substantial number of additional cases.

176. The Bill also extends the criminal law in some specific areas. The offences relating to indecent communication have no direct equivalent in the law at present, though in some circumstances it might be prosecuted as a breach of the peace or under legislation on stalking and harassment. The provisions on protective offences in respect of children cover boys under the age of 16 where the existing common law provisions apply only to sexual activity with boys under the age of 14. COPFS consider that the number of additional offences reported to them as a result of these specific changes to the law are unlikely to be substantial. COPFS and ACPOS do not think these changes will result in a substantial number of additional cases.

Prosecution, courts and legal aid costs

177. Taking into account the above, it is difficult to gauge how many additional cases will be reported to the police or prosecuted, though it is clear that the increase will not be large. For the purpose of the financial memorandum, we have detailed the cost implications of a 1% and 3% increase in the number of sexual offences reported for prosecution.

178. In 2005/06 there were a total of 821 convictions for offences of indecency (excluding those convicted of prostitution related offences and incest, which are not covered by this Bill). The conviction rate for crimes of indecency is 79%, which implies that just over 1000 such cases

---

These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

were tried in the Scottish courts in 2005/06. A 1% increase in the number of cases tried in the Scottish courts would result in around 10 additional cases being tried each year.

179. In 2006/07, around 30% of sexual offence cases were tried in the High Court, and 69% were tried in the Sheriff Court. Less than 1% of all sexual offence cases were tried in the District Court. Precise figures for the proportion of sexual offence cases tried in the Sheriff Court under solemn and summary procedure are not available. However, based on the number of individuals granted legal aid in respect of a sexual offence tried under Sheriff summary procedure, we estimate that around half of sexual offence cases tried in the Sheriff Courts are tried under summary procedure. For the purpose of the Financial Memorandum, we therefore assume that 30% of additional cases will be tried in the High Court, 35% in the Sheriff Court under solemn procedure and 35% in the Sheriff Court under summary procedure.

180. Additional cases tried in the Scottish courts would carry costs for COPFS, the courts service and legal aid. Assuming that the additional cases would fall to the High Court, Sheriff Solemn and Sheriff Summary Courts in the proportions outlined above, the weighted average cost for COPFS would be £7,085 per case (based on average costs for COPFS in 2005/06). The weighted average cost to the Scottish Court Service (SCS) would be £2,485 per case (based on average costs for 2005/06). The Scottish Legal Aid Board (SLAB) state in their annual report for 2006/07 that the average legal aid cost of a sexual offence case in 2005/06 was £5,035. However, it should be noted that small increases, like that predicted in this case, can be accommodated within normal fluctuations in the number of cases reported to COPFS and prosecuted in the courts. In such circumstances, the marginal cost will be met from within existing budgets for COPFS, SCS and SLAB and will not require any additional funding. The total average cost per additional case is thus estimated to be £14,605.

Summary of Costs Arising From Additional Court Cases

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecution Costs (COPFS) per case.</td>
<td>£7,085</td>
<td>Para 180</td>
</tr>
<tr>
<td>Court costs per case</td>
<td>£2,485</td>
<td>Para 180</td>
</tr>
<tr>
<td>Legal aid costs per case</td>
<td>£5,035</td>
<td>Para 180</td>
</tr>
<tr>
<td><strong>Total cost per case</strong></td>
<td><strong>£14,605</strong></td>
<td></td>
</tr>
<tr>
<td>Total cost per annum assuming ~1% increase in number of cases per year (10 additional cases)</td>
<td>£146,050</td>
<td></td>
</tr>
<tr>
<td>Total cost per annum assuming ~3% increase in number of cases per year (30 additional cases)</td>
<td>£438,150</td>
<td></td>
</tr>
</tbody>
</table>
181. One-off costs will also be incurred by COPFS and the Scottish Court Service as a result of the requirement to train staff and adapt IT systems and databases to reflect the new legislative framework for sexual offences. COPFS consider it would be necessary to conduct a specific one-day training event for all legal and precognition staff to familiarise them with the new legislation. COPFS estimate the cost of this event to be between £50,000 and £60,000. COPFS will also require to update their IT systems and to update the training and information manuals on sexual offences for all staff. The costs are not anticipated to be significant and are estimated to be between £5,000 and £10,000.

182. The one-off costs for the Scottish Courts Service are not anticipated to be significant. The Bill does not amend criminal procedure or create new disposals in respect of sex offenders. There would be a requirement to amend IT systems and update briefing for clerks. It is estimated that the cost of this will be between £5,000 and £10,000.

Costs on the police

183. ACPOS consider that the primary financial implications for Scottish police forces will relate to the requirement for training and awareness raising work in relation to the new legislation, which will require to be delivered to all officers, with a particular emphasis on those officers likely to attend initial reports and Family Protection officers. There will be a need to review the current syllabus delivered to probationary Constables at the Scottish Police College and the general guidance documents regarding the investigation of sexual offences. It is estimated that the cost of this will be between £75,000 and £150,000. There may be additional costs for Scottish police forces arising from a possible increase in reporting and prosecution of sexual offences. Detailed figures on the average cost to the police arising from the reporting or prosecution of a sexual offence are not available.

184. However, ACPOS consider that as the Bill does not, in the main, seek to criminalise conduct which is not currently an offence, financial implications are unlikely to be significant.

Costs on the Scottish Prison Service

185. An increase in the number of persons prosecuted for sexual offences is likely to result in a slight upward pressure on the prison population. We estimate that a 1% increase in the number of sexual offences cases prosecuted would result in no more than 10 additional prisoner places each day and a 3% increase, in no more than 30 additional prisoner places each day. For planning purposes (and in line with advice on other legislation) the Scottish Prison Service (SPS) estimates that the recurring annual cost per prisoner place, if additional capacity were required, is £40,000 in addition to the capital cost of accommodation. We therefore estimate that a 1% increase in convictions would result in an additional cost to the Scottish Prison Service of £400,000 and a 3% increase would result in an additional cost of £1.2m.

186. However, for small increases in population, like that predicted in this case, it is expected that any extra prisoners may be accommodated within normal fluctuations in prison population at marginal cost only. This means that the recurring annual cost mentioned above is unlikely to arise in practice (and that information given in this respect is for background interest only). In such circumstances, the marginal cost will be met from within existing SPS budgets and will not require the allocation of additional funding.
Costs on the Scottish Children’s Reporter Administration

187. Unlike the draft Bill produced by the SLC, the Bill does not create a new ground for referral to the Scottish Children’s Reporter Administration (SCRA). Children engaged in under-age sexual activity who are investigated by the police would, in the vast majority of instances, already be referred to the Children’s Reporter, rather than being prosecuted in the criminal courts. It is possible that, by extending criminalisation of consensual under-age penetrative sexual activity to both the male and the female (under the current law, only a male child under 16 can commit this offence) there will be a small increase in the number of children referred to SCRA on offence grounds.

188. Discussions with the Scottish Children’s Reporter Administration (SCRA) suggest that this is unlikely to result in a significant increase in the number of referrals they receive as current practice regarding reports of consensual under-age sexual activity is that both parties are referred to the Children’s Reporter – the boy on offence grounds and the girl on non-offence grounds.

189. It is nonetheless possible that the provisions contained in the Bill will result in a small number of additional referrals of children who do not currently come into contact with the Children’s Hearing System. Detailed figures on the cost to the SCRA of referrals to the Children’s Reporter are not available at present. However, an indicative estimate based on the total number of referrals processed by SCRA each year (around 100,000 – of which 40,000 result in a Hearing, with 13,000 children subject to compulsory measures of supervision at any one time) and the total grant-in-aid to SCRA (£28m) would be that the average total cost of a referral to SCRA is £280. We estimate that the new provisions could result in 200 additional cases for the SCRA. However the following table outlines the cost of a range of levels.

<table>
<thead>
<tr>
<th>Referrals</th>
<th>Cost per annum (based on £280 per referral)</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>£28,000</td>
</tr>
<tr>
<td>200</td>
<td>£56,000</td>
</tr>
<tr>
<td>300</td>
<td>£84,000</td>
</tr>
<tr>
<td>400</td>
<td>£112,000</td>
</tr>
</tbody>
</table>

COSTS ON LOCAL AUTHORITIES

Criminal Justice Social Work

190. We estimate that a 1% increase in the number of prosecutions for sexual offences would lead to an additional 2 probation orders a year, and that a 3% increase would lead to an additional 6 probation orders. The average cost of a probation order in 2004/05 (the most recent year for which figures are available) was £1,293. The costs for these fall to Criminal Justice Social Work. Based on the above assumptions, we would estimate the total additional cost arising from additional probation orders to be between £2,586 and £7,758.
Costs arising from Children’s Hearings

191. Any additional referrals to the Children’s Reporter may result in additional costs for local authorities if, at any subsequent Children’s Hearing, it is determined that compulsory measures are required to be put in place in respect of the child. COSLA inform us that they do not have average figures for the cost to a local authority of a referral to the Children’s Reporter. However, based on our estimate that there may be between 100 and 300 additional referrals as a result of the legislation, we would not expect any additional costs to exceed 0.3% of the total costs falling to local authorities from Children’s Hearings.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

192. Individuals who are convicted of any of the offences provided for in this Bill will be expected to pay any fine imposed on them by the court as a result of that conviction. There are no costs for other bodies or businesses.

SUMMARY OF ADDITIONAL COSTS ARISING

193. The table below summarises the estimated total one-off and potential recurrent costs which may arise from any increase in investigations or prosecutions from the Sexual Offences (Scotland) Bill. With regard to COPFS, SCS, SLAB and SPS costs, the lower estimate calculates the costs arising from a 1% increase in the prosecution of sexual offences, and the higher estimate from a 3% increase. Subject to the parliamentary progress of the Bill and the date of commencement, we would expect the one-off costs to arise in 2009-10 and the recurrent costs to start to arise from 2010-2011.

<table>
<thead>
<tr>
<th></th>
<th>One-off costs arising from training, changes to systems, etc</th>
<th>Recurrent costs arising from additional cases (low estimate)</th>
<th>Recurrent costs arising from additional cases (high estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>COPFS (para 180-181)</td>
<td>£50,000 - £60,000</td>
<td>£70,850</td>
<td>£212,550</td>
</tr>
<tr>
<td>Scottish Court Service (para 180 and 182)</td>
<td>£5,000 - £10,000</td>
<td>£24,850</td>
<td>£74,850</td>
</tr>
<tr>
<td>Scottish Legal Aid Board (para 180)</td>
<td>N/A</td>
<td>£50,350</td>
<td>£151,050</td>
</tr>
<tr>
<td>Scottish Children’s Reporter Administration (para 187-189)</td>
<td>N/A</td>
<td>£28,000</td>
<td>£112,000</td>
</tr>
</tbody>
</table>
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

| **Police Costs** (para 184) | £75,000 - £200,000 | N/A | N/A |
| **Scottish Prison Service**<sup>3</sup> (para 185) | N/A | £400,000 | £1.2m |
| **Local Authority Criminal Justice Social Work** (para 190) | N/A | £2,586 | £7,758 |

**TOTAL COSTS**

| (low estimate) | £130,000 | £576,636 | £1,758,208 |
| (high estimate) | £270,000 | |

---

**SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

194. On 17 June 2008, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

---

**PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

195. On 16 June 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

---

<sup>3</sup> As noted in Para 15, costs are based on Scottish Prison Service’s estimate of the average cost per prisoner-place. However, in practice, small increases in population, like that predicted in this case, it is expected that any extra prisoners may be accommodated within normal fluctuations in prison population at marginal cost only.
“In my view, the provisions of the Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
These documents relate to the Sexual Offences (Scotland) Bill (SP Bill 11) as introduced in the Scottish Parliament on 17 June 2008

SEXUAL OFFENCES (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)


Applications for reproduction should be made in writing to: Information Policy, Office of the Queen’s Printer for Scotland (OQPS), St Clements House, 2-16 Colegate, Norwich NR3 1BQ, or by e-mail to licensing@oqps.gov.uk. OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley