

Sexual Offences (Scotland) Act 2009

Law

Autonomy

1. Particularly where consent is in issue, it is important that judges explain to juries that sexual offences, both at common law and under the 2009 Act, are intended to criminalise conduct which interferes with another person's sexual autonomy. Such a direction has two benefits:

1. It will ensure that juries understand the nature of the offence they are considering;
2. It should prevent erroneously held conventional wisdom about the nature of crimes of rape and sexual assault and "rape myths" intruding on decision making.

In [PF Edinburgh v Aziz \[2022\] HCJAC 46, 2023 JC 51](#) the appeal court examined the issue of autonomy in considering an offence of communicating indecently, section 7 of the 2009 Act, and noted that it underpinned the common law on sexual offences just as it underpins the Act. In paragraph [20] of the opinion of the court, the Lord Justice General categorised the different ways in which the law has sought to protect the sexual autonomy of adults, children and the vulnerable.

In its analysis of the development of the common law and the 2009 Act, at paragraphs 20-24, it is clear that the court was not innovating but drawing on long-established principles.

Autonomy at common law

2. In [Dickie v HM Advocate \(1897\) 2 Adam 331](#) Lord Justice Clerk MacDonald observed in an appeal arising from a charge of indecent assault that:

"Every woman is entitled to protection from attack upon her person."

In giving the leading opinion of a bench of seven judges in [Lord Advocate's Reference \(No 1 of 2001\) 2002 SCCR 435](#) Lord Justice General Cullen explained, at paragraph [40]:

"...The criminal law exists in order to protect commonly accepted values against socially unacceptable conduct. What does the law of rape seek to protect in the modern world? It may be said with considerable force that it should seek to protect a woman against the invasion of her privacy by sexual intercourse, that is to say where that takes place without her consent. What happens with her consent on one occasion should not determine what is acceptable on another. In the present day, in which there is considerable sexual freedom, both in and out of marriage, should the law of rape not support the principle that whether there is to be sexual intercourse should depend on whether the woman consents, wherever and whenever she pleases?"

Autonomy under the Sexual Offences (Scotland) Act 2009

3. The origins of the 2009 Act reveal an explicit concern to ensure that the sexual autonomy of individuals, regardless of gender, is respected as the court observed in [Aziz](#).

Having noted the declaration in [Webster v Dominick 2005 1 JC 65](#) that what had been thought to be the all-encompassing crime of shameless indecency did not exist and the redefinition of rape in [Lord Advocate's Reference \(No 1 of 2001\)](#) as the legal background, the Lord Justice General explained in [PF Edinburgh v Aziz](#) at paragraph [22]:

"...the Scottish Law Commission produced its Report 9 on Rape and Other Sexual Offences (no 209) in 2007. This examined how, what it described as, "the most fundamental principle" of "Respect for sexual autonomy" might find its way into the criminal law. This respect was described as operating (paragraph 1.25):

"Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime."

The Lord Justice General had previously referred to autonomy as an important principle in [GW v HM Advocate \[2019\] HCJAC 23, 2019 JC 109](#) in which he quoted, at

paragraph [31], remarks made by Lady Hale in [R v Cooper \[2009\] UKHL 42, \[2009\] 1 WLR 1786](#) at paragraph [27]:

"....[I]t is difficult to think of an activity which is more person - and situation - specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place, autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention..."

Lady Hale's explanation of consent chimes precisely with the provisions of the 2009 Act and the definition of consent as free agreement.

In appropriate circumstances, judges have found it useful to quote Lady Hale in their directions on consent and observed that juries appear readily to grasp her explanation.

The Sexual Offences (Scotland) Act 2009

4. The provisions relating to the new statutory sexual offences contained in the [Sexual Offences \(Scotland\) Act 2009](#) came into force on 1 December 2010. The Act repealed certain parts of the [Criminal Law Consolidation \(Scotland\) Act 1995](#) including Sections 3, 5, 6, 7(2), 7(3), 13(1) to (8A), 13(10), 13(11), 14, 16A, and 16B. Its provisions apply to offences committed from 1 December 2010. The common law and old statutory offences will continue to apply to offences committed prior to that date. Accordingly, existing law and directions relating to common law rape, for example, will continue to be required.

5. Broadly, the Act creates a series of offences comprising rape, sexual assault by penetration, sexual coercion, coercing a person to be present during a sexual activity, coercing a person into looking at a sexual image, sexual exposure and voyeurism. [Part 1](#), sections 1 to 9 deal with these in the context of adult persons. [Part 4](#) deals with these in the context of young children (sections 18 to 26) and older children (sections 28 to 37). [Part 5](#) deals with abuse of trust in relation to children and mentally disordered persons.

The Act covers a broad range of activity and, as such, whether the alleged conduct was "sexual" may be a particularly live issue in some cases.

[Section 60\(2\)](#) provides:

(2) 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.

The issue was considered in [*Kennedy v PF Aberdeen* \[2024\] HCJAC 47, 2024 SLT 1375](#) which involved an appeal to the High Court in respect of a decision of the Sheriff Appeal Court. Both the sheriff and the SAC had found that a male stripper's actions in touching the breasts and simulating sexual intercourse against the body of invited guests at a hen party, who were not consenting, was sexual assault contrary to section 3 of the 2009 Act. The High Court agreed with the decision but, in departing from some of the SAC's reasoning, explained, at paragraph [19], that the only mental element in the commission of the actus reus was that the conduct was deliberate or reckless. When considering whether conduct was sexual, there was no reason to exclude an accused's motives. Their weight would vary according to the circumstances. Context was also a relevant factor.

Lord Justice General Carloway concluded:

"[20] One obvious example where touching or other bodily contact is usually sexual is where it occurs on sexually sensitive parts of the body, such as female breasts, buttocks or the genital area. Less usually, the context may indicate that touching such parts is not sexual (cf the paramedic, *supra*). An example in which contact is almost always sexual is where the male intentionally touches the female with the area of his genitalia or in a manner which emulates a sexual act. The appellant used both of these methods during his performance, but he maintained nevertheless that the conduct was not sexual because he was acting a part. His motive was entertainment and was not for sexual gratification. These were all relevant circumstances. In so far as the opinions of the Sheriff Appeal Court both in this case (at paragraph [14]) and in *PF Edinburgh v Harper* [2024] SCA (Crim) 10 (at paragraphs [26]-[28]) suggest otherwise, they are in error. However, something which is part of a performance, and the motivation for which is entertainment, may still be

sexual. In this case, other circumstances pointed strongly to that being the correct conclusion.

[21] An essential point to stress is that sexual touching or other sexual bodily contact is not criminal per se. It constitutes a contravention of section 3 only if it is done without the consent of the person with whom there is touching or bodily contact or without any reasonable belief that they are consenting. A performer does not have a licence to invade the sexual autonomy of audience members. Any such invasion requires the free agreement of the person affected.

[22] In respect of both complainers, there was neither consent nor reasonable belief that they were consenting. They made it clear to the appellant that they did not wish him to touch or have bodily contact with them. The nature of what took place involved intimate physical contact and the simulation of sexual acts. Their sexual autonomy was invaded. These were weighty circumstances pointing to the conduct being sexual.

[23] The sheriff applied the correct test. He had regard to all the circumstances. The SAC were correct to refuse the appeal. In all the circumstances, there is no doubt that the appellant did sexually assault the complainers in terms of section 3(1) and (2)(b) and (c) of the 2009 Act. The appeal is therefore refused.”

6. The relevant provisions of the Act should always be studied with care. The suggested directions which follow provide definitions of the crimes created by the Act and offer some guidance on issues which may arise in the context of particular cases. It will always be necessary to select with care from within each style the directions which are relevant and to expand and adjust these to suit the evidential circumstances of each individual case.

7. At the end of the draft directions on rape is a summary of points which may found the evidential basis of the prosecution case. This may be used as an aide-memoire, and can be easily adapted to suit other charges.

Evidence and corroboration in sexual offences

Restrictions on evidence in sexual offence cases: s274 and s275 of the 1995 Act

8. A particular evidential consideration in sexual offence cases is the restriction, imposed by s274 of the 1995 Act, on leading certain evidence about the complainer’s

character, or about the complainer's behaviour (whether sexual or otherwise), or about certain conditions or predispositions to which the complainer has at any time been subject. Section 275 of the 1995 Act allows the court to admit evidence, otherwise prohibited by s274, on application by a party and subject to the criteria provided in s275. The court may make any decision on the admissibility of such evidence subject to conditions imposed under s275(6).

In [*Daly and Keir v HM Advocate* \[2025\] UKSC 38](#), the UK Supreme Court, whilst dismissing the appeals before it on the facts, determined that the approach of the Scottish courts to the common law, as applied following [*CJM v HM Advocate* \[2013\] H CJAC 22, 2013 SLT 380](#), is liable to result in violations of the rights of the accused under Article 6 and should be modified (paragraphs [181] and [192]). Accordingly, decisions of the Scottish courts from 2013, which predate *Daly and Keir*, ought to be read subject to the Supreme Court's observations therein.

Detailed guidance on the operation of sections 274 and 275 of the 1995 Act is provided in Chapter 9 of the [Preliminary Hearings Bench Book](#).

9. In [*Lord Advocate's Reference No 1 of 2023* \[2023\] H CJAC 40, 2024 JC 140](#), a bench of seven judges restated the law on corroboration in sexual offence cases, and generally, that on any charge only two matters require corroboration: (1) the crime was committed and (2) that the accused committed it.

10. There is no need to find corroboration for separate elements of the crime. For example, in a rape case, there is no need to provide corroboration for penetration and, separately, for lack of consent. It is the testimony of the complainer that requires to be corroborated, not individual facts or elements of an offence. In a case of rape or sexual assault, a piece of circumstantial evidence, such as a complainer's distress witnessed by another witness, or injuries, can corroborate the commission of the crime. ("[Corroboration generally/corroboration in rape etc](#)").

[*Lord Advocate's References Nos 2 & 3 of 2023* \[2024\] H CJAC 43, 2024 SLT 1207](#) went further than the 1st reference of 2023 and establishes that a witness speaking to a complainer's de recenti statement can provide corroboration of the complainer's evidence on both the commission of the crime and identification of the accused as perpetrator. This is so even in the absence of distress.

11. Judges must bear in mind the memo by the Lord Justice General Carloway and Lord Justice Clerk Lady Dorrian of 15 November 2023 "Defining rape and identifying what requires corroboration" in the Appendices to the Jury Manual.

Consent

[See below for guidance on cases in which there is a special defence of consent, or a special defence of reasonable belief of consent.]

12. Where the absence of consent is an essential element of the crime there is an onus on the Crown to prove that the complainer did not consent, even in the absence of a special defence of consent, and the jury should be directed accordingly: [Bakhjam v HM Advocate 2018 JC 127](#) at paragraph [33].

It is a misdirection to direct the jury that it must be proved that the accused *knew* that the complainer was not consenting. To require it to be proved that the accused knew that the complainer was not consenting sets the bar far higher, for the Crown, than proof of the absence of a reasonable belief that the complainer was consenting (See: LJG and LJC Memo of 15 November 2023 in Appendices to the Jury Manual; See also the guidance below: A direction on reasonable belief is not required in every case).

13. [Section 12](#) defines consent as meaning free agreement. [Section 13](#) lists certain circumstances in which free agreement is absent. The list is not exhaustive. Section 13 provides that free agreement to conduct is absent where:

- a complainer is incapable by reason of intoxication of consenting to it;
- a complainer submits because of violence or threats of violence;
- a complainer is unlawfully detained by the accused;
- a complainer submits due to a mistake because of the accused's deception as to the nature or purpose of the conduct;
- a complainer agrees or submits by reason of the accused impersonating a person known personally to the complainer;
- the only expression or indication of agreement is from a person other than the complainer. In other words, valid consent cannot be given on a complainer's behalf by someone else.

14. [Section 15](#) provides that consent to conduct does not, of itself, imply consent to any other conduct and that consent to conduct may be withdrawn at any time before or, in the case of continuing conduct, during, the conduct. Accordingly, if the conduct

takes place or continues after consent has been withdrawn it takes place without consent.

The timing of consent

15. It is necessary for consent to be given, in whatever form, at the time of the sexual act, and for there to be continuing consent throughout the conduct: [GW v HM Advocate \[2018\] HCJAC 23](#).

Consent where the complainer is asleep or unconscious

16. [Section 14](#) provides that a person is incapable, while asleep or unconscious, of consenting to any conduct. Furthermore, it has been held that consent expressed at a point materially remote from the conduct said to constitute the crime, cannot provide a defence of consent in terms of the 2009 Act; it is necessary for the consent to be given, in whatever form, at the time of the sexual act and that there be continuing consent throughout the conduct: [GW v HM Advocate \[2019\] HCJAC 23, 2019 JC 109](#). Accordingly, a sleeping person cannot consent to sexual activity, nor can a person give consent, when awake, to sexual activity taking place while they are asleep.

Whether consent has been given, in whatever form, is examined by reference to the time of the sexual act and not at a point remote from it. Thus, the fact that consensual conduct of the same type has happened before will not, at least on its own, constitute consent to the same conduct occurring at a different time.

Accordingly, a sleeping person cannot consent to sexual activity and because consent must be given at the time, sexual conduct which occurs when a person is in that state is criminal.

Consent to conduct does not, of itself, imply consent to any other conduct: Section 15(2). Thus, the fact that consensual conduct of the same type has happened before will not, at least on its own, constitute consent to the same conduct occurring at a different time *GW v HM Advocate*.

The absence of consent need not always be expressed

17. Even if a complainer does not say in terms that there was no consent, its absence can, in appropriate circumstances. In such circumstances, a judge can and should direct the jury accordingly: [Cowan v HM Advocate \[2024\] HCJAC 35](#).

In [Cowan](#), the trial judge sustained a [section 97A](#) submission and removed the word “intoxicated” from the libel leaving the modus of rape specified as “asleep or unconscious and incapable of giving or withholding consent.” The evidence of the complainer was that the appellant had penetrated her in a situation where there was no intimate contact between them before she found him penetrating her in his bed. There was some ambiguity in her evidence as to whether she was still asleep when this commenced or whether it commenced when she had just woken up. The Advocate depute had conceded that because he had not asked the complainer whether or not she had consented, his case was periled only on her being asleep or unconscious. The judge agreed that this was the only route to verdict open and directed the jury accordingly. The appellant appealed on sufficiency. The court explained, with reference to [HM Advocate v Afzal \[2019\] HCJAC 37](#) and [Van der Schyff v HM Advocate \[2015\] HCJAC 67, 2015 SCL 783](#) that the real issue was whether the Crown had proved that the complainer was penetrated without consent. Despite the Crown’s approach it was open to the jury to infer that she was not consenting even if they were not satisfied that she was asleep or unconscious. It followed that:

“The jury should have been given directions in that regard as well as directions about her capacity or incapacity to consent. It was an obvious and fair route to verdict, of which the jury were deprived. The parties could have been alerted to this by the trial judge during the discussion on the submission under section 97A.”

It was in any event open to the jury to find that the complainer had been asleep when penetration commenced. The appeal was refused.

Another recent illustration is found in a statement of reasons following a post-conviction appeal decision of 5 May 2022, *Raymond Anderson v HM Advocate*. The court held that the jury had been entitled to find that there was no “free agreement” in the circumstances of sexual activity to which the complainer acquiesced in a coercive and controlling relationship when she felt that she had no real choice. The decision is not reported but can be found by judges in the T:drive, “Appeal opinions, pre-trial” folder under the file name: Anderson-Sect288C-proofofconsent.

Consent where there is an “attack” on the complainer

18A. In [Kirkup v HM Advocate \[2025\] HCJAC 9, 2025 SLT 234](#), the court explained at paragraph [25]:

“The Sexual Offences (Scotland) Act 2009 has no effect on the requirements of, or defences to, assault. Section 3(2)(c) concerns the definition of a **sexual** assault, which need not involve any **attack** but can be committed simply by touching or otherwise making physical contact with a complainer. In these cases, consent will be a defence. The crime of assault remains unaltered and consent is no defence to an attack on the person of another.”

The position is the same with sexual crimes at common law such as rape. Whether in a sexual context or otherwise, it is not a defence that the complainer consented to an action which constitutes assault unless that action was inherent in or associated with the sexual activity; *Kirkup* above *Smart v HM Advocate 1975 JC 30* at paragraph [33]. In *Kirkup*, in the context of a charge of rape under section 1, the court determined that even if the complainer consented to being choked and slapped to the head, these actions constituted the crime of assault. The court declined to resolve in advance whether slapping to the body, if consented to, would constitute assault. The appeal court left it to the trial judge to determine on the evidence how to direct the jury on that matter. An averment of assault specifying an action in a sexual encounter will constitute the crime of assault if it has potential to cause serious harm, even if there was consent; *Kirkup* at paragraphs [25] to [27].

Consent in the context of grooming

18B.1. In *HM Advocate v LM [2025] HCJAC 3, 2025 SLT 385*, a Crown sentence appeal, the Appeal Court looked closely at grooming and identified some of its hallmarks. The complainer, a 15-year-old girl at the time of the offending, gave evidence that she perceived herself to be consenting to sexual activity with the respondent. The Crown relied on evidence showing that the respondent had engaged in a course of manipulative behaviour to distort the complainer’s perception, which vitiated her consent. The jury convicted the respondent of rape and sexual assault on the basis that the complainer had not consented.

18B.2. The Appeal Court held that the trial judge’s approach to sentencing had failed to recognise the pattern of grooming behaviour blatantly apparent from the evidence, and the way in which grooming can affect the perceptions of the groomed (paragraph [39]). In cases where there is perceived consent on the part of an older child, and even enthusiastic participation in what has taken place, care should be taken to assess all of the facts and circumstances surrounding the offending.

18B.3. At paragraph [36] the Court stated:

“It is now recognised that a jury may conclude that the free agreement required for true consent is not present where vulnerabilities of the victim are taken advantage of. Factors such as (i) a significant age gap, (ii) a disparity in positions of power/authority/trust, (iii) other vulnerabilities of the victim for example due to chaotic lifestyles or difficult family relationships, (iv) the sexual inexperience of the victim, (v) the nature and pattern of the perpetrator’s conduct towards the victim before sexual activity occurred, (vi) evidence of premeditation on the part of the perpetrator, (vii) evidence that the perpetrator used manipulation techniques towards the victim, (viii) evidence that the perpetrator exerted influence over the victim, (ix) the overall character, nature and persona of the victim, including their level of understanding and knowledge of the position they were in and the significance of what they were being asked to do should all be properly explored and taken into account when determining whether free agreement has truly been given.”

18B.4. Under reference to English ([R v Taylor \[2022\] EWCA Crim 1207](#); [R v Ali \[2015\] EWCA Crim 1279](#), [2015] Cr App R 33), and Scottish caselaw ([HM Advocate v JB \[2021\] HCJAC 16](#), 2021 JC 194; [NP v HM Advocate \[2022\] HCJAC 24](#); [HM Advocate v CB \[2023\] HCJAC 4](#), 2023 JC 59; [DS v HM Advocate \[2017\] HCJAC 12](#), 2017 SCCR 129; [JW v HM Advocate \[2018\] HCJAC 10](#), 2018 SCCR 74; and [Kelly v HM Advocate \[2018\] HCJAC 17](#), 2018 SCCR 104), the Court recognised the term has been used by the court to describe a broad variety of offending, ranging from the most severe and egregious sexual offending against very young children (e.g. [HM Advocate v CB](#)) to cases where there has been, on the face of it, enthusiastic and willing participation by the complainer (e.g. [NP v HM Advocate](#)) (paragraph [33]).

18B.5. At paragraph [34], the Court concluded that it was obvious from the caselaw that grooming usually consists of a pattern of manipulative behaviour which exhibits a number of very common features or hallmarks, giving the following as examples:

“(i) It is a common theme in cases of grooming for victims to be in a vulnerable position. The vulnerability may simply arise from the victim’s age and stage of development. Whilst younger children may be particularly vulnerable, older children as they mature and explore their own identities may be susceptible to sexual grooming in the manner seen in [NP](#), [R v Hubbard \[2002\] EWCA Crim 494](#), [2002] 2 Cr App R (S) 101 and [R v MacNicol \[2003\] EWCA Crim 3093](#), [2004] 2 Cr App R (S) 2 where their youth and sexual

inexperience is taken advantage of by those who are in a position of trust or authority. Young people who might not otherwise be particularly vulnerable but are pubescent and coming to terms with their sexuality are often targets of grooming.

(ii) Typically, the offending manifests as a course of conduct. The court will be less likely to accept that a sexual offence is aggravated by an element of grooming where the offending takes place spontaneously.

(iii) The offending will often follow a pattern of escalation. The offending may begin by small gestures of perceived kindness (such as lifts home, gifts or compliments) or by communications that seem, on the face of it, relatively innocent, but which then start probing into the victim's personal life and, later, sex life. Perpetrators will often try to escalate the intensity of the relationship by forming, strengthening and misusing a bond of trust. In cases of physical sexual abuse, the abuse will often begin with less invasive sexual offending such as kissing and touching. It will often escalate to more serious behaviours such as penetrative actions and, in the most serious of cases, sexual intercourse.

(iv) The use of emotional manipulation techniques by perpetrators against victims is common. The emotional dependency which has been engendered in the victim may be utilised to continue the abuse, and to make the victim afraid that what they may wrongly perceive as emotional support may be withdrawn. Perpetrators may make their victims feel guilty or that they are somewhat responsible for what has happened. Perpetrators will often tell their victims that they, the perpetrator, will get into trouble or go to prison should anyone find out about the offending. Perpetrators may also use manipulation techniques to engineer a scenario where it is very difficult for their victims to leave or stop submitting themselves to the abuse. Frequently the perpetrator's manipulation techniques are used to distort the victim's perception and encourage them to engage in criminal activity. As a result the victim may perceive their compliance as consent in circumstances where consent may not have been freely given.

(v) In almost all cases there is an element of secrecy which is employed and enforced by the perpetrator. Perpetrators often tell their victims that they must not tell anyone about the offending. The sexual offending itself takes

place in private, and often unconventional places where their activities are unlikely to be detected. This could be in a car, in secluded areas such as woodland or in places far from where the perpetrator and the victim reside.

(vi) The behaviour is usually planned and systematic, and may involve a lengthy process.

(vii) In very many cases there will be a breach of trust by someone in a position of authority or responsibility towards the child, such as a coach, teacher, relative, close family friend or clergyman."

18B.6. The Appeal Court noted at paragraph [35] that the way in which grooming can affect the perception of the groomed was clearly articulated in [R v Taylor \[2022\] EWCA Crim 1207](#), at paragraph [30] per Holroyde LJ:

"The important point, in cases such as this, is that even a clear and unequivocal assertion of willing consent by a complainant may have to be seen in the context of other evidence, and surrounding circumstances, which may cause the jury to conclude that the assertion is an unreliable guide to what was actually happening. It must be remembered that the conduct of an abuser may cause his victim not merely to acquiesce but also to perceive her own acquiescence as consent. Conduct which may be described as grooming, or analogous to grooming, is after all intended so to distort the victim's perception as to encourage her to engage in sexual activity which is inappropriate and wrong."

18B.7. Similarly, in [R v Ali \[2015\] EWCA Crim 1279, \[2015\] Cr App R 33](#) Fulford, LJ, stated at paragraph [57] that:

"One of the consequences when vulnerable people are groomed for sexual exploitation is that compliance can mask the lack of true consent on the part of the victim."

And at paragraphs [58] and [63]:

"Although ... grooming does not necessarily vitiate consent, it starkly raises the possibility that a vulnerable or immature individual may have been placed in a position in which he or she is led merely to acquiesce rather than to give proper or real consent. One of the consequences of grooming is that it has a tendency to limit or subvert the alleged victim's capacity to make free decisions, and it creates the risk that he or she simply submitted because of

the environment of dependency created by those responsible for treating the alleged victim in this way. Indeed, the individual may have been manipulated to the extent that he or she is unaware of, or confused about, the distinction between acquiescence and genuine agreement at the time the incident occurred.

...

Although SS gave evidence which, at face value, appeared to indicate that she had consented, as the judge observed this needed to be viewed in the context of her account of her meeting Ali, the way he treated her, how often they met, her consumption of alcohol, and the particular events that led to sex between them on the first occasion."

18B.8. As is stated in [LM](#), care should be taken to assess all of the facts and circumstances surrounding the offending where grooming is relied on to vitiate consent. A suggested direction is included in [section 1 rape](#). This direction can be adapted for common law rape.

Special defence of consent

[See above for more general guidance on the law relating to consent in terms of the Sexual Offences (Scotland) Act 2009.]

- **A defence of consent requires notice**

19. An accused is required to give notice of a defence of consent or a defence of reasonable belief of consent. [Section 78](#) of the Criminal Procedure (Scotland) Act 1995 provides as follows:

(1) It shall not be competent for an accused to state a special defence or to lead evidence calculated to exculpate the accused by incriminating a co-accused unless—

(a) a plea of special defence or, as the case may be, notice of intention to lead such evidence has been lodged and intimated in writing in accordance with subsection (3) below—

(b) the court, on cause shown, otherwise directs.

(2) Subsection (1) above shall apply to a defence of automatism, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent as if it were a special defence.

(2A) In subsection (2) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer's consent to the act which is the subject matter of the charge or the accused's belief as to that consent.

(2B) In subsection (2A) above, "complainer" has the same meaning as in section 274 of this Act.

- **Withdrawal of a defence of consent**

20. Where a special defence is not being insisted upon, it is normal and accepted practice for the accused's representatives to intimate that before parties address the jury.

There are also circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury, essentially when there is no evidence to support it. Where there is no evidence of consent or facts from which consent could reasonably be inferred, no amount of cross-examination or references to it in a speech to the jury or elsewhere make it so: *Bakhjam* at paragraph [35]. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best practice for the trial judge to clarify the position outwith the presence of the jury before parties address the jury: ([*Lucas v HM Advocate* 2009 SCCR 892](#)).

- **Directions on a defence of consent**

21. Where there is a defence of consent, a judge will probably wish to identify, at some point in final directions, the evidence of consent on which the defence found (usually that of the accused or a statement by the accused, but it could be from part of the evidence of the complainer or some other source). A judge could address that when directing on special defence or on an individual charge or charges. It may be better to do so under reference to a charge(s). This should serve to make clear that it is for the Crown to negate any evidence of consent and prove the absence of consent.

As is noted above, where consent is an essential ingredient of the crime, even in the absence of a special defence, there is an onus on the Crown to prove that the complainer did not consent; *Bakhjam* at paragraph [33].

Special defence of reasonable belief of consent

- **A defence of reasonable belief requires notice**

22. The requirement to give notice of a defence of consent extends to a defence that the accused reasonably believed the complainer to have been consenting (section

78(2A) of the 1995 Act). Where the notice of special defence does not mention belief as to consent, it is out of the equation unless and until the court permits it to be introduced. If the defence wish to found on it in their speech, they ought to raise the issue before the Crown speech and seek permission to amend the special defence accordingly ([Thomson v HM Advocate 2025 JC 71](#) at paragraph [45]).

- **A defence of reasonable belief is not required in every case**

23. Where the absence of reasonable belief is an essential element of the offence, the direction to the jury should include the statutory definition of the crime which, in relevant cases, will include the absence of reasonable belief as an essential element of the offence. Any further direction on reasonable belief is not required unless that issue is a live one at the trial: [Maqsood v HM Advocate \[2019\] SCCR 59](#). That position was most recently reaffirmed in [Little v HM Advocate 2025 SLT 512](#), in which the Appeal Court refused an application to reinstate a ground of appeal that sought to argue that, in terms of section 3 of the 2009 Act, the absence of reasonable belief is an essential element of the offence itself, and that in every case the jury required to be satisfied of it before they could return a verdict of guilt. It was sought to argue that removing the issue from the jury's consideration offended against the presumption of innocence, in breach of the common law and Article 6.2 ECHR. The application was refused as inarguable. In their decision the court looked at the history of the defence and the need for a notice. The court stated at paragraph [28] that it is not entirely clear that there is always an evidential burden placed on the accused, confirming at paragraph [29]:

"That having been said, very often a matter will only be known to an accused person and evidential burdens are not unusual. They do not subvert the onus of proof. Even if there is such a burden it is only to the effect of requiring an issue to be raised on the evidence. It is then for the Crown to disprove it, usually by means of inference."

And in *Little v HM Advocate (No.2)* 2025 SLT 518, at paragraph [21] the court stated:

"Scots law has long taken the view that a direction on the question of an accused's belief that a complainer consented is only needed if it is a live issue on the evidence; *Meek v HM Advocate* 1982 SCCR 613. In *Maqsood*, the Lord Justice General (Carloway) explained that beyond giving the statutory definition of an offence under part 1 of the 2009 Act (section 1 in that case),

no further direction is required on reasonable belief unless it is a live issue in the trial.” (per LJC Beckett, Opinion of the Court at paragraph 21)

As explained above, if the defence wish to found on reasonable belief and it is not mentioned in the special defence, they ought to raise the issue before the Crown speech and seek permission to amend the special defence accordingly (*Thomson v HM Advocate*, paragraph [45]). If the judge is persuaded that the question of the accused’s belief in the complainer’s consent arises on the evidence at trial, the trial judge should give directions on that.

Where a special defence specifies reasonable belief in consent, it is appropriate to withdraw it when there is no evidence on which it can reasonably be considered to arise.

In some situations it will assist for the judge to confirm to parties prior to speeches whether directions will or will not be given on reasonable belief. If necessary, the judge can hear submissions and in most cases rule on it before speeches to avoid the jury hearing a speech on an issue the judge will tell them to ignore. If a judge does not do so, but there is no live issue of reasonable belief very clear directions to that effect should be given; [*LW v HM Advocate* 2023 HCJAC 18](#) at paragraph [26].

- **Is reasonable belief a live issue?**

24. The case-law suggests that honest or reasonable belief in consent is rarely a live issue. Reasonable belief is only live in circumstances in which the evidence is such that the jury may determine that, although the complainer did not consent, there is evidence suggesting that the accused believed that the complainer consented and, in the circumstances, the accused's belief was reasonable. As Lord Justice Clerk Dorrian explained in *LW v HM Advocate* 2023 JC 184, at paragraph [18] with reference to *Maqsood*:

"[. . .] although a judge ought to continue to direct a jury that the definition of rape includes an absence of reasonable belief, no further direction on reasonable belief is required unless that is a live issue at trial. That issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting. That does not normally arise, for example, where an accused describes a situation in which the complainer is clearly consenting and there is

no room for a misunderstanding." (*Maqsood*, *infra*, per the Lord Justice General at paragraph [17])

The decision in [Briggs v HM Advocate 2019 SCCR 323](#) suggests that, in most if not all cases where the defence is denial that sex took place, the question of whether the accused lacked honest belief in consent does not arise. Briggs was approved and applied on this point in *Thomson v HM Advocate* in which the appellant faced charges of rape at common law and under the 2009 Act. The LJG (Lord Carloway) explained, with reference to defence counsel having sought to introduce an issue of belief in his speech, that:

"...It was not appropriate to introduce a defence for which there was no evidential base. If a complainer says she did not consent and the accused says she did, it is not for defence counsel to invent a middle, speculative ground."

- **Steps taken to ascertain whether there was consent**

25. Section 16 of the 2009 Act provides that, for charges brought under sections 1-11 of the Act, in determining 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 what those steps were. If there is evidence such that reasonable belief is a live issue, a direction in this regard may be appropriate. For example, in a case in which reasonable belief is a live issue and in which significant violence is alleged, it may be appropriate to direct the jury to consider whether they accepted that violence was used and, if so, how the accused could reasonably have thought that the complainer was freely agreeing to intercourse.

- **Reasonable belief where there is evidence that the complainer is asleep or unconscious**

26. Given the provisions of section 14 and 16 of the Act, there can never be a reasonable belief of consent when the accused *knows* that the complainer is asleep or unconscious. That position was affirmed by the court in *GW v HM Advocate* per LJG Carloway:

"The court agrees with the decision and reasoning of the PH judge, that consent which is expressed at a point materially remote from the conduct said to constitute the crime, cannot provide a defence in terms of the statutory provisions. It agrees also with the Sheriff Appeal Court in [KT](#) (at para.4) that it

is axiomatic that, if the law provides that a person is incapable, whilst asleep or unconscious, of consenting to any conduct, there can never be a reasonable belief of consent in such circumstances.”

It may be, of course, that the accused does not accept that the complainer was asleep at the material time, and may therefore plead a defence of consent or reasonable belief in consent. In such a case, however, the issue is not merely whether the complainer was awake, or whether the accused thought the complainer was awake, but also whether the complainer consented to the activity in question, or whether the circumstances were such as to permit a reasonably held belief that the complainer was consenting to the activity in question. In [LW v HM Advocate 2023 HCJAC 18](#), reasonable belief was held not to have been a live issue. The complainer’s evidence was that she was asleep. The appellant’s evidence was that he lay behind the complainer, that the complainer was grinding her bottom up and down against him, and that the complainer made sexual noises when he penetrated her. There was also evidence of a text message from the appellant which implied that he knew that the complainer was asleep when he began to penetrate her. In these circumstances, the court held that reasonable belief was not a live issue.

- **Reasonable belief where the complainer is incapable of consenting by reason of a mental disorder**

27. In [Winton v HM Advocate 2017 SCCR 320](#), the court explained that section 17 does not create an offence, but merely provides that a person who comes within the terms of the section is not capable of giving consent, and that where the requirements of that section are met, the Crown need not prove lack of consent.

Where the complainer was incapable of consenting by reason of a mental disorder (section 17), reasonable belief will be live where the evidence is such that the jury may determine that, although the complainer could not consent: (i) the accused believed that the complainer was *capable* of consenting; (ii) the accused believed that the complainer *did* consent and (iii) in the circumstances, those beliefs were reasonable.

- **Proof of the absence of reasonable belief**

28. If reasonable belief is a live issue, it is for the Crown to prove its absence. Whether or not an accused had a reasonable belief will be a matter of inference drawn from established facts. As is noted above, it is a misdirection to direct the jury that it must be proved that the accused knew the complainer was not

consenting. To require the Crown to prove that the accused knew the complainer was not consenting sets the bar far higher than the absence of reasonable belief (See: LJG and LJC Memo of 15 November 2023 in Appendices to the Jury Manual).

In [*Duthie v HM Advocate* 2021 SCCR 100](#), a full bench confirmed that absence of honest or reasonable belief is not a fact which requires to be proved by corroborated evidence. Indeed, following Lord Advocate's Reference 1 of 2023 all that is required to be corroborated is the commission of the crime and identification of the accused. Even before Lord Advocate's Reference No 1 of 2023, it was not necessary for the Crown to prove absence of reasonable belief with corroborated evidence (*Maqsood v HM Advocate* [2019] SCCR 59). As the Lord Justice Clerk explained in *AA v HM Advocate* [2021] HCJAC 9, the court declined to remit this issue for consideration by a full bench and the law is as stated in *Maqsood*.

Proof of age of complainer or other person

29. There is a statutory presumption that if the age of a person is specified in an indictment or complaint, it will, unless challenged, be held as admitted. [Section 255A](#) of the Criminal Procedure (Scotland) Act 1995 provides as follows:

"Where the age of any person is specified in an indictment or a complaint, it shall, unless challenged—

(a) in the case of proceedings on indictment by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i)] of this Act; or

(b) in summary proceedings—

(i) by preliminary objection before the plea of the accused is recorded; or

(ii) by objection at such later time as the court may in special circumstances allow,

be held as admitted."

In cases where the age of the complainer is challenged, the production of a birth certificate will be sufficient.

Section 49 and sexual gratification

30. [Section 49](#) is relevant to a number of offences which deal with the purpose of the offender and provides:

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of sections 5 to 9, 22 to 26 and 32 to 36, A's purpose was—

- (a) obtaining sexual gratification, or
- (b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

31. The provision was examined in [PF Edinburgh v Aziz \[2022\] HCJAC 46, 2023 JC 51](#).

The High Court of Justiciary upheld the sheriff, who had been overturned by the Sheriff Appeal Court, in determining that a taxi driver had committed the offence of indecent communication under section 7 in speaking to two young women (18 and 21) who entered his taxi at 3am without having sufficient funds on them to pay the fare but had enough money available at home. When they told him of the situation, he asked "what else can you offer?" and when they enquired what he meant he replied, "sex." Both felt uncomfortable and unsafe, and one of them was frightened. They left the taxi and took a photo of the licence number.

32. In these circumstances, the sheriff had been entitled to find that intentionally and for the purpose of obtaining sexual gratification the appellant had directed a sexual verbal communication at them without either of them consenting.

33. The court examined section 49 and found that the test is an objective one. The court was not directed towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes can reasonably be inferred from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification. The only defence potentially available would be reasonable belief but it was not available in the circumstances of this case.

Dockets (section 288BA 1995 Act)

34. See section 288BA of the Criminal Procedure (Scotland) Act 1995 and the guidance provided in the chapter: [Dockets](#).

Alternative verdicts

35. Subject to the observations of the court in [Duncan v HM Advocate \[2018\] HCJAC 60, 2019 JC 9](#) which stresses that this may be a rare event if the matter has not been referred to by parties and a jury should then be directed only on an alternative verdict which obviously arises on the evidence, it may sometimes be appropriate to give the jury direction on an alternative verdict.

For 2009 Act offences, [section 50](#) creates the power to convict of alternative offences and [Schedule 3](#) of the Act sets out the alternative verdicts which are available on the various statutory offences listed there. Schedule 3 is reproduced as an appendix to the Jury Manual entitled " Alternative verdicts under Schedule 3 to the Sexual Offences (Scotland) Act 2009". See also the chapter on Alternative verdicts.

Possible form of direction on the Sexual Offences (Scotland) Act 2009

Section 1: Rape of an adult

Note on terminology and pronouns: *The directions should be adapted to make them comprehensible in the particular case: for example, in a rape by a male upon a female, it may make sense, in particular after general statements of the principles to use relevant pronouns rather than repeatedly refer to complainer or person,*

Direction

"Charge [x] is a charge of rape under [section 1](#) of the 2009 Act

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice.

Rape is the intentional or reckless penetration to any extent by the accused's penis of the complainer's:

- vagina,
- anus, or,
- mouth

without the complainer's consent and without any reasonable belief on the part of the accused that the person consented.

[In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

In this case it is alleged that the accused penetrated the complainer's [vagina/anus/mouth] with his penis without his/her/their consent.

Penetration

Any degree of penetration is enough. Ejaculation of semen is not necessary.

Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

[In this case it is not disputed that penetration was intentional].

In the exceptional case, where recklessness may arise on the evidence

[Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

Reckless acts show total indifference to and complete disregard of the consequences.]

Consent

Consent means free agreement. It is free agreement at the time of the sexual act that matters. Whether or not there is free agreement is for you to determine having regard to what the parties did and said to each other and the evidence as a whole. Did the complainer freely agree or was the complainer's freedom to choose restricted in some way?

Situation specific

There must be consent specific to the occasion on which sexual activity took place. There is no activity which is more person – and situation – specific than sexual relations. A person does not consent to sex in general but consents to this act of sex with this person at this time and in this place. It is free agreement at the time of the

sexual act that matters. Any person has a freedom to make a choice of whether or not to do so.

[Select as appropriate from the following directions:]

Within a relationship

[Rape/sexual assault] can happen between all different kinds of people. quite often when the people involved are already known to each other, related or in an existing relationship.

The law is that a complainer who is in a sexual relationship with somebody can be [raped/sexually assaults] by that person. A person is fully entitled not to consent on any occasion regardless of the relationship.

I have already explained that a person does not consent to sex in general but consents to this act of sex, at this time and in this place. A person is fully entitled not to consent on any occasion regardless of whether they consented to sexual activity on an earlier or later occasion.

No need for violence, protest, resistance or injury

Experience shows that there is no typical rape/sexual assault. There is no need for the prosecution to prove that the accused used violence or force although [he/she/they] may have.

Experience also shows that there is no typical reaction to unwanted sexual activity. Some people may protest and physically resist throughout the event. But others may be unable to do so and may freeze or decide to give up any struggle.

[Consider whether [Absence of physical resistance or physical force direction](#) (section 288DB) should be given at this stage]

A person consents if they agree to something when they are capable of making a choice about it and are free to do so. Consent can be given enthusiastically or with reluctance, but even if reluctantly given it is still consent. But when a person gives in to something due to threats, repeated demands, persistent psychological coercion, fear or because they simply feel unable to resist, that is not consent. A person can, in some circumstances, simply let the sexual activity take place because they feel that is the only way they see the incident ending. In such a situation, it is open to you to conclude that there was no free agreement.

The prosecution do not need to prove that the complainer communicated [her/his/their] lack of consent to the accused by, for example, shouting at the accused or calling for help.

[*Where appropriate* - The fact that the complainer did not say 'no' does not mean that the complainer was consenting.]

Where there is evidence of exploitation/grooming

In this case the Crown says that the complainer was [groomed/exploited] by the accused and that she did not freely agree to the [*specify activity*].

Let me explain what the courts have learned from experience about [exploitation/grooming] and the circumstances in which it can arise.

Typically, the perpetrator takes advantage of a power imbalance to control and manipulate the [child/vulnerable person]. Perpetrators may engage in a course of conduct to distort the [child/vulnerable person's] perception and continue the abuse.

The [child/vulnerable person] may not realise that they are being [exploited/groomed]. They may not resist or protest.

When considering free agreement, you should consider the relationship between the complainer and the accused, how it developed and the degree of influence that the accused may have had over the complainer. Just because the complainer perceived the activities to be consensual does not necessarily mean that the complainer freely agreed to them.

You should consider the whole circumstances, including:

- How the complainer and the accused's relationship developed.
- Whether the accused was in a position of authority or responsibility towards the complainer.
- How old or mature the accused and complainer were and any age difference between them.
- Whether the complainer was vulnerable due to their personal circumstances.
- The complainer's level of understanding and knowledge of the position they were in and the significance of what they were being asked to do.
- Whether there was a pattern of behaviour by the accused to obtain trust which escalated into misuse of that trust.
- Whether the accused used manipulation to continue the abuse.

You can take all of these matters into account when deciding if there was free agreement by the complainer.

Situations where there is no consent/no capacity to consent or consent is withdrawn

[The following directions address the circumstances listed under s13 where consent is absent. It is a non-exhaustive list. It does not imply that in circumstances not listed in s13, there is free agreement. Thereafter the directions address circumstances where there is no capacity to consent (under s14 and 17) and where the scope of consent is withdrawn (under s15).]

1. Where the conduct occurs at a time when the complainer is incapable of consenting because of the effect of alcohol or drugs

The law is that where sexual conduct occurs at a time when a complainer is incapable because of the effect of alcohol or any other substance of consenting to it, then there is no free agreement and no consent. It makes no difference whether the complainer took the alcohol or drugs [him/herself/themselves] or was plied them by another.

2. Where the person is subjected to or threatened with violence

Where a person agrees or submits to sexual conduct because of violence used against [him/her/them] [or anyone else] and/or because of threats of violence made against [him/her/them] [or anyone else], there is no free agreement. The violence or threat of violence need not immediately precede the conduct.

3. Where a complainer is detained by the accused

Where a person agrees or submits to sex with a person because [he/she/they] [is/are] unlawfully detained by that person there is no free agreement.

[Adapt as appropriate]

Detention need not involve force. To trick somebody into a room, and then lock the door would be enough. Detention is simply the deprivation of freedom and liberty of movement. A person does not have a right to detain another person. If you are satisfied that the complainer was detained by the accused and because of that the complainer submitted, then the complainer did not consent.

4. Where the person is deceived about the nature or purpose of the conduct

There is no free agreement if a person only agrees or submits to the conduct because [she/he/they] had been deceived by the other person about the nature or

purpose of the conduct. There has to be some deception by the accused and this must have led to the complainer being mistaken about the nature or purpose of the conduct complained of. If you conclude that the complainer did not realise that this was a sexual act and that the complainer believed the accused when the accused told the complainer that it was, for example, some sort of medical procedure, then there would be no free agreement on the complainer's part.

5. Where the person submits to the conduct as a result of impersonation

There is no free agreement if the accused induces the complainer to agree to, or submit to, the conduct by impersonating somebody known personally to the complainer. If the accused pretends to be the person's regular sexual partner and the complainer mistakenly believed that, the accused would be guilty of rape if intercourse occurred because of that deception. There must be impersonation which led to the agreement or submission to what took place.

6. Third party consent

Only the complainer can give consent. It cannot be given on the complainer's behalf by anyone else.

7. Where the complainer is asleep or unconscious

The complainer must be in a position to give or withhold consent. So, sexual conduct with a person who is asleep or unconscious is criminal.

8. Where the person consented to some form of sexual activity

Consent to one form of sexual conduct does not of itself imply consent to another form of sexual conduct. Unless a/the particular activity specified in the charge was freely agreed to, it took place without consent.

9. Where the person withdraws consent at some stage

Consent must be present throughout sexual conduct for it to be consensual. Consent may be withdrawn and, if it is, then conduct which takes place after that occurs without consent.

10. Mentally disordered person

A person who is suffering from a mental disorder is incapable of consenting to sexual conduct where, because of the disorder, the person was unable to:

- understand what the conduct was; or

- form a decision as to whether to engage in the conduct, or as to whether it should take place, or to communicate such a decision.

A mental disorder means a mental illness, personality disorder or a learning disability.

As a consequence, where the Crown has proved that the complainer suffers from a mental disorder, they do not have to prove a lack of consent on the part of the complainer.

Where there is a special defence of consent

In this case the accused has lodged a special defence of consent. That was read out to you at the start of the trial, and you have a copy of it.

As I explained in my directions at the start of the trial, the only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. A notice of special defence does not change the burden of proof. The defence do not need to lead evidence in support of it. It is for the Crown to prove the absence of consent, not for the accused to prove its presence.

In this case the accused says *[or insert evidential basis as appropriate]* that the complainer consented to what happened.

To support that the defence rely on:

[Here that evidence could be summarised.]

If you believe that or it leaves you in reasonable doubt of the accused's guilt, you must acquit.

On the other hand the Crown says the complainer did not consent to what happened. The Crown relies on:

[Here the Crown's position could be summarised.]

You should look at all the evidence, consider the points made for and against the defence of consent, and then decide if the Crown has proved guilt beyond reasonable doubt.

Where there is a defence of reasonable belief of consent

[This direction will only be required in the rare situation where, although the evidence is apt to prove that the complainer was not consenting, there is evidence that the accused believed that the complainer was consenting in circumstances where a reasonable person could think that the complainer was consenting.]

In this case the accused has lodged a special defence that the accused reasonably believed the complainer to have been consenting. That was read out to you at the start of the trial, and you have a copy of it.

As I explained in my directions at the start of the trial, the only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. A notice of special defence does not change the burden of proof. The defence do not need to lead evidence in support of it. It is for the Crown to prove that the accused did not reasonably believe that the complainer was consenting, not for the accused to prove that he did.

If you accept that the complainer was not consenting to [*e.g. penetration*], but you conclude that the accused, nevertheless, reasonably believed that the complainer was consenting, you must return a verdict of not guilty. That is because an accused who [*e.g. penetrates*] the [vagina/anus/mouth] of a complainer reasonably believing that the complainer was consenting is not guilty of [*e.g. rape*] even if, in fact, the complainer was not consenting. However, simply having an honest belief that the complainer was consenting would not be enough. The accused's belief must be held on reasonable grounds. Whether an accused had, or did not have, a reasonable belief is an inference from the evidence you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence before you that would entitle you to conclude that the accused reasonably held that belief.

[Here that evidence could be summarised.]

On the other hand the Crown remind you that:

[Here the Crown's position could be summarised.]

To decide if the accused's belief that the complainer was consenting was reasonable, you should have regard, among other matters, to:

- Whether the accused took any steps to find out if the complainer was consenting, and
- What steps these were.

If you accept any evidence that the accused believed that the complainer was consenting and if you also conclude that the accused's belief was reasonably held, you must find the accused not guilty.

Reasonable belief where the complainer has a mental disorder

If you accept that the complainer had a mental disorder and was not capable of consenting to [e.g. *penetration*], but you conclude that the accused, nevertheless, reasonably believed that the complainer was capable of consenting and believed she did consent, then you must return a verdict of not guilty. That is because a person who [e.g. *penetrates*] the [vagina/anus/mouth] of a complainer reasonably believing that that the complainer was capable of consenting and did consent is not guilty of [e.g. *rape*] even if, in fact, the complainer was not capable of consenting. However, simply having an honest belief that the complainer was capable of consenting, and did consent, would not be enough. The accused's belief must be held on reasonable grounds. Whether an accused had, or did not have, a reasonable belief is an inference from the evidence you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence before you that would entitle you to conclude that the accused reasonably held that belief.

[Here that evidence could be summarised.]

On the other hand the Crown remind you that:

[Here the Crown's position could be summarised.]

To decide if the accused's belief that the person was capable of consenting and did consent, was reasonable, you should have regard, among other matters, to:

- Whether the accused took any steps to find out if the complainer was capable of consenting, and did consent, and
- What steps these were.

If you accept any evidence that the accused believed that the complainer was capable of consenting, and believed that she did consent, and if you conclude that those beliefs were reasonably held you must find the accused not guilty.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how the rape is alleged to have been committed. That penetration was intentional [or reckless] does not need corroboration.

Where the complainer is an essential witness

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials, namely that the accused raped her/him/them.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

[Please note: *in cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the foregoing direction may not be necessary, or may need to be adapted.*]

Only where appropriate:

Distress

[If anything more elaborate is required reference can be made to "[Corroboration: Evidence of Distress](#)" in Part II of the Manual.]

Corroboration for the complainer's evidence of being raped can come from the evidence of others that the complainer was distressed afterwards, provided the distress was genuine, was caused at least in part by what the complainer said happened, and was not wholly due to other extraneous factors like shame or remorse.

Where there is evidence of a de recenti statement in the context of distress

[Where appropriate]

When a complainer gives an account to a witness shortly after the event when exhibiting such distress, it enhances and strengthens the corroborative effect of evidence of distress.

Moreover, if you find it to be a continuing reaction to what happened, the statement spoken to by [the witness] is itself corroboration of the complainer's account [of being raped] [by the accused].

Where there is evidence of a de recenti statement but no distress

You have heard evidence from [witness X] of what the complainer [insert name] said shortly after the {specify crime}. This is an exception to the normal exclusion of hearsay. If you accept the complainer said that:

shortly after the {specify crime}, and

as a continuing reaction to it,

it is evidence to prove facts. What the witness reported the complainer saying can corroborate the complainer's evidence.

Injury

Corroboration can also come from evidence of any injuries the complainer sustained. Signs of violence may be the consequence of being raped and may support the complainer's account of being raped.

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Summary

[In many cases it may be unnecessary to narrate paras 1 and/or 2, in which case para 3 may require slight elaboration.]

For the Crown to prove this charge, you must be satisfied that:

1. the accused penetrated the complainer's vagina/anus/mouth with his penis,
2. penetration was intentional [or reckless] and
3. the accused did so without the complainer's consent

Only where appropriate:

4. the accused had no reasonable belief that the complainer was consenting.

Consider whether to give [Delayed Reporting direction](#). (section 288DA)

Consider whether to give [Absence of physical resistance or physical force direction](#). (section 288DB)

Where appropriate consider whether to give [Background of Domestic Abuse direction](#).

Where appropriate consider whether to give [Lack of Emotion direction](#).

Directions on other offences under the 2009 Act

These offences are dealt with in the numerical order in which they appear in the 2009 Act.

Having said that, the charge of assault with intent to rape is not itself an offence under the Act but an assault at common law with the intent to commit either the statutory crime of rape or the common law offence of rape (or intent to ravish) depending on when it is alleged to have been committed. See the reference to these offences in [section 210A \(10\)\(iv\) and \(iva\)](#). Presumably there could be an offence of sexual assault under [Section 3 of the 2009 Act](#) with intent to commit the statutory crime of rape but if that arises the directions can be adapted. Sexual assault with intent to commit the statutory crime of rape is not mentioned in section 210A since sexual assault itself is already covered in any event.

Section 1: Assault with intent to rape (adult) under section 1 of the Sexual Offences (Scotland) Act 2009

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Note: Please see above. This is a common law crime with the aggravation of intent to commit a statutory one. It is included here for ease of reference. Intent is always a matter of inference from the primary facts and for these reasons the aggravation does not require to be proved by corroborated evidence.

Charge ...is a charge of assault at common law with intent to rape under [section 1 of the 2009 Act](#).

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice.

Assault

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults.

Whether a person has acted deliberately can be inferred from what has been said and/or done and from the nature of the behaviour.

[Where appropriate:]

- Weapons may or may not be involved.
- Injury may or may not result.
- Menaces or threats producing fear or alarm in the other person are assaults.
- *[Where injury libelled: use the [direction on injuries in assault](#) as appropriate]*
- The word "repeatedly" means more than once.

If you are satisfied that the accused assaulted the complainer, you must then go on to consider whether that was done with the intention of raping the complainer.

With intent to rape

If the complainer was deliberately attacked by the accused, with the intention of raping her, that is the crime of assault with intent to rape.

Rape is the intentional penetration, to any extent, by the accused's penis of the complainer's:

- vagina
- anus or
- mouth

without the complainer's consent.

Consent: *[Use [Directions from s1](#) as appropriate.]*

Reasonable belief: *[If, in exceptional circumstances, a judge considers that reasonable belief arises, use [Directions from s1](#) as appropriate.]*

Whether the accused intended to rape the complainer can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

If you decided to convict the accused of assault but were not satisfied that his intention was to rape then you would delete from the charge the words “*with intent to rape*”.

Corroboration

Both the commission of the crime, and that the accused committed it must be proved by corroborated evidence, meaning evidence from more than one source. Intent to rape does not need to be corroborated. The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of injury**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer’s account- see the chapter on “[Corroboration generally/Corroboration in rape etc](#)”.]

Additional directions

[One or more of the following directions on “myths” should be given where relevant:]

- A [Delayed Reporting direction](#). (section 288DA)
- An [absence of physical resistance or physical force direction](#). (section 288DB)
- A [Background of Domestic Abuse direction](#).
- A [Lack of Emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused deliberately attacked the complainer;
2. The accused acted with the intention of raping the complainer;

If you decided to convict the accused of assault but were not satisfied that the accused's intention was to rape then you would delete from the charge the words "*with intent to rape*". If you were satisfied that the accused's intention was to rape then those words would remain in the charge.

Section 2: Sexual assault by penetration

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual assault by penetration under [section 2 of the 2009 Act](#).

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice.

The crime of sexual assault by penetration consists of the intentional or reckless sexual penetration, to any extent, by any part of the accused's body, including his penis, or with anything else, of the complainer's:

- vagina, or
- anus

without the complainer's consent, and without any reasonable belief that the complainer was consenting.

[In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

Penetration

In this case it is alleged that the accused penetrated the complainer's vagina/anus with [specify] without the complainer's consent.

Any degree of penetration is enough. Ejaculation of semen is not necessary.

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

[One or more of the following directions on intention should be given:]

- Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- *Or:*

In this case it is not disputed that penetration was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:*

Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

Consent

[Use [directions from s1](#) as appropriate.]

Reasonable belief

[Use [directions from s1](#) as appropriate.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That penetration was intentional [or reckless] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- Where the complainer is an essential witness

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of distress

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of injury

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- An [absence of physical resistance or physical force direction](#) (section 288DB).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused penetrated the complainer's vagina or anus with a part of the accused's body, or something else,
2. Penetration was sexual,
3. Penetration was intentional [or reckless]
4. Penetration took place without the complainer's consent,

[If appropriate]

5. The accused had no reasonable belief that the complainer was consenting.

Section 3: Sexual assault

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual assault under [section 3 of the 2009 Act](#).

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy in other words the right to choose what happens to their body. The law is that no one should be subjected to unwanted sexual activity. There must be consent. A person must be in a position to make a choice.

The crime of sexual assault consists of:

[The following can be adapted as appropriate - irrelevant activity should normally be omitted]

- the intentional [or reckless] sexual penetration, by any means, including penetration by the accused's penis, and to any extent, of the complainer's vagina, anus or mouth,
- intentionally [or recklessly] touching the complainer sexually,
- engaging in any other form of sexual activity in which the accused intentionally [or recklessly] has physical contact with the complainer, including bodily contact, contact by means of an implement, and whether through clothing or not,
- intentionally [or recklessly] ejaculating semen on to the complainer, or
- intentionally [or recklessly] emitting urine or saliva on to the complainer sexually.

The [act] must take place without the complainer's consent, and without any reasonable belief on the part of the accused that the complainer was consenting.

[In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

The conduct

In this case it is alleged that the accused [intentionally/recklessly] [penetrated/touched] the complainer, sexually, and without the complainer's consent.

[Where penetration is alleged: Any degree of penetration is enough. Ejaculation of semen is not necessary.]

An action or activity is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

[One or more of the following directions on intention should be given:]

- The action or activity must be intentional. Intentional means deliberate. Whether an activity is deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- Or:

In this case it is not disputed that [specify the conduct] was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:* The action or activity must be intentional or reckless. Intentional means deliberate. Whether the accused acted deliberately or recklessly can be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to and complete disregard of the consequences.

Consent

[Use [directions from s1](#) as appropriate.]

Reasonable belief

[Use [directions from s1](#) as appropriate.]

Corroboration

Both the commission of the crime and that the accused committed it must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally [or recklessly] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- Where the complainer is an essential witness

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of distress

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of injury

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- An [absence of physical resistance or physical force direction](#) (section 288DB).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused engaged in the activity described in the charge;
2. The accused did so intentionally [or recklessly]
3. The activity was sexual;
4. The activity took place without the complainer's consent;

[If appropriate]

5. The accused had no reasonable belief that the complainer was consenting.

Section 4: Sexual coercion

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual coercion under [section 4 of the 2009 Act](#).

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy in other words the right to choose what happens to their body. The law is that no one should cause another person to take part in a sexual activity without their consent. There must be consent. A person must be in a position to make a choice.

The crime of sexual coercion consists of the accused intentionally causing the complainer to participate in a sexual activity without the complainer's consent, and without any reasonable belief that the complainer was consenting.

[In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

The conduct

In this case it is alleged that the accused intentionally caused the complainer to [specify the alleged conduct] without his/her/their consent.

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

"Causing" simply means that there must be some direct connection between what the accused did and the complainer's resulting conduct.

Causing does not need to involve compulsion.

[Where relevant:] Physical contact between the accused and the complainer may be involved, but is not necessary.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and the nature of the behaviour.

Consent

[Use [directions from s1](#) as appropriate.]

Reasonable belief

[Use [directions from s1](#) as appropriate.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally does not need to be corroborated.

[One or more of the following directions should be given where relevant:]

- Where the complainer is an essential witness

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of distress

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of injury

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- An [absence of physical resistance or physical force direction](#) (section 288DB).

- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused caused the complainer to participate in the activity described in the charge;
2. The accused did so intentionally;
3. The activity was sexual;
4. The accused did so without the complainer's consent;

[If appropriate:]

5. The accused had no reasonable belief that the complainer was consenting.

Section 5: Coercing a person into being present during a sexual activity

Law

[Section 5: Coercing a person into being present during a sexual activity-](#)

1. If a person ("A")—
 - a. without another person ("B") consenting, and
 - b. without any reasonable belief that B consents,either intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of B or intentionally and for a purpose mentioned in that subsection causes B to be present while a third person engages in such an activity, then A commits an offence, to be known as the offence of coercing a person into being present during a sexual activity.
2. The purposes are—
 - a. obtaining sexual gratification,
 - b. humiliating, distressing or alarming B.

3. Without prejudice to the generality of subsection (1), the reference in that subsection—
 - a. to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
 - b. to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

Section 49: Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36-

1. For the purposes of; [sections 5 to 9, 22 to 26](#) and [32 to 36](#), A's purpose was-
 - a. obtaining sexual gratification, or
 - b. humiliating, distressing or alarming B,if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.
2. In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The accused must intentionally engage in the sexual activity in the presence of the complainer or intentionally cause the complainer to be present while a third person engages in such an activity.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Possible form of direction

Section 5: Coercing a person into being present during a sexual activity

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of coercing a person into being present during a sexual activity under [section 5 of the Act](#).

Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. That right also protects a person from being present during a sexual activity if they did not consent to that. There must be consent. A person must be in a position to make a choice.

The crime consists of the accused:

- intentionally engaging in a sexual activity in the presence of the complainer
- [and/or]
- intentionally causing the complainer to be present while a third person engages in a sexual activity in the presence of the complainer;

and doing so to obtain sexual gratification, or to humiliate, distress or alarm the complainer.

The crime is committed where that is done without the complainer's consent, and without any reasonable belief that the complainer consented.

[In this case however I direct you that no issue of reasonable belief arises for consideration.]

The conduct

In this case it is alleged that the accused [specify the alleged conduct] .

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

"Causing" simply means that there must be some direct connection between what the accused did and the complainer's presence. Causing does not need to involve compulsion.

[Where appropriate: Physical contact between the accused and the complainer may be involved, but is not necessary.]

It is enough for the Crown to show that the complainer was present and could have seen what happened. It need not show that the complainer did see.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

[*Where appropriate:* Engaging in a sexual activity in the complainer's presence includes the accused engaging in it in a place in which the accused can be observed by the complainer, other than by the complainer looking at an image. Causing the complainer to be present while a third party is engaging in such a sexual activity, includes a third party engaging in it in a place in which he/she/they can be observed by the complainer, other than by the complainer looking at an image.]

The accused's purpose

The accused must have acted in the presence of the complainer for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the complainer.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is neither here nor there.

How do you judge the accused's purpose? Consider the circumstances and ask yourselves the question: Why would the accused engage in a sexual activity in the presence of the complainer? [and/or as appropriate] [Why would the accused cause the complainer to be present while a third party engages in a sexual activity?]

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the complainer, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Consent

[Use [*directions from s1*](#) as appropriate.]

Reasonable belief

[Use [*directions from s1*](#) as appropriate.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of injury**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- An [absence of physical resistance or physical force direction](#) (section 288DB).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused engaged in *[specify the activity]* in the presence of the complainer;

[Where appropriate:] The accused intentionally caused the complainer to be present when a third party engaged in [specify the activity];

2. The accused did so intentionally;
3. The activity was sexual;
4. The accused did so without the complainer's consent;

[If appropriate:]

The accused had no reasonable belief that the complainer was consenting.

5. It can reasonably be inferred in all the circumstances that the accused's purpose was to obtain sexual gratification / humiliate, distress or alarm the complainer.

Section 6: Coercing a person to look at a sexual image

Law

Section 6: Coercing a person into looking at a sexual image-

1. If a person ("A") intentionally and for a purpose mentioned in subsection (2) causes another person ("B")-
 - a. without B consenting, and
 - b. without any reasonable belief that B consents,to look at a sexual image, then A commits an offence, to be known as the offence of coercing a person into looking at a sexual image.
2. The purposes are—
 - a. obtaining sexual gratification,
 - b. humiliating, distressing or alarming B.
3. For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—
 - a. A engaging in a sexual activity or of a third person or imaginary person so engaging,
 - b. A's genitals or the genitals of a third person or imaginary person.

Section 49: Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36-

1. For the purposes of [sections 5 to 9, 22 to 26](#) and [32 to 36](#), A's purpose was-
 - a. obtaining sexual gratification, or
 - b. humiliating, distressing or alarming B,if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.
2. In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The accused must intentionally cause the complainer to look at the image, but the purpose need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Possible form of direction

Section 6: Coercing a person to look at a sexual image

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of causing a person to look at a sexual image under [section 6 of the 2009 Act](#).

Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. That right also protects a person from being made to look at a sexual image without their consent. There must be consent. A person must be in a position to make a choice.

The crime consists of the accused intentionally causing the complainer to look at a sexual image and doing so to obtain sexual gratification, or to humiliate, distress or alarm the complainer.

The crime is committed where that is done without the complainer's consent, and without any reasonable belief that the complainer consented.

[In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

The conduct

In this case it is alleged that the accused made the complainer look at [specify sexual image].

A sexual image is an image produced in any way, whether still or moving, of:

- the accused engaging in a sexual activity, or of a third party or an imaginary person doing so, or
- the genitals of the accused, or of a third party or of an imaginary person.

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

"Causing" means that there must be some direct connection between what the accused did and the result which happened. Causing need not involve compulsion. Taking the person by surprise, e.g., by putting a sexual image among other images being shown would be enough.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

The accused's purpose

The accused must have acted for the purpose of obtaining sexual gratification, or to humiliate, alarm or distress the complainer. Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose? Consider the nature of the image and ask yourselves the question, "Why would the accused cause the complainer to look at the image?"

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain

sexual gratification, or to humiliate, distress, or alarm the complainer, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Consent

[Use [directions from s1](#) as appropriate.]

Reasonable belief

[Use [directions from s1](#) as appropriate.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- Where the complainer is an essential witness

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of distress

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of injury

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on “myths” should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused caused the complainer to look at a sexual image;
2. The accused did so intentionally;
3. It can reasonably be inferred in all the circumstances that the accused’s purpose in doing that was to obtain sexual gratification / humiliate, distress or alarm the complainer;
4. The accused did so without the complainer’s consent;

[If appropriate:]

5. The accused had no reasonable belief that the complainer was consenting.

Section 7: Communicating indecently

Law

Section 7: Communicating indecently etc-

1. If a person (“A”), intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, another person (“B”)-
 - a. without B consenting to its being so sent or directed, and
 - b. without any reasonable belief that B consents to its being so sent or directed,then A commits an offence, to be known as the offence of communicating indecently.
2. If, in circumstances other than are as mentioned in subsection (1), a person (“A”), intentionally and for a purpose mentioned in subsection (3), causes

another person ("B") to see or hear, by whatever means, a sexual written communication or sexual verbal communication—

- a. without B consenting to seeing or as the case may be hearing it, and
- b. without any reasonable belief that B consents to seeing or as the case may be hearing it,

then A commits an offence, to be known as the offence of causing a person to see or hear an indecent communication.

3. The purposes are—

- a. obtaining sexual gratification,
- b. humiliating, distressing or alarming B.

4. In this section—

"written communication" means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

"verbal communication" means a communication in whatever verbal form, and without prejudice to that generality includes—

- a. communication which comprises sounds of sexual activity (whether actual or simulated), and
- b. communication by means of sign language.

Section 49: Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36-

1. For the purposes of sections 5 to 9, 22 to 26 and 32 to 36, A's purpose was—
 - a. obtaining sexual gratification, or
 - b. humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

2. In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The provision was examined in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The High Court of Justiciary upheld the sheriff, who had been overturned by the Sheriff Appeal Court, in determining that a taxi driver had committed the offence in speaking to two young women (18 and 21) who entered his taxi at 3am without having sufficient funds on them to pay the fare but had enough money available at home. When they told him of the situation, he asked "what else can you offer?" and when they enquired what he meant he replied, "sex." Both felt uncomfortable and unsafe, and one of them was frightened. They left the taxi and took a photo of the licence number.

In these circumstances, the sheriff had been entitled to find that intentionally and for the purpose of obtaining sexual gratification the appellant had directed a sexual verbal communication at them without either of them consenting.

The court examined section 49 and found that the test is an objective one. The court was not directed towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes can reasonably be inferred from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification. The only defence potentially available would be reasonable belief but it was not available in the circumstances of this case.

Possible form of direction

Section 7: Communicating indecently

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of communicating indecently under [section 7 of the 2009 Act](#).

Every person has a right to sexual autonomy, in other words the right to choose what happens to their body. The right extends further. The law protects a person's freedom from being subjected to sexual language without their consent where it is directed for unlawful purposes which I will explain. There must be consent. A person must be in a position to make a choice.

Where the charge is under section 7(1):

The crime consists of the accused:

[Select as appropriate]

- intentionally sending, by any means, a sexual written communication, to the complainer; or
- intentionally directing, by any means, a sexual verbal communication, at the complainer;

Where the charge is under section 7(2):

The crime consists of the accused:

- intentionally causing the complainer to see or hear, by any means, a sexual written communication or verbal communication;

The direction continues here for both 7(1) and 7(2):

The crime is committed where that is done without the complainer's consent, and without any reasonable belief that the complainer consented. [*In most cases:* In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

Finally, the accused's purpose must have been to obtain sexual gratification, or to humiliate, distress or alarm the complainer.

The conduct

In this case it is alleged that the accused [summarise allegation].

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

A "written communication" is one in any written form. It is wide enough to cover writing from somebody other than the accused, such as an extract from a book or a magazine.

A "verbal communication" is one in any verbal form. It includes a communication which comprises the sound of sexual activity, actual or simulated. It also covers communication by sign language.

"Sending" and "directing" have their ordinary meaning. The Crown does not need to show that what was sent or directed was actually received or heard. Just sending it is enough if the accused has done all he/she/they needs to do for the complainer to receive it.

"Causing", where the accused has not sent or directed the communication, simply means that there must be some direct connection between whatever the accused did and the result which happened, namely the seeing or hearing of it by the complainer.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

The accused's purpose

The accused must have [done x] for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the complainer.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the complainer, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

How do you judge purpose?

Consider the nature of the communication and ask yourselves the question, "Why would a person send it / direct it at / cause it to be seen / heard by, the complainer?"

Consent

[Use [directions from s1](#) as appropriate.]

Reasonable belief

[Use [directions from s1](#) as appropriate.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- Where the complainer is an essential witness

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of distress

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of injury

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge, you must be satisfied that:

1. [s7(1)] The accused sent a written communication to [or directed a verbal communication at] the complainer

Or

[s7(2)] The accused caused the complainer to see, or hear, a written or verbal communication;

2. The accused did so intentionally;

3. The content of the communication was sexual;

4. It can reasonably be inferred in all the circumstances that the accused did so to obtain sexual gratification, or to humiliate, distress or alarm the complainer;
5. The complainer did not consent to the communication being sent or directed/seeing or hearing the communication;

[If appropriate]

6. The accused had no reasonable belief that the complainer was consenting.

Section 8: Sexual exposure

Law

The [provision](#) makes clear that the accused must expose his/her/their genitals deliberately and intend that the complainer will see them.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Possible form of direction

Section 8: Sexual exposure

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual exposure under [section 8 of the 2009 Act](#).

Every person has a right to sexual autonomy in other words the right to choose what happens to their body. That right also protects a person from being exposed to unwanted sexual behaviour where it is directed for unlawful purposes which I will explain. There must be consent. A person must be in a position to make a choice.

The crime consists of the accused intentionally exposing the accused's genitals in a sexual manner to the complainer, with the intention that the complainer will see

them, and doing so to obtain sexual gratification, or to humiliate, distress or alarm the complainer.

The crime is committed where that is done without the complainer's consent, and without any reasonable belief that the complainer consented. [*In most cases:* In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

The conduct

In this case it is alleged that the accused [specify activity] without the complainer's consent [*Or:* without any reasonable belief that the complainer consented].

The accused must have acted intentionally in two respects. First, the accused must have deliberately exposed his/her/their genitals *and*, secondly, the accused must have intended that the complainer would see them.

You can infer that the accused acted deliberately and intended the complainer to see his/her/their genitals, from what is proved to have been said and/or done, the nature of the behaviour and the circumstances in which it happened.

The exposure must have been in a sexual manner. Exposure is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

[*Where appropriate:*

The exposure must be of the genitals. It would not be enough for a conviction if the exposure was of the bottom or the breasts, even if that was intended to obtain sexual gratification or to humiliate, distress or alarm.]

The exposure must have been to the complainer in particular and done with the intention that the complainer would see the genitals. The accused must have acted intentionally, not just recklessly.

[*Where appropriate:*

If the exposure was not initially intentional, for example if the accused had been urinating and was unaware of the presence of the complainer, but the exposure was persisted in after the accused was aware that the complainer could see the genitals, from that point the accused would have been acting intentionally].

The accused's purpose

The accused must have [done x] for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the complainer.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the person, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed is irrelevant.

How do you judge the accused's purpose?

Consider what is proved to have happened and ask yourselves the question, "Why would the accused do that?"

Consent

[Use [directions from s1](#) as appropriate.]

Reasonable belief

[Use [directions from s1](#) as appropriate.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge, you must be satisfied that:

1. The accused exposed his/her/their genitals to the complainer, intending the complainer to see them;
2. The accused acted intentionally;
3. The exposure was in a sexual manner;
4. It can be reasonably inferred in all the circumstances that the accused acted to obtain sexual gratification, or to humiliate, distress or alarm the complainer;
5. The accused did so without the complainer's consent;

[If appropriate:]

6. The accused had no reasonable belief that the complainer was consenting.

Section 9: Voyeurism

Law

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect

towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification.

Possible form of direction

Section 9: Voyeurism

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of voyeurism under [section 9 of the 2009 Act](#).

Every person has a right to sexual autonomy in other words the right to choose what happens to their body. That right also protects a person from being subjected to unwanted intrusion on their sexual privacy where it is directed for unlawful purposes which I will explain. There must be consent. A person must be in a position to make a choice.

The crime of voyeurism consists of the accused:

[The following can be adapted as appropriate - irrelevant activity should normally be omitted]

- observing a person doing a **private act**, to obtain sexual gratification for himself/herself, or to humiliate, distress or alarm the person (or both)
- operating equipment with the intention of enabling himself/herself, or anyone else, to observe a person doing a **private act**, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the person (or both)
- recording a person doing a **private act**, with the intention that the accused or anyone else, will look at an image of the person doing a **private act**, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the person (or both), or
- operating equipment beneath a person's clothing, with the intention that the accused, or anyone else, will see the person's genitals or buttocks, exposed or covered with underwear, or will see the underwear, in circumstances where these would not otherwise be visible, to obtain sexual gratification for

himself/herself or for the other party, or to humiliate, distress or alarm the person (or both)

- recording an image beneath the person's clothing of the person's genitals or buttocks, exposed or covered with underwear, or of the underwear, in circumstances where these would not otherwise be visible, with the intention that the accused, or anyone else, will look at the image, to obtain sexual gratification for himself/herself or for the other party, or to humiliate, distress or alarm the person (or both)
- installing equipment, or constructing or adapting a structure or part of a structure with the intention of enabling himself/herself, or anyone else, to do any of these things,

and doing so without the person's consent, and without any reasonable belief that the person consented. [*In most cases:* In this case, however, I direct you that no issue of reasonable belief arises for consideration.]

The conduct

In this case it is alleged that the accused [summarise the allegation].

[*Give the following directions as appropriate:*]

- **Where the charge involves a complainer doing a private act**

The law is that a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and:

[*Select as appropriate:*]

- the person's genitals, buttocks or breasts are exposed or covered only with underwear,
- the person is using a lavatory, or
- the person is doing a sexual act that is not of a kind ordinarily done in public.

- **"Operating equipment"**

"Operating equipment" includes enabling or securing its activation by another person without that person's knowledge.

- **"Structure"**

Structure includes a tent, vehicle or vessel or other temporary or movable structure.

- **On a charge alleging that the accused acted “with the intention”**

Where the charge states, “*with the intention of doing [x]*”, it means trying to make it happen, which is something you can infer from what was said and/or done, the nature of the behaviour and the circumstances in which it happened. Whether or not [x] was achieved is irrelevant.

The accused’s purpose

The accused must have acted for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the complainer.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

The Crown does not need to prove what the accused’s actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the person that is sufficient. Whether the person was in fact humiliated, distressed or alarmed is irrelevant.

How do you judge the accused's purpose?

Consider the nature of the accused’s actions and ask yourselves the question: “*Why would a person do that?*”

[A judge may wish to specify the conduct libelled in posing the question.]

Consent

[Use [directions from s1](#) as appropriate.]

Reasonable belief

[Use [directions from s1](#) as appropriate.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be

corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge, you must be satisfied that

1. The accused did what is described in the charge;
2. It can be reasonably inferred in all the circumstances that the accused's conduct was for the purpose of obtaining sexual gratification for the accused (or another), or to humiliate, distress or alarm the complainer;
3. The accused did so without the complainer's consent;

[If appropriate:]

4. The accused had no reasonable belief that the complainer was consenting.

Section 11: Administering a substance for sexual purposes

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge under [section 11 of the 2009 Act](#) of administering a substance, or causing a substance to be taken, for sexual purposes.

The law aims to protect a person's bodily privacy. Every person has a right to sexual autonomy in other words the right to choose what happens to their body. The law is that no one should be subjected to sexual activity to which they do not consent.

There must be consent. A person must be in a position to make a choice and section 11 makes it a crime to try to override, by certain means, a person's ability to choose.

The crime consists of:

- intentionally administering a substance to the complainer

Or

intentionally causing a substance to be taken by the complainer;

- without the complainer knowing; and
- without any reasonable belief that the complainer knows. [*In most cases: In this case, however, I direct you that no issue of the accused having a reasonable belief arises for consideration*].

The crime is committed where the accused does that for the purpose of stupefying or overpowering the complainer, in order to enable the accused or someone else to engage in a sexual activity with the complainer.

The conduct

In this case it is alleged that the accused [*summarise the allegation*].

"Administering" means giving.

"Causing a substance to be taken" describes actions less direct and immediate.

"Causing" means that there must be some direct connection between what the accused did and the person's resulting action. It covers a variety of situations, like putting a drug into a bottle of lemonade, intending it to be drunk by the person, or persuading someone else to spike the drink.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what has been proved to have been said and/or done and the circumstances in which it happened.

Absence of knowledge by the complainer

The complainer must not have known that they were taking the substance. The fact that the complainer did not know that the accused had administered the substance, or had caused the complainer to take it, can be inferred from what has been proved to have been said and/or done and the circumstances in which it happened.

If, however, the complainer *did* know about the substance but the accused, by act or omission, led the complainer reasonably to believe that the substance was of substantially less strength or quantity than it actually was, then the complainer's knowledge of the substance (or the accused's belief as to the complainer's knowledge) must be disregarded. So, for example, if the accused gives the complainer a drink knowing that it has substantially more vodka in it than the complainer believes, then the law says that the complainer does not know what he/she/they is/are consuming.

Reasonable belief of knowledge

[Use [*directions from s1*](#) as appropriate.]

The accused's purpose

The accused must have acted for the purpose of stupefying or overpowering the complainer in order to enable the accused, or someone else, to engage in a sexual activity with the complainer. An activity is sexual if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements in the charge are descriptive only, to give the accused fair notice

of how this crime is said to have been committed, and do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

You can infer that the accused acted intentionally and can infer the accused's purpose in administering the substance from what has been said and/or done and the circumstances in which it happened. Intention and purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [background of domestic abuse direction](#).
- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge, you must be satisfied that:

1. The accused administered the substance or caused the substance to be taken by the complainer;
2. The accused did so intentionally;

3. That was done to stupefy or overpower the complainer;
4. That was done to enable someone to engage in a sexual activity with the complainer;
5. The complainer did not know he/she/they was/were being given the substance;

Or

The accused led the complainer to believe that the substance was of substantially less strength or quantity than it actually was;

[If appropriate:]

6. The accused had no reasonable belief that the complainer knew he/she/they was/were being given the substance.

Section 18: Rape of a young child

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of rape of a young child under [section 18 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime consists of the intentional or reckless penetration, to any extent, by the accused's penis of the child's:

- vagina,
- anus, or
- mouth

A child under the age of 13 years cannot consent to sexual activity and consent is therefore irrelevant.

Penetration

Any degree of penetration is enough. Ejaculation of semen is not necessary.

[One or more of the following directions on intention should be given:]

- Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- *Or:*

In this case it is not disputed that penetration was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:*

Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there is evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how is alleged to have been committed. That penetration was intentional [or reckless] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused penetrated the child's [*specify body part*] with his penis.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of injury**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the child's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- An [absence of physical resistance or physical force direction](#) (section 288DB).

- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge you must be satisfied that:

1. The accused penetrated the child's vagina/anus/mouth with his penis;
2. Penetration was intentional [or reckless];

[Only where in issue:]

3. The child was under 13 at the time.

Section 18: Assault with intent to rape (young child)

Note: This is a common law crime with the aggravation of intent to commit a statutory one. It is included here for ease of reference. Intent is always a matter of inference from the primary facts and for these reasons the aggravation does not require to be proved by corroborated evidence.

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of assault at common law with intent to rape under [section 18 of the 2009 Act](#).

Assault

An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults.

Whether a person has acted deliberately can be inferred from what has been said and/or done and from the nature of the behaviour.

[Where appropriate:]

- Weapons may or may not be involved.
- Injury may or may not result. Menaces or threats producing fear or alarm in the other person are assaults.

- *[Where injury libelled: use the direction on injuries in assault as appropriate]*
- The word "repeatedly" means more than once.

If you are satisfied that the accused did assault the child, you must then go on to consider whether that was done with the intention of raping the child.

With intent to rape

If a child under 13 was deliberately attacked by the accused with the intention of raping the child, that is the crime of assault of a young child with intent to rape.

Rape is the intentional penetration, to any extent, by the accused's penis of the child's:

- vagina
- anus
- mouth

A child under the age of 13 cannot consent to sexual activity and consent is therefore irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [Proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there is evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Whether the accused intended to rape the child can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

If you decided to convict the accused of assault but were not satisfied that his intention was to rape then you would delete from the charge the words “*with intent to rape*”.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated. That the accused intended to rape the child does not need to be corroborated. Intention can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child’s evidence to be credible and reliable in every detail but before you could convict the accused of assault you would have to regard the child’s evidence as credible and reliable in its essentials, namely that the accused assaulted the child. In deciding whether you accept the child’s evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of injury**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- An [absence of physical resistance or physical force direction](#) (section 288DB).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused deliberately attacked the child;
2. The accused acted with the intention of raping the child;

[and only where in issue:]

3. The child was under 13 at the time

If you decided to convict the accused of assault of a child but were not satisfied that the accused's intention was to rape then you would delete from the charge the words "*with intent to rape*". If you were satisfied that the accused's intention was to rape then those words would remain in the charge.

Section 19: Sexual assault of a young child by penetration

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual assault of a young child by penetration under [section 19 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime consists of the intentional or reckless sexual penetration, to any extent, by the accused with any part of his body, including his penis, or anything else, of the child's:

- vagina, or
- anus

A child under the age of 13 cannot consent to sexual activity and consent is therefore irrelevant.

Penetration

In this case it is alleged that the accused penetrated the complainer's vagina/anus with *[specify]*.

Any degree of penetration is enough. Ejaculation of semen is not necessary.

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

[One or more of the following directions on intention should be given:]

- Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- *Or:*

In this case it is not disputed that penetration was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:*

Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime and that the accused committed it must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only to give the accused fair notice of how the sexual assault is alleged to have been committed. They do not need to be corroborated. That penetration was intentional [or reckless] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused penetrated the child's *[specify body part]* with his *[specify the body part or object]*.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA)
- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge you must be satisfied that:

1. The accused penetrated the child's vagina or anus with a part of the accused's body or with something else;
2. Penetration was intentional [or reckless];
3. Penetration was sexual;

[Only where in issue:]

4. The child was under 13 at the time.

Section 20: Sexual assault on a young child

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual assault on a young child under [section 20 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime of sexual assault consists of:

[The following can be adapted as appropriate - irrelevant activity should normally be omitted]

- the intentional or reckless sexual penetration, by any means including penetration by the accused's penis and to any extent, of the child's vagina, anus or mouth
- intentionally or recklessly touching the child sexually
- engaging in any other form of sexual activity in which the accused intentionally or recklessly has physical contact with the child, including bodily contact, contact by means of an implement, and whether through clothing or not
- intentionally or recklessly ejaculating semen on to the child
- intentionally or recklessly emitting urine or saliva on to the child sexually

A child under the age of 13 years cannot consent to sexual activity and consent is therefore irrelevant.

The conduct

In this case it is alleged that the accused [specify the alleged conduct].

[Where, exceptionally, penetration is alleged use [directions from s1](#) as appropriate.]

Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

[One or more of the following directions on intention should be given:]

- The action or activity must be intentional. Intentional means deliberate. Whether an activity is deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- Or:

In this case it is not disputed that [specify the conduct] was intentional.

- Or in the exceptional case, where recklessness may arise on the evidence:

The action or activity must be intentional or reckless. Intentional means deliberate. Whether the accused acted deliberately or recklessly can be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to and complete disregard of the consequences.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements in the charge are descriptive only, to give the accused fair notice of how the sexual assault is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally [or recklessly] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused [specify the conduct alleged].

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused engaged in the activity described in the charge;
2. The accused acted intentionally [or recklessly];
3. The activity was sexual;

[Only where in issue:]

4. The child was under 13 at the time.

Section 21: Causing a young child to participate in a sexual activity

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of causing a young child to participate in a sexual activity under [section 21 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime consists of the accused intentionally causing the young child to participate in a sexual activity.

A child under the age of 13 years cannot consent to sexual activity and consent is therefore irrelevant.

The conduct

In this case it is alleged that the accused intentionally caused the child to [*specify the alleged conduct*].

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

"Causing" simply means that there must be some direct connection between what the accused did and the child's resulting conduct.

Causing does not need to involve compulsion.

[*Where relevant:*] Physical contact between the accused and the child may be involved, but not necessarily so. Causing the child to engage in sexual activity alone, or with a third party is enough.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements in the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused caused the child to participate in a sexual activity.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused caused the complainer to participate in the activity described in the charge;
2. The accused acted intentionally;
3. The activity was sexual;

[Only where in issue:]

4. The complainer was under 13 at the time.

Section 22: Causing a young child to be present during a sexual activity

Law

22 Causing a young child to be present during a sexual activity

(1) If a person ("A") either—

(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child ("B") who has not attained the age of 13 years, or

(b) intentionally and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,

then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(3) Without prejudice to the generality of subsection (1), the reference—

(a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and

(b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B.

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9, 22 to 26](#) and [32 to 36](#), A's purpose was—

(a) obtaining sexual gratification, or

(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The accused must intentionally engage in the sexual activity in the presence of the complainer or intentionally cause the complainer to be present while a third person engages in such an activity.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Section 22: Causing a young child to be present during a sexual activity

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of causing a young child to be present during a sexual activity under [section 22 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime consists of the accused:

- intentionally engaging in a sexual activity in the presence of the child,
- [and/or]
- intentionally causing the child to be present while a third person engages in a sexual activity.

And doing so to obtain sexual gratification, or to humiliate, distress or alarm the child.

A child under the age of 13 years cannot consent to such activity and consent is therefore irrelevant.

The conduct

In this case it is alleged that the accused [specify the conduct alleged].

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

"Causing" simply means that there must be some direct connection between what the accused did and the child's presence. Causing does not need to involve compulsion.

[*Where necessary:* Physical contact between the accused and the child may be involved, but is not necessary.]

It is enough for the Crown to show that the child was present and could have seen what happened. It need not show that child did see the sexual activity.

[*Where appropriate:*] Engaging in a sexual activity in the child's presence includes the accused engaging in it in a place in which the accused can be observed by the child, other than by the child looking at an image.

[*Where appropriate:*] Causing the child to be present while a third party is engaging in a sexual activity, includes a third party engaging in it in a place in which the third party can be observed by the child, other than by the child looking at an image.]

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

The accused must have deliberately acted in the presence of the child for the purpose of obtaining sexual gratification or for humiliating, distressing or alarming the child.

The accused's purpose

The accused must have acted for the purpose of obtaining sexual gratification, or to humiliate, distress or alarm the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose? Consider the circumstances and ask yourselves the question: Why would the accused engage in a sexual activity in the presence of the child? [*and/or as appropriate:* Why would the accused cause the child to be present while a third party engages in a sexual activity?]

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether the child was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused engaged in a sexual activity in the presence of the child, [and/or: caused the child to be present while another person engaged in a sexual activity in the presence of the child].

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc.](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused engaged in an activity as described in the charge in the presence of the child;

[and/or where appropriate:]

The accused caused the child to be present when a third party engaged in an activity as described in the charge;

2. The accused did so intentionally;

3. The activity was sexual;
4. It can reasonably be inferred in all the circumstances that the accused's purpose in doing that was to obtain sexual gratification, or to humiliate, distress or alarm the child,

[and only where in issue:]

5. The child was under 13 at the time.

Section 23: Causing a young child to look at a sexual image

Law

23 Causing a young child to look at a sexual image

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

(2) The purposes are—

- (a) obtaining sexual gratification,
- (b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

- (a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
- (b) A's genitals or the genitals of a third person or imaginary person.

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9](#), [22 to 26](#) and [32 to 36](#), A's purpose was—

- (a) obtaining sexual gratification, or
- (b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The accused must intentionally cause the complainer to look at the image, but the purpose need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Section 23: Causing a young child to look at a sexual image

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of causing a young child to look at a sexual image under [section 23 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime consists of the accused intentionally causing the child to look at a sexual image and doing so to obtain sexual gratification, or to humiliate, distress or alarm the child.

A child under the age of 13 years cannot consent to such activity and consent is therefore irrelevant.

The conduct

In this case it is alleged that the accused caused the child to look at [a sexual image].

A "sexual image" is an image produced in any way, whether still or moving, of:

- the accused engaging in a sexual activity, or of a third party or an imaginary person doing so, or
- of the genitals of the accused, or of a third party or of an imaginary person.

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

"Causing" means that there must be some direct connection between what the accused did and the result which happened. Causing need not involve compulsion. Taking the child by surprise, for example, by putting a sexual image among other images being shown would be enough.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

The accused's purpose

The accused must have acted for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose? Consider the nature of the image and ask yourselves the question, "Why would the accused cause the child to look at the image?"

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether the child was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused caused the child to look at a sexual image.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused caused the child to look at a sexual image;
2. The accused did so intentionally;
3. It can reasonably be inferred in all the circumstances that the accused's purpose in doing that was to obtain sexual gratification, or to humiliate, distress or alarm the child;

[and only where in issue:]

4. The child was under 13 at the time.

Section 24: Communicating indecently with a young child

Law

24 Communicating indecently with a young child etc.

(1) If a person ("A"), intentionally and for a purpose mentioned in subsection (3)—

(a) sends, by whatever means, a sexual written communication to, or

(b) directs, by whatever means, a sexual verbal communication at,

a child ("B") who has not attained the age of 13 years, then A commits an offence, to be known as the offence of communicating indecently with a young child.

(2) If, in circumstances other than are as mentioned in subsection (1), a person ("A"), intentionally and for a purpose mentioned in subsection (3) causes a child ("B") who has not attained the age of 13 years to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing a young child to see or hear an indecent communication.

(3) The purposes are—

- (a) obtaining sexual gratification,
- (b) humiliating, distressing or alarming B.

(4) In this section—

"written communication" means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

"verbal communication" means a communication in whatever verbal form, and without prejudice to that generality includes—

- (a) a communication which comprises sounds of sexual activity (whether actual or simulated), and
- (b) a communication by means of sign language.

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9, 22 to 26](#) and [32 to 36](#), A's purpose was—

- (a) obtaining sexual gratification, or
- (b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The equivalent adult provision (section 7) was examined in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The High Court of Justiciary upheld the sheriff, who had been overturned

by the Sheriff Appeal Court, in determining that a taxi driver had committed the offence in speaking to two young women (18 and 21) who entered his taxi at 3am without having sufficient funds on them to pay the fare but had enough money available at home. When they told him of the situation, he asked "what else can you offer?" and when they enquired what he meant he replied, "sex." Both felt uncomfortable and unsafe, and one of them was frightened. They left the taxi and took a photo of the licence number.

In these circumstances, the sheriff had been entitled to find that intentionally and for the purpose of obtaining sexual gratification the appellant had directed a sexual verbal communication at them without either of them consenting.

The court examined section 49 and found that the test is an objective one. The court was not directed towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes can reasonably be inferred from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification. The only defence potentially available would be reasonable belief but it was not available in the circumstances of this case.

Section 24: Communicating indecently with a young child

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of communicating indecently with a young child under [section 24 of the 2009 Act](#).

The Act defines a young child as a child under 13.

Where the charge is under section 24(1):

The crime consists of the accused:

[Select as appropriate]

- intentionally sending, by any means, a sexual written communication, to the child; or
- intentionally directing, by any means, a sexual verbal communication, at the child.

And doing so to obtain sexual gratification, or to humiliate, distress or alarm the child.

Where the charge is under section 24(2):

The crime consists of the accused:

- intentionally causing the child to see or hear, by any means, a sexual written or verbal communication

And doing so to obtain sexual gratification, or to humiliate, distress or alarm the child

The direction continues here for both s24(1) and s24(2):

A child under the age of 13 cannot consent to such communications and consent is therefore irrelevant.

The conduct

In this case it is alleged that the accused [*summarise the allegation*].

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

A "written communication" is one in any written form and covers writing from somebody other than the accused, such as an extract from a book or a magazine.

A "verbal communication" is one in any verbal form and covers communications which include the sound of sexual activity, whether actual or simulated. It also covers communication by sign language.

"Sending" and "directing" have their ordinary meaning. The Crown does not need to show that what was sent or directed was actually received or heard. Just sending it is enough if the accused has done all he/she/they needs to do for the child to receive it.

"Causing" simply means that there must be some direct connection between whatever the accused did and the seeing or hearing of the communication by the child.

The accused must have acted intentionally. Intentional means deliberate. Whether an activity is deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

The accused's purpose

The accused must have acted for the purpose of obtaining sexual gratification, or to humiliate, distress or alarm the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider the nature of the communication and ask yourselves the question, "Why would the accused send it to/direct it at/cause it to be seen/heard by, the child?"

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the child that is sufficient. Whether the child was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused [sent/directed/caused the child to see/caused the child to hear] a sexual communication.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).

- A [lack of emotion direction](#).

Summary:

For the Crown to prove this charge, you must be satisfied that:

1. **[24(1)]** The accused sent a written communication to [or directed a verbal communication at] the child

OR

[24(2)] The accused caused the child to see or hear a written or verbal communication;

2. The accused did so intentionally;

3. The content of the communication was sexual;

4. It can be reasonably inferred in all the circumstances that the accused did so to obtain sexual gratification, or to humiliate, distress or alarm the child;

[and only where in issue:]

5. The child was under 13 at the time.

Section 25: Sexual exposure to a young child

Law

The [provision](#) makes clear that the accused must expose his/her/their genitals deliberately and intend that the young child will see them.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Possible form of direction

Section 25: Sexual exposure to a young child

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of sexual exposure to a young child under [section 25 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime consists of the accused intentionally exposing his/her/their genitals in a sexual manner to a young child, with the intention that the child will see them, and doing so to obtain sexual gratification, or to humiliate, distress or alarm the child.

A child under the age of 13 years cannot consent to such activity and consent is therefore irrelevant.

The conduct

In this case it is alleged that the accused [*summarise the allegation*].

The accused must have acted intentionally in two respects. First, the accused must have deliberately exposed his/her/their genitals and, secondly, the accused must have intended that the child would see them.

You can infer that the accused acted deliberately and intended the child to see his/her/their genitals, from what is proved to have been said and/or done, the nature of the behaviour and the circumstances in which it happened.

The exposure must have been in a sexual manner. Exposure is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

[*Where appropriate:*

The exposure must be of the genitals. It would not be enough for a conviction if the exposure was of the bottom or the breasts, even if that was intended to obtain sexual gratification or to produce humiliation, distress or alarm.]

The exposure must have been to the person (or persons) in particular and done with the intention that that person (or persons) would see the genitals. The accused must have acted intentionally, not just recklessly,

[Where appropriate:

If the exposure was not initially intentional, for example if the accused had been urinating and was unaware of the presence of the child, but the exposure was persisted in after the accused was aware that the child could see the genitals, from that point the accused would have been acting intentionally].

The accused's purpose

The accused must have exposed himself/herself/themselves for the purpose of obtaining sexual gratification, or to humiliate, distress or alarm the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider what is proved to have happened and ask yourselves the question, "Why would the accused do that?"

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether the child was in fact humiliated, distressed or alarmed is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused exposed his genitals to the child in a sexual manner.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on “myths” should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge, you must be satisfied that:

1. The accused exposed his/her/their genitals to the child;
2. The accused did so intentionally and intended that the child would see his/her/their genitals;
3. The exposure was in a sexual manner;
4. It can be reasonably inferred in all the circumstances that he/she/they did so to obtain sexual gratification for herself/himself/themselves, or to humiliate, distress or alarm the child, or both;

[And only where in issue]

5. The child was under 13 at the time.

Section 26: Voyeurism towards a young child

Law

26 Voyeurism towards a young child

(1) If a person (“A”) does any of the things mentioned in subsections (2) to (5) in relation to a child (“B”) who has not attained the age of 13 years, then A commits an offence, to be known as the offence of voyeurism towards a young child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a **private act**.

(3) The second thing is that A operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe—

- (a) B's genitals or buttocks (whether exposed or covered with underwear), or
- (b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

- (a) B's genitals or buttocks (whether exposed or covered with underwear), or
- (b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.

(5) The sixth thing is that A—

- (a) installs equipment, or
- (b) constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).

(6) The purposes referred to in subsection (2) are—

- (a) obtaining sexual gratification,
- (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3), (4), (4A) and (4B) are—

- (a) obtaining sexual gratification (whether for A or C),
- (b) humiliating, distressing or alarming B.

(8) Section 10 applies for the purposes of this section as it applies for the purposes of section 9 (the references in that section to section 9(3), (4A) and (5) being construed as references to subsections (3), (4A) and (5) of this section).

10 Interpretation of section 9

(1) For the purposes of section 9, a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—

- (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
- (b) the person is using a lavatory, or
- (c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) For the purposes of section 9(3) and (4A), operating equipment includes enabling or securing its activation by another person without that person's knowledge.

(3) In section 9(5), "structure" includes a tent, vehicle or vessel or other temporary or movable structure.

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9](#), [22 to 26](#) and [32 to 36](#), A's purpose was—

- (a) obtaining sexual gratification, or
- (b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification.

Possible form of direction

Section 26: Voyeurism towards a young child

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of voyeurism towards a young child under [section 26 of the 2009 Act](#).

The Act defines a young child as a child under 13.

The crime consists of the accused:

[The following can be adapted as appropriate - irrelevant activity should normally be omitted]

- observing the child doing a **private act**, to obtain sexual gratification, or to humiliate, distress or alarm the child, (or both)
- operating equipment with the intention of enabling the accused, or someone else, to observe the child doing a **private act**, and doing so to obtain sexual gratification for himself/herself or for the other person, or to humiliate, distress or alarm the child (or both)
- recording a child doing a **private act** with the intention that the accused or someone else will look at an image of the child doing a private act, and doing so to obtain sexual gratification for himself/herself or for the other person, or to humiliate, distress or alarm the child (or both)
- operating equipment beneath a child’s clothing, with the intention that the accused, or someone else, will see the child’s genitals or buttocks, whether exposed or covered with underwear, or will see the underwear, in circumstances where these would not otherwise be visible, and doing so to obtain sexual gratification for himself/herself or for the other person, or to humiliate, distress or alarm the child (or both)
- recording an image, beneath the child's clothing, of the child's genitals or buttocks, whether exposed or covered with underwear, or of the child’s

underwear, in circumstances where these would not otherwise be visible, and doing so with the intention that the accused, or someone else, will look at the image to obtain sexual gratification, or doing so to humiliate, distress or alarm the child (or both)

- installing equipment, or constructing or adapting a structure, or part of a structure, with the intention of enabling the accused, or someone else, to [specify one of the acts mentioned above]. [*Where necessary:* A structure includes a tent, vehicle or vessel or other temporary or movable structure.]

A child under the age of 13 cannot consent to any such activity and consent is therefore irrelevant.

The conduct

In this case it is alleged that the accused [summarise the allegation].

[*Give the following directions as appropriate:*]

- **Where the charge involves a complainer doing a private act**

The law is that a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and:

[*Select as appropriate:*]

- the person's genitals, buttocks or breasts are exposed or covered only with underwear,
- the person is using a lavatory, or
- the person is doing a sexual act that is not of a kind ordinarily done in public.]

- **"Operating equipment"**

"Operating equipment" includes enabling or securing its activation by another person without that person's knowledge.

- **"Structure"**

Structure includes a tent, vehicle or vessel or other temporary or movable structure.

- **On a charge alleging that the accused acted "with the intention"**

Where the charge states, "*with the intention of*" doing [x]", it means trying to make it happen, which is something you can infer from what was said and/or done, the

nature of the behaviour and the circumstances in which it happened. Whether or not [x] was achieved is irrelevant.

- **Where the charge alleges that the accused acted “with the intention”**

Where the charge states that the accused acted “*with the intention of doing [x]*”, it means that the accused was trying to make that happen. That is something you can infer from what was said and/or done, the nature of the behaviour and the circumstances in which it happened. Whether or not [x] was achieved is irrelevant.

The accused’s purpose

The accused must have acted for the purpose of obtaining sexual gratification [either for himself/herself or someone else] or to humiliate, distress or alarm the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider the nature of the accused’s actions and ask yourselves the question, “Why would the accused do that?”

[A judge may wish to specify the conduct libelled in posing the question]

The Crown does not need to prove what the accused’s actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted so as to obtain sexual gratification [for himself/herself or for someone else], or to humiliate, distress, or alarm the child, that is sufficient. Whether the child was in fact humiliated, distressed or alarmed is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the accused believed the child to be over 13**

It is no defence to this charge that the accused believed that the child had reached the age of 13.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused *[specify the act alleged]*.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused did what is described in the charge;
2. It can be reasonably inferred in all the circumstances that the accused's conduct was for the purpose of obtaining sexual gratification [for himself/herself or another person], or to humiliate, distress or alarm the child;

[and only where in issue]

3. The child was under 13 at the time.

Section 28: Having sexual intercourse with an older child

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of having sexual intercourse with an older child under [section 28 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of the intentional or reckless penetration, to any extent, by the accused's penis of the child's:

- vagina,

- anus, or
- mouth

And where:

- the accused is 16 or over; **and**
- the child is aged 13, 14 or 15

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

Penetration

Any degree of penetration is enough. Ejaculation of semen is not necessary.

[One or more of the following directions on intention should be given:]

- Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- *Or:*

In this case it is not disputed that penetration was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:*

Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the child's age is stated in the charge and has not been challenged or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the child is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See [s40\(1\)](#) and [s41](#): Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused ([s39\(2\)](#)) i.e. accused:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the

accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how this crime is alleged to have been committed. That penetration was intentional [or reckless] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the child's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the child's evidence as credible and reliable in its essentials: namely that the accused penetrated the child's *[specify body part]* with his penis.

In deciding whether you accept the child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- Where there is evidence of a de recenti statement in the context of distress

[Use [directions from s1](#) as appropriate.]

- Other sources of corroboration

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused penetrated the vagina/anus/mouth of the complainer with the accused's penis;
2. That the accused did so intentionally [or recklessly];
[only where in issue]
3. The accused was 16 or over;
4. The complainer was 13, 14 or 15 [Or where appropriate: under 16] at the time.

Section 29: Engaging in penetrative sexual activity with or towards an older child

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of engaging in penetrative sexual activity with or towards an older child under [section 29 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of the intentional or reckless sexual penetration, to any extent and by any part of the accused's body, including his penis or anything else, of the child's:

- vagina or
- anus

And where:

- the accused is 16 or over **and**
- the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

Penetration

Any degree of penetration is enough. Ejaculation of semen is not necessary.

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

[One or more of the following directions on intention should be given:]

- Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- *Or:*

In this case it is not disputed that penetration was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:*

Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

Reckless acts show total indifference to, and complete disregard of, the consequences.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the complainer's age is stated in the charge and has not been challenged or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

*[See **s40(1)** and **s41: Deeming Provision 1**]*

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.]

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused (s39(2)) i.e. accused:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*

- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how this crime is alleged to have been committed. That penetration was intentional [or reckless] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely

that the accused penetrated the complainer's [*specify body part*] with his [*specify the body part or object*].

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [*directions from s1*](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [*directions from s1*](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[*Corroboration generally/Corroboration in rape etc*](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [*delayed reporting direction*](#) (section 288DA).
- A [*lack of emotion direction*](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused penetrated the vagina/anus of the complainer with some part of the accused's body or with something else;
2. Penetration was sexual;
3. Penetration was intentional [or reckless];

[*only where in issue:*]

2. The accused was 16 or over;
3. The complainer was 13, 14 or 15 [Or where appropriate: under 16] at the time.

Section 30: Engaging in sexual activity with or towards an older child

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of engaging in sexual activity with or towards an older child under [section 30 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of:

[The following can be adapted as appropriate - irrelevant activity should normally be omitted]

- the intentional or reckless sexual penetration by any means, including penetration by the accused's penis, and to any extent, of the child’s vagina, anus or mouth
- intentionally or recklessly touching the child sexually
- engaging in any other form of sexual activity in which the accused intentionally or recklessly has physical contact with the child, including bodily contact, contact by means of an implement, and whether through clothing or not
- intentionally or recklessly ejaculating semen on to the child
- intentionally or recklessly emitting urine or saliva on to the child sexually

And doing so where:

- the accused is 16 or over; and
- the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

The conduct

In this case it is alleged that the accused [specify the alleged conduct].

[Where, exceptionally, penetration is alleged use [directions from s1](#) as appropriate.]

Penetration, touching or any other activity is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

Intention

[One or more of the following directions on intention should be given:]

- The penetration / touching / activity must be intentional. Intentional means deliberate. Whether penetration / touching / activity was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- *Or:*

In this case it is not disputed that penetration / the touching / the activity was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:*

Penetration/the touching/the activity must be intentional or reckless. Intentional means deliberate. Whether penetration/touching/activity was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the complainer's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the

accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where the defence is that the age gap between the accused and complainer was less than two years – s39(3)**

It is a defence to a charge of engaging in sexual activity with or towards an older child that, at the time when the conduct took place, the difference in age between the accused and complainer [or where both parties are accused "the parties"] did not exceed two years.

[Where the charge is under Section 30(2)(a) add, as appropriate:

But that defence does not apply to the parts of the charge relating to sexual penetration of the vagina, anus or mouth by the penis or of the vagina or anus with the mouth, tongue or teeth.]

[Where the charge is under Section 30(2)(b) or (c) add, as appropriate:

But that defence does not apply to the parts of the charge involving sexual touching or activity consisting of: (i) the vagina, anus or penis [of either party] being touched sexually by the mouth; or (ii) the vagina, anus or mouth being penetrated by the penis.]

[With the exception of those parts of the charge] That defence is open to the accused. It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how the crime is alleged to have been committed. That sexual activity was intentional [or reckless] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused engaged in sexual activity with, or towards, the complainer.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).

- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused engaged in conduct of the sort described in the charge;
2. The accused did so intentionally [or recklessly];
3. The conduct was sexual;

[Only where in issue:]

4. The accused was 16 or over;
5. The complainer was 13, 14 or 15 *[Or where appropriate: under 16]* at the time.

Section 31: Causing an older child to participate in a sexual activity

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of causing an older child to participate in a sexual activity under [section 31 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of the accused:

- intentionally causing the child to participate in a sexual activity;
- and doing so where the accused is 16 or over, and the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

The conduct

In this case it is alleged that the accused [specify the alleged conduct].

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

"Causing" simply means that there must be some direct connection between what the accused did and the child's resulting conduct.

Causing need not involve compulsion.

[Where relevant] Physical contact between the accused and the child may be involved, but not necessarily so. Causing the child to engage in sexual activity alone, or with a third party is enough.

The accused must have acted intentionally. Intentional means deliberate. Whether any sexual activity was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

Age

- **Where the complainer's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted]

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the

complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where the defence is that the age gap between the accused and complainer was less than two years – s39(3)**

It is a defence to a charge of engaging in sexual activity with or towards an older child that, at the time when the conduct took place, the difference in age between the accused and complainer did not exceed two years.

That defence is open to the accused. It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements in the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused caused the complainer to participate in a sexual activity.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on “myths” should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused caused the complainer to participate in the activity described in the charge;
2. The accused did so intentionally;
3. The activity was sexual;

[And only where in issue]

4. The accused was 16 or over;
5. The complainer was 13, 14 or 15 [Or where appropriate: under 16] at the time.

Section 32: Causing an older child to be present during a sexual activity

Law

(1) If a person (“A”), who has attained the age of 16 years either—

(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child (“B”), who—

(i) has attained the age of 13 years, but

(ii) has not attained the age of 16 years, or

(b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,

then A commits an offence, to be known as the offence of causing an older child to be present during a sexual activity.

(2) The purposes are—

- (a) obtaining sexual gratification,
- (b) humiliating, distressing or alarming B.

(3) Without prejudice to the generality of subsection (1), the reference—

- (a) in paragraph (a) of that subsection to A engaging in a sexual activity in the presence of B, includes a reference to A engaging in it in a place in which A can be observed by B other than by B looking at an image, and
- (b) in paragraph (b) of that subsection to B being present while a third person engages in such an activity, includes a reference to B being in a place from which the third person can be so observed by B

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9](#), [22 to 26](#) and [32 to 36](#), A's purpose was—

- (a) obtaining sexual gratification, or
- (b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The accused must intentionally engage in the sexual activity in the presence of the complainer or intentionally cause the complainer to be present while a third person engages in such an activity.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in *PF Edinburgh v Aziz* [2022] HCJAC 46. The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Possible form of direction

Section 32: Causing an older child to be present during a sexual activity

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of causing an older child to be present during a sexual activity under [section 32 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of the accused:

- intentionally engaging in a sexual activity in the presence of the child;

[and/or]

- intentionally causing the child to be present while a third person engages in a sexual activity in the presence of the child.

And doing so to obtain sexual gratification, or to humiliate, distress or alarm the child.

The crime is committed where that is done when the accused is 16 or over, and the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

The conduct

In this case it is alleged that the accused [describe the conduct alleged].

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

“Causing” simply means that there must be some direct connection between what the accused did and the child's presence. Causing does not need to involve compulsion.

[Physical contact between the accused and the child may be involved, but is not necessary.]

It is enough for the Crown to show that the child was present and could have seen what happened. It need not show that the child did see the sexual activity.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

[If appropriate:] Engaging in a sexual activity in the child's presence includes the accused engaging in it in a place in which the accused can be observed by the child, other than by the child looking at an image. Causing the child to be present while a third party is engaging in such a sexual activity, includes a third party engaging in it in a place in which he/she/they can be observed by the complainer, other than by the complainer looking at an image.

The accused's purpose

The accused must have deliberately acted in the presence of the child for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider what is proved to have happened and ask yourselves the question: Why would the accused engage in a sexual activity in the presence of the complainer? [and/or as appropriate: Why would the accused cause the complainer to be present while a third party engages in a sexual activity?]

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the complainer, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the complainer's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where it is suggested (or there was evidence) that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police

statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where the defence is that the age gap between the accused and complainer was less than two years – s39(3)**

It is a defence to a charge of engaging in sexual activity with or towards an older child that, at the time when the conduct took place, the difference in age between the accused and complainer did not exceed two years.

That defence is open to the accused. It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused caused the complainer to be present during a sexual activity.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused engaged in an activity as described in the charge in the presence of the complainer;

[Or where appropriate: The accused caused the complainer to be present when a third party engaged in an activity as described in the charge];

2. The accused acted intentionally;
3. The activity was sexual;

4. It can reasonably be inferred in all the circumstances that the accused's purpose in doing that was to obtain sexual gratification, or to humiliate, distress or alarm the complainer;

[And only where in issue:]

5. The accused was 16 or over;
6. The complainer was 13, 14 or 15 *[Or where appropriate: under 16]* at the time.

Section 33: Causing an older child to look at a sexual image

Law

33 Causing an older child to look at a sexual image

(1) If a person ("A"), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (2) causes a child ("B"), who—

(a) has attained the age of 13 years, but

(b) has not attained the age of 16 years,

to look at a sexual image, then A commits an offence, to be known as the offence of causing an older child to look at a sexual image.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(3) For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—

(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,

(b) A's genitals or the genitals of a third person or imaginary person.

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9](#), [22 to 26](#) and [32 to 36](#), A's purpose was—

(a) obtaining sexual gratification, or

(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The accused must intentionally cause the complainer to look at the image, but the purpose need not be subjectively intentional as the appeal court explained in *PF Edinburgh v Aziz* [2022] HCJAC 46. The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Possible form of direction

Section 33: Causing an older child to look at a sexual image

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of causing an older child to look at a sexual image under [section 33 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of the accused intentionally causing the child to look at a sexual image and doing so to obtain sexual gratification or to humiliate, distress or alarm the child.

The crime is committed where that is done when the accused is 16 or over, and the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

The conduct

In this case it is alleged that the accused made the complainer look at [a sexual image].

A "sexual image" is an image produced in any way, whether still or moving, of:

- the accused engaging in a sexual activity, or of a third party or an imaginary person doing so, or
- of the genitals of the accused, or of a third party or of an imaginary person.

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

"Causing" means that there must be some direct connection between what the accused did and the result which happened. Causing need not involve compulsion. Taking the complainer by surprise, for example, by putting a sexual image among slides being shown would be enough.

The accused must have acted intentionally. Intentionally means deliberately. Whether the accused acted deliberately can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

The accused's purpose

The accused must have acted for the purpose of obtaining sexual gratification or to humiliate, distress or alarm the complainer.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider the nature of the image and ask yourselves the question, "Why would the accused cause the complainer to look at the image?"

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the complainer, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the complainer's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*

- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where the defence is that the age gap between the accused and complainer was less than two years – s39(3)**

It is a defence to a charge of engaging in sexual activity with or towards an older child that, at the time when the conduct took place, the difference in age between the accused and complainer [or where both parties are accused "the parties"] did not exceed two years.

That defence is open to the accused. It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused caused the complainer to look at a sexual image.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused caused the complainer to look at a sexual image;
2. The accused acted intentionally;

3. It can reasonably be inferred in all the circumstances that the accused's purpose in doing that was to obtain sexual gratification, or to humiliate, distress or alarm the complainer;

[And only where in issue]

3. The accused was 16 or over; and

4. The complainer was 13, 14 or 15 *[Or where appropriate: under 16]* at the time.

Section 34: Communicating indecently with an older child

Law

34 Communicating indecently with an older child etc.

(1) If a person ("A"), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, a child ("B") who—

(a) has attained the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of communicating indecently with an older child.

(2) If, in circumstances other than are as mentioned in subsection (1), a person ("A"), who has attained the age of 16 years, intentionally and for a purpose mentioned in subsection (3), causes another person ("B") who is a child described in paragraphs (a) and (b) of subsection (1) to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing an older child to see or hear an indecent communication.

(3) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) In this section—

written communication” means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

“verbal communication” means a communication in whatever verbal form, and without prejudice to that generality includes—

(a) a communication which comprises sounds of sexual activity (whether actual or simulated), and

(b) a communication by means of sign language

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9, 22 to 26](#) and [32 to 36](#), A's purpose was—

(a) obtaining sexual gratification, or

(b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

The equivalent adult provision (section 7) was examined in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The High Court of Justiciary upheld the sheriff, who had been overturned by the Sheriff Appeal Court, in determining that a taxi driver had committed the offence in speaking to two young women (18 and 21) who entered his taxi at 3am without having sufficient funds on them to pay the fare but had enough money available at home. When they told him of the situation, he asked “what else can you offer?” and when they enquired what he meant he replied, “sex.” Both felt uncomfortable and unsafe, and one of them was frightened. They left the taxi and took a photo of the licence number.

In these circumstances, the sheriff had been entitled to find that intentionally and for the purpose of obtaining sexual gratification the appellant had directed a sexual verbal communication at them without either of them consenting.

The court examined section 49 and found that the test is an objective one. The court was not directed towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes can reasonably be inferred from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification. The only defence potentially available would be reasonable belief but it was not available in the circumstances of this case

Possible form of direction

s34 Communicating indecently with an older child etc.

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of communicating indecently with an older child under [section 34 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

Where the charge is under section 34(1)

The crime consists of the accused:

[Select as appropriate:]

- intentionally sending, by any means, a sexual written communication, to the child; or
- intentionally directing, by any means, a sexual verbal communication, at the child.

And doing so for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the child.

Where the charge is under section 34(2)

The crime consists of the accused:

- intentionally causing the child to see or hear, by any means, a sexual written communication or verbal communication.

And doing so for the purpose of obtaining sexual gratification, or humiliating, distressing or alarming the child.

The direction continues here for both s34(1) and s34(2):

The crime is committed where that is done when the accused is 16 or over, and the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

The conduct

In this case it is alleged that the accused [*summarise the allegation*].

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

A "written communication" is one in any written form. It is wide enough to cover writing from somebody other than the accused, such as an extract from a book or a magazine.

A "verbal communication" is one in any verbal form. It includes a communication which comprises the sound of sexual activity, actual or simulated. It also covers communication by sign language.

"Sending" and "directing" have their ordinary meaning. The Crown does not need to show that what was sent or directed was actually received or heard. Just sending it is enough if the accused has done all he/she/they needs to do for the complainer to receive it.

"Causing", where the accused has not sent or directed the communication, simply means that there must be some direct connection between whatever the accused did and the result which happened, namely the seeing or hearing of it by the complainer.

The accused must have acted intentionally. Intention is to be inferred from what is proved to have been said and/or done. An intentional act is a deliberate act. It is the opposite of an accidental or careless act.

The accused's purpose

The accused must have acted for the purpose of obtaining sexual gratification, or to humiliate, alarm or distress the complainer.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider the nature of the communication and ask yourselves the question, "Why would the accused send it to/direct it at/cause it to be seen/heard by, the complainer?"

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the complainer that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the complainer's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under

13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where the defence is that the age gap between the accused and complainer was less than two years – s39(3)**

It is a defence to a charge of engaging in sexual activity with or towards an older child that, at the time when the conduct took place, the difference in age between the accused and complainer did not exceed two years.

That defence is open to the accused. It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused [sent / directed / caused the child to see / caused the complainer to hear] a sexual communication.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. **[34(1)]** The accused sent a written communication to [or directed a verbal communication at] the complainer;

OR

[34(2)] The accused caused the complainer to see or hear, a written or verbal communication;

2. The accused did so intentionally;

3. The content of the communication was sexual;

4. It can be reasonably inferred in all the circumstances that the accused did so to obtain sexual gratification, or to humiliate, distress or alarm the child;

[And only where in issue]

5. The accused was 16 or over; and

6. The complainer was 13, 14 or 15 *[Or where appropriate: under 16]* at the time.

Section 35: Sexual exposure to an older child

Law

The [provision](#) makes clear that the accused must expose his/her/their genitals deliberately and intend that the complainer will see them.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions.

Possible form of direction

Section 35: Sexual exposure to an older child

Note: In the following direction the complainer is referred to as "the child". Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to "the complainer".

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual exposure to an older child under [section 35 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of the accused intentionally exposing his/her/their genitals in a sexual manner to an older child, with the intention that the child will see them, and doing so to obtain sexual gratification, or to humiliate, distress or alarm the child.

The crime is committed where that is done when the accused is 16 or over, and the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

The conduct

In this case it is alleged that the accused [summarise allegation].

The accused must have acted intentionally in two respects. First, the accused must have deliberately exposed his/her/their genitals *and*, secondly, the accused must have intended that the child would see them.

You can infer that the accused acted deliberately and intended the child to see his/her/their genitals, from what is proved to have been said and/or done, the nature of the behaviour and the circumstances in which it happened.

The exposure must be in a sexual manner. The exposure is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

[If appropriate:

The exposure must be of the genitals. It would not be enough for a conviction if the exposure was of the bottom or the breasts, even if that was intended to obtain sexual gratification or to produce humiliation, distress or alarm.]

The exposure must have been to the person (or persons) in particular and done with the intention that he/she/they see(s) the genitals. The accused must have acted intentionally, not just recklessly,

[If appropriate:

If the exposure was not initially intentional, for example if the accused had been urinating and was unaware of the presence of the complainer, but the exposure was persisted in after the accused was aware that the complainer could see the genitals, from that point the accused would have been acting intentionally].

The accused's purpose

The accused must have exposed himself/herself/themselves for the purpose of obtaining sexual gratification, or humiliate, distress or alarm the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is neither here nor there.

How do you judge the accused's purpose?

Consider what is proved to have happened and ask yourselves the question, "Why would the accused do that?"

The Crown does not need to prove what the accused's actual purpose was. If in all the circumstances it can reasonably be inferred that the accused acted so as to obtain sexual gratification, or to humiliate, distress, or alarm the complainer, that is sufficient. Whether the complainer was in fact humiliated, distressed or alarmed is irrelevant.

Age

[One or more of the following directions relating to age should be given where appropriate:]

- **Where the complainer's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where it is suggested (or there was evidence) that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the*

charge is brought considers it is appropriate for that foreign conviction to have that effect; or

- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where the defence is that the age gap between the accused and complainer was less than two years – s39(3)**

It is a defence to a charge of engaging in sexual activity with or towards an older child that, at the time when the conduct took place, the difference in age between the accused and complainer [or where both parties are accused "the parties"] did not exceed two years.

That defence is open to the accused. It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be

corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused exposed his genitals to the complainer in a sexual manner.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.].]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.].]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

So, for the Crown to prove this charge, you must be satisfied that:

1. The accused exposed his/her/their genitals to the complainer;

2. The accused acted intentionally and intended that the complainer would see his/her/their genitals;
3. The exposure was in a sexual manner;
4. It can reasonably be inferred in all the circumstances that the accused's purpose in doing that was to obtain sexual gratification, or to humiliate, distress or alarm the complainer;

[And only where in issue]

5. The accused was 16 or over at the time;
6. The complainer was 13, 14 or 15 *[Or where appropriate: under 16]* at the time.

Section 36: Voyeurism towards an older child

Law

36 Voyeurism towards an older child

(1) If a person ("A"), who has attained the age of 16 years, does any of the things mentioned in subsections (2) to (5) in relation to a child ("B") who—

(a) has attained the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of voyeurism towards an older child.

(2) The first thing is that A, for a purpose mentioned in subsection (6), observes B doing a private act.

(3) The second thing is that A operates equipment with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4) The third thing is that A records B doing a private act with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

(4A) The fourth thing is that A operates equipment beneath B's clothing with the intention of enabling A or another person ("C"), for a purpose mentioned in subsection (7), to observe—

- (a) B's genitals or buttocks (whether exposed or covered with underwear), or
- (b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B) The fifth thing is that A records an image beneath B's clothing of—

- (a) B's genitals or buttocks (whether exposed or covered with underwear), or
- (b) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person ("C"), for a purpose mentioned in subsection (7), will look at the image.

(5) The sixth thing is that A—

- (a) installs equipment, or
- (b) constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).

(6) The purposes referred to in subsection (2) are—

- (a) obtaining sexual gratification,
- (b) humiliating, distressing or alarming B.

(7) The purposes referred to in subsections (3), (4), (4A) and (4B) are—

- (a) obtaining sexual gratification (whether for A or C),
- (b) humiliating, distressing or alarming B.

(8) Section 10 applies for the purposes of this section as it applies for the purposes of section 9 (the references in that section to section 9(3),(4A) and (5) being construed as references to subsections (3), (4A) and (5) of this section).

10 Interpretation of section 9

(1) For the purposes of section 9, a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—

- (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
- (b) the person is using a lavatory, or
- (c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) For the purposes of section 9(3) and (4A), operating equipment includes enabling or securing its activation by another person without that person's knowledge.

(3) In section 9(5), "structure" includes a tent, vehicle or vessel or other temporary or movable structure.

49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36

(1) For the purposes of [sections 5 to 9](#), [22 to 26](#) and [32 to 36](#), A's purpose was—

- (a) obtaining sexual gratification, or
- (b) humiliating, distressing or alarming B,

if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.

(2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.

When it comes to purposes, this need not be subjectively intentional as the appeal court explained in [PF Edinburgh v Aziz \[2022\] HCJAC 46](#). The court examined section 49, in the context of section 7 to which section 49 also applies, and found that the test for the purposes is an objective one. The court was not directed in this respect towards determining what the appellant's purpose (intention) actually was, since that purpose is taken to be proved if an inference of one of the stated purposes is capable of being drawn from the accused's actions. It was immaterial whether his expectation was to obtain immediate or deferred gratification.

Possible form of direction

Section 36: Voyeurism towards an older child

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of voyeurism towards an older child under [section 36 of the 2009 Act](#).

The Act distinguishes between young children, who are under 13 years, and older children, who are aged 13, 14 or 15 years. This offence relates to older children.

The crime consists of the accused:

[The following can be adapted as appropriate - irrelevant activity should normally be omitted]

- observing the child doing a **private act**, to obtain sexual gratification, or to humiliate, distress or alarm the child, (or both)
- operating equipment with the intention of enabling the accused, or someone else, to observe the child doing a **private act**, and doing so to obtain sexual gratification for himself/herself or for the other person, or to humiliate, distress or alarm the child (or both)
- recording a child doing a **private act** with the intention that the accused or someone else will look at an image of the child doing a private act, and doing so to obtain sexual gratification for himself/herself or for the other person, or to humiliate, distress or alarm the child (or both)
- operating equipment beneath a child’s clothing, with the intention that the accused, or someone else, will see the child’s genitals or buttocks, whether exposed or covered with underwear, or will see the underwear, in circumstances where these would not otherwise be visible, and doing so to obtain sexual gratification for himself/herself or for the other person, or to humiliate, distress or alarm the child (or both)
- recording an image, beneath the child's clothing, of the child's genitals or buttocks, whether exposed or covered with underwear, or of the child’s

underwear, in circumstances where these would not otherwise be visible, and doing so with the intention that the accused, or someone else, will look at the image to obtain sexual gratification, or doing so to humiliate, distress or alarm the child (or both)

- installing equipment, or constructing or adapting a structure, or part of a structure, with the intention of enabling the accused, or someone else, to [specify one of the acts mentioned above]. [Where necessary: A structure includes a tent, vehicle or vessel or other temporary or movable structure.]

The crime is committed where the accused does [that / these things] when:

- the accused is 16, and
- the child is 13, 14 or 15.

The law aims to protect older children from sexual abuse or exploitation and so consent is irrelevant.

The conduct

In this case it is alleged that the accused [summarise the allegation].

[Give the following directions as appropriate:]

- **Where the charge involves a complainer doing a private act**

The law is that a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and:

[Select as appropriate:]

- the person's genitals, buttocks or breasts are exposed or covered only with underwear,
- the person is using a lavatory, or
- the person is doing a sexual act that is not of a kind ordinarily done in public.]

- **"Operating equipment"**

"Operating equipment" includes enabling or securing its activation by another person without that person's knowledge.

- **"Structure"**

Structure includes a tent, vehicle or vessel or other temporary or movable structure.

- **On a charge alleging that the accused acted “with the intention”**

Where the charge states, “with the intention of” doing [x]”, it means trying to make it happen, which is something you can infer from what was said and/or done, the nature of the behaviour and the circumstances in which it happened. Whether or not [x] was achieved is irrelevant.

The accused’s purpose

The accused must have acted for the purpose of obtaining sexual gratification [either for himself/herself or someone else] or for the purpose of humiliating, distressing or alarming the child.

Sexual gratification means any kind of sexual pleasure or satisfaction. Whether or not a reasonable person would have got such gratification is irrelevant.

How do you judge the accused's purpose?

Consider what the accused did and ask yourselves, “Why would the accused do that?”

[A judge may wish to specify the conduct libelled in posing the question]

The Crown does not need to prove what the accused’s actual purpose was. If, in all the circumstances, it can reasonably be inferred that the accused acted to obtain sexual gratification, or to humiliate, distress, or alarm the child, that is sufficient. Whether the child was in fact humiliated, distressed or alarmed or the accused in fact obtained sexual gratification is irrelevant.

Age

- **Where the complainer's age is stated in the charge and has not been challenge or is admitted**

In the circumstances of this case, the age of the child [is established by it being stated in the charge and is not in dispute] [is admitted].

- **Where the age of the complainer is in dispute**

[A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.]

- **Where there was evidence that the complainer was under 13 at the time of the sexual conduct, or that the accused believed that the complainer was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the complainer must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the complainer was younger than 13 at the time of the conduct [or that the accused believed that the complainer was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the complainer was under 16 at the time of the conduct, then the law deems, or presumes, the complainer to have been an older child at that time.

- **Where the defence is that the accused reasonably believed the complainer to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where the defence is that the age gap between the accused and complainer was less than two years – s39(3)**

It is a defence to a charge of engaging in sexual activity with or towards an older child that, at the time when the conduct took place, the difference in age between the accused and complainer did not exceed two years.

That defence is open to the accused. It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer's evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have

to regard the complainer's evidence as credible and reliable in its essentials: namely that the accused [specify the act alleged].

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, it must show that:

1. The accused did the things alleged in the charge;
2. It can reasonably be inferred, in all the circumstances, that the accused's purpose in doing that was to obtain sexual gratification, or to humiliate, distress or alarm the complainer;

[And only where in issue:]

3. The accused was 16 or over at the time; and
4. The complainer was 13, 14, or 15 [Or where appropriate: under 16] at the time.

Section 37(1): Older children engaging in sexual conduct with each other

Note: Section 37 of the 2009 Act makes it an offence for older children (“A” and “B”) to engage in certain (but not all) sexual conduct with each other. The provision distinguishes the conduct of child A (the child who penetrates or touches) and child B (the child who is penetrated or touched). Section 37(1) applies to the conduct of child A and s37(4) applies to the conduct of child B. A direction on one or both of these provisions may be required in such cases.

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of engaging, while an older child, in sexual conduct with, or towards, another older child. The charge is under [section 37\(1\) of the 2009 Act](#).

The Act distinguishes between young children, who are under 13, and older children, who are aged 13, 14 or 15. This offence relates to older children.

The crime consists of:

the intentional or reckless sexual penetration, to any extent, by the accused’s penis of another older child’s:

- vagina,
- anus or
- mouth.

Or

the intentional or reckless sexual touching by the accused’s mouth of another older child’s:

- vagina,
- anus or
- penis.

The crime is committed where both the accused and the other child are aged 13, 14 or 15.

Whether the other child consented the sexual conduct is irrelevant.

The conduct

In this case it is alleged that [*specify the allegation*].

[*Where appropriate*: Any degree of penetration is enough and the ejaculation of semen is not necessary.]

[*Where appropriate*: Touching with the mouth includes touching with the tongue or teeth.]

Penetration/touching is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

[*One or more of the following directions on intention should be given:*]

- Penetration must be intentional. Intentional means deliberate. Whether penetration was deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.
- *Or:*

In this case it is not disputed that penetration was intentional.

- *Or in the exceptional case, where recklessness may arise on the evidence:*

Penetration must be intentional or reckless. Intentional means deliberate. Whether penetration was deliberate or reckless is something to be inferred from what is proved to have been said and/or done and from the nature of the behaviour. Reckless acts show total indifference to, and complete disregard of, the consequences.

Age

[*One or more of the following directions relating to age should be given where appropriate:*]

- **Where the ages of the accused and the other child are stated in the charge and have not been challenged or are admitted**

In the circumstances of this case, the ages of the accused and the other child [are established by them being stated in the charge and are not in dispute][are admitted].

- **Where the age of the accused or other child is in dispute**

[A direction on proof of age may be required. See paragraphs 23 and 24 of the law section of this chapter for the requirements of proof.]

- **Where it is suggested that the other child was aged 16 or over at the time of the sexual conduct**

You must be satisfied beyond reasonable doubt that the other child was under 16 at the time. There was some evidence to suggest that the other child was over 16. If you accept that, or if you are left in reasonable doubt about whether the other child was under 16, then you must acquit because the offence is only committed where the other child was under 16 at the time of the sexual conduct.

- **Where the defence is that the accused reasonably believed the other child to be 16 or over at the time of the sexual conduct – s39(1)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider

whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where there was evidence that the other child was under 13 at the time of the sexual conduct, or that the accused believed that the other child was under 13**

[See s40(1) and s41: Deeming Provision 1]

I have said that the other child must have been an older child at the time of the offence. But it does not matter if, in fact, the child was under 13 at the time. That is because it is no defence to this charge that the other child was younger than 13 at the time of the conduct [*or that the accused believed that the other child was under 13 at the time*]. As long as you are satisfied beyond reasonable doubt that the other child was under 16 at the time of the conduct, then the law deems, or presumes, the other child to have been an older child at that time.

- **Where there was evidence that the accused was under 13 at the time of the offence**

I have said that the accused must have been an older child at the time of the offence. That means that you must be satisfied beyond reasonable doubt that the accused was aged 13 or over at the time of the conduct. If you are not satisfied that the accused was aged 13 or over, or you have a reasonable doubt about that, you must acquit because the accused cannot be criminally responsible for this offence if he/she/they was/were under 13 at the time.

- **Where there was evidence that the accused was over 16 at the time of the offence**

[See s40(3) and s41: Deeming Provision 3]

I have said that the accused must have been an older child at the time of the offence. Now there was some evidence to suggest that the accused was over 16 at the time of the conduct. I should make it clear that that is not a defence. It does not matter if the accused was over 16. So, as long as you are satisfied beyond reasonable doubt that

the accused was aged 13 or over, then the law deems, or presumes, the accused to have been an older child at that time and so it is irrelevant if the accused was, in fact, 16 or over.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how the crime is alleged to have been committed. That the penetration/touching was intentional [or reckless] does not need corroboration.

[One or more of the following directions should be given where relevant:]

- **Where the other child is an essential witness**

Please note that in cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the other child may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.

You do not need to find [the other child's] evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard [the other child's] evidence as credible and reliable in its essentials: namely that the accused engaged in the sexual activity described in the charge with or towards him/her/them.

In deciding whether you accept the other child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the other child's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on “myths” should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused did the things alleged in the charge;
2. The conduct was intentional [or reckless];
3. The conduct was sexual;

[Only if there is an issue as to age:]

4. The accused was 13 or over at the time; and
5. The other child was 13, 14, or 15 *[Or where appropriate: under 16]* at the time.

Section 37(4): Older children engaging in consensual sexual conduct with each other

Note: Section 37 of the 2009 Act makes it an offence for older children (“A” and “B”) to engage in certain (but not all) sexual conduct with each other. The provision distinguishes the conduct of child A (the child who penetrates or touches) and child B (the child who is penetrated or touched). Section 37(1) applies to the conduct of child A and s37(4) applies to the conduct of child B. A direction on one or both of these provisions may be required in such cases.

Note: In the following direction the complainer is referred to as “the child”. Where, at the time of trial, it is no longer appropriate to refer to the complainer as a child it may be necessary to refer, instead, to “the complainer”.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate’s Reference No 1 of 2023](#).

Charge [x] is a charge of engaging, while an older child, in certain types of consensual sexual conduct with another older child. The charge is under [section 37\(4\) of the 2009 Act](#).

The Act distinguishes between young children, who are under 13, and older children, who are aged 13, 14 or 15. This offence relates to older children.

The crime is committed where an older child consents to:

- the sexual penetration of his/her/their vagina, anus or mouth by another child using that child's penis.

[Or, as appropriate:]

- the sexual touching of his/her/their vagina, anus or penis by another child using that child's mouth.

The conduct

In this case it is alleged that the accused consented to the other child [describe the conduct alleged].

[Where appropriate: Any degree of penetration is enough and the ejaculation of semen is not necessary.]

[Where appropriate: Touching with the mouth includes touching with the tongue or teeth.]

Penetration/touching is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

Consent

You must be satisfied that the accused consented to the conduct alleged. If you are not, or if you have a reasonable doubt about whether he/she/they consented, then you must acquit. The accused would not have committed an offence if the conduct took place against his/her/their will.

[Where the defence is that the accused did not consent to the conduct then use Directions on consent from s1 as appropriate.]

Age

[One or more of the following directions should be given as appropriate:]

- **Where the ages of both the accused and the other child are stated in the charge and have not been challenged**

In the circumstances of this case, the ages of the accused and the other child [are established by them being stated in the charge and are not in dispute][are admitted].

- **Where the age of the accused or the other child is in dispute**

[A direction on proof of age may be required. See paragraphs 23 and 24 of the law section of this chapter for the requirements of proof.]

- **Where there was evidence that the other child was 16 or over at the time of the sexual conduct**

You must be satisfied beyond reasonable doubt that the other child was under the age of 16 at the time of the conduct. There was some evidence to suggest that the other child was over 16 at the time of the conduct. If you accept that, or if you are left in reasonable doubt about whether the other child was under 16, then you must acquit because the offence is only committed where the other child was under 16 at the time of the sexual conduct.

- **Where the defence is that the accused reasonably believed the other child to be 16 or over at the time of the sexual conduct – s39(1)(b)**

[Note: the defence is not available to certain categories of accused: s39(2) i.e. those:

- *who have previously been charged by the police with a sexual offence listed in schedule 1 to the Act;*
- *who have a previous conviction for a relevant foreign offence committed against a person under the age of 16 (meaning a previous conviction by a court in a member State of the European Union for an offence that is equivalent to one listed in paragraph 1, 4, 7, 10, 13 (so far as applying to an offence listed in paragraph 1, 4, 7 or 10) or 14 of schedule 1) and the court before which the charge is brought considers it is appropriate for that foreign conviction to have that effect; or*
- *in respect of whom a risk of sexual harm order is in force.]*

In this case there was evidence that the accused believed that the complainer had reached the age of 16 years and that it was reasonable for the accused to believe that. That would be a defence. It is said there is evidence [derived from cross examination of Crown witnesses, or from the accused, or from the accused's police statement, or from defence witnesses] from which you should conclude: (i) that the

accused believed that the complainer was over 16 at the time of the alleged conduct; and (ii) that the accused's belief was reasonable.

It is for you to decide whether you accept any evidence that the accused believed that the complainer had reached the age of 16. If you conclude that the accused believed that the complainer was 16 or over, then you must go on to consider whether that belief was based on reasonable grounds. If the accused believed that the complainer had reached the age of 16, and if the accused held that belief on reasonable grounds, then you must acquit the accused, even if he/she/they was/were, in fact, mistaken.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

- **Where there was evidence that the other child was under 13 at the time of the sexual conduct, or that the accused believed that the other child was under 13**

[See s40(2) and s41: Deeming Provision 2]

I have said that the other child must have been an older child at the time of the offence. But it does not matter if, in fact, the other child was under 13 at the time. That is because it is no defence to this charge that the other child was younger than 13 at the time of the conduct [or that the accused believed that the other child was under 13 at the time]. As long as you are satisfied beyond reasonable doubt that the other child was under 16 at the time of the conduct, then the law deems, or presumes, the other child to have been an older child at that time.

- **Where there was evidence that the accused was under 13 at the time of the offence**

I have said that the accused must have been an older child at the time of the offence. That means that you must be satisfied beyond reasonable doubt that the accused was aged 13 or over at the time of the conduct. If you are not satisfied that the accused was 13 or over, or you have a reasonable doubt about that, you must acquit because the accused cannot be criminally responsible for this offence if he/she/they was/were under 13 at the time.

- **Where there was evidence that the accused was over 16 at the time of the offence**

[See s40(4) and s41: Deeming Provision 4]

I have said that the accused must have been an older child at the time of the offence. Now there was some evidence to suggest that the accused was over 16 at the time of the conduct. I should make it clear that that is not a defence. It does not matter if the accused was over 16 at the time of the conduct. As long as you are satisfied beyond reasonable doubt that the accused was 13 or over, then the law deems, or presumes, the accused to have been an older child at that time and so it is irrelevant if the accused was, in fact, 16 or over.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source.

The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how this crime is alleged to have been committed.

[One or more of the following directions should be given where relevant:]

- **Where the other child is an essential witness**

[In cases of intoxication or where there is CCTV or witness evidence, or an admission by the accused, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find [the other child's] evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard [the other child's] evidence as credible and reliable in its essentials: namely that the accused engaged in the sexual activity with or towards the other child described in the charge.

In deciding whether you accept the other child's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. The accused did the things alleged in the charge;
2. The conduct was sexual;
3. The accused consented to the conduct;

[Only if there is an issue as to age:]

4. The accused was 13 or over at the time; and
5. The other child was 13, 14, or 15 *[Or where appropriate: under 16]* at the time.

Section 42: Sexual abuse of trust

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual abuse of trust, under section 42 of the 2009 Act.

The crime is committed where an accused who is aged 18 or over engages in sexual activity with, or directed towards, a complainer who is under 18, and in respect of whom the accused is in a position of trust.

In such circumstances, it is irrelevant whether the complainer consented to sexual activity with the accused.

The conduct

In this case it is alleged that the accused [*describe the conduct alleged*].

You must be satisfied that the conduct took place and that it was *sexual* conduct. An activity is sexual if a reasonable person would, in all the circumstances, consider it to be sexual.

[*Where appropriate*: In this case it is not disputed the sexual conduct was sexual].

The conduct must be intentional. Intentional means deliberate. Whether an activity is deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

[*Where appropriate*: In this case it is not disputed the sexual conduct was intentional].

Age

[*One or more of the following directions relating to age should be given as appropriate*:]

- **Where the ages of the accused and complainer are stated in the charge and have not been challenged**

In the circumstances of this case, the ages of the accused and the complainer [are established by them being stated in the charge and are not in dispute][are admitted].

- **Where the age of the accused or complainer is in dispute**

[*A direction on proof of age may be required. See [proof of age of complainer or other person](#) of this chapter for the requirements of proof.*]

- **Where there is a defence that the accused reasonably believed the complainer to be aged 18 or over - Section 45(1)(a)**

In this case it is said by the defence that the accused believed that the complainer had reached the age of 18 years, and that it was reasonable for him to believe that. If you are satisfied of that, that is a defence to this charge.

However, the accused's belief must be held on reasonable grounds. Whether an accused had a reasonable belief is an inference to be drawn from any evidence which you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence that would entitle you to conclude that the accused reasonably held that belief:

[Here that evidence could be summarised]

On the other hand the Crown remind you that:

[Here the Crown's position could be summarised]

If you accept that the accused believed that the complainer was aged 18 or over, and that it was reasonable for the accused to believe that, or if you are left in reasonable doubt about those things you must acquit even if the accused was, in fact, mistaken.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply.

Position of trust

The offence is only committed if, at the time of the conduct, the accused was in "a position of trust" in respect of the complainer.

[Select whichever of the following is appropriate:]

- In this case it is not disputed that, at the time of the conduct, the accused was in a position of trust in respect of the complainer and so you need not consider that matter further.

Or

- The law defines certain situations in which a person is in a position of trust in respect of another person. One of those situations is where:

[Select as appropriate:]

- the complainer is **detained in an institution**, by court order or by statute, and is under 18, and the accused looks after people under 18 in that institution.
- the complainer is **resident in a home** or other place in which accommodation is provided by a local authority under an Act relating to children, and the accused looks after persons aged under 18 in that place, then the accused will be in a position of trust in respect of the complainer.
- the complainer is **accommodated and cared for** in:
 - (a) a hospital and the accused looks after people under 18 in that place,
 - (b) accommodation provided by an independent health care service and the accused looks after people under 18 in that place,

(c) accommodation provided by a care home service, a residential establishment and the accused looks after people under 18 in that place,

(d) accommodation provided by a school care accommodation service or a secure accommodation service, and the accused looks after people under 18 in that place,

- the complainer is **receiving education** at:

(a) a school and the accused looks after people under 18 in that school, or

(b) a further or higher education institution and the accused looks after the complainer in that institution.

- the accused:

(a) has any **parental responsibilities or parental rights** in respect of the complainer and the complainer is a member of the same household as the accused.

(b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights, and the complainer is a member of the same household as the accused.

(c) had any such responsibilities or rights but no longer has such responsibilities or rights and the complainer is a member of the same household as the accused; or

(d) treats the complainer as **a child of their family** and the complainer is a member of the same household as the accused.

[Definitions of the various institutions mentioned are at [section 44](#) which can be incorporated if necessary]

[Where relevant: What is involved in "looking after" a person? That covers regularly caring for, teaching, training, supervising, or being in sole charge of the person.]

**Where there is a defence that the accused reasonably believed that the complainer was not a person in respect of whom the accused was in a position of trust -
Section 45(1)(b)**

In this case it is said by the defence that the accused believed that the complainer was not someone in relation to whom the accused was in a position of trust, and that it was reasonable for the accused to believe that. If you are satisfied of that, that is a defence to this charge.

However, the accused's belief must be held on reasonable grounds. Whether an accused had a reasonable belief is an inference to be drawn from any evidence which you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence before you that would entitle you to conclude that the accused reasonably held that belief:

[Here that evidence could be summarised]

On the other hand the Crown remind you that:

[Here the Crown's position could be summarised]

If you accept any evidence that the accused believed that the complainer was not someone in relation to whom he was in a position of trust, and if you also accept that that belief was reasonably held you must acquit even if the accused was, in fact, mistaken.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply.

Where there is a defence that the parties were married or in a civil partnership
- [Section 45\(2\)\(a\)](#)

It is a defence to this charge that the complainer was the spouse or civil partner of the accused at the time of the conduct. If you conclude that the accused and complainer were married / were civil partners at the time of the conduct, or if you are left with a reasonable doubt about that, then you must acquit.

It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply.

Where there is a defence that the parties were in a sexual relationship immediately prior to position of trust being established - [Section 45\(2\)\(b\)](#)

It is a defence to this charge that a sexual relationship existed between the complainer and the accused immediately before the accused came to be in a position of trust in respect of the complainer. [The accused's position is: / there was evidence to suggest that:]

If you conclude that a sexual relationship existed between the complainer and the accused immediately before [state the nature of the position of trust], or if you are left with a reasonable doubt about that, then you must acquit.

[Where the position of trust arises by virtue of s43(6): The defence does not apply where the accused had fulfilled or exercised any parental responsibilities or parental rights, past or present, in respect of the complainer and the complainer is a member of the same household as the accused, or where the complainer is treated by the accused as one of his/her family, and is a member of the same household as the accused.]

It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it must be proved by corroborated evidence, meaning evidence from more than one source. The other elements in the charge are descriptive only, to give the accused fair notice of how this crime is alleged to have been committed, and they do not need to be corroborated.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of injury**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. *[If in dispute:]* The accused was 18 or over;
2. *[If in dispute:]* The complainer was under 18 at the time of the conduct;
3. *[If raised:]* The accused had no reasonable belief that the complainer was aged 18 or over at the time of the conduct.
4. *[If in dispute:]* The accused was in a position of trust in respect of the complainer at the time of the sexual conduct;
5. *[If raised:]* The accused had no reasonable belief that he/she/they was/were not in a position of trust in respect of the complainer;
6. The accused engaged in the act alleged in the charge;
7. The accused did so intentionally; and
8. It was a sexual act.

Section 45 Defences, if raised

[Section 45\(1\)\(a\)](#)

In this case it is said by the defence that the accused reasonably believed that the complainer had reached the age of 18 years. That would be a defence. It is said that there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his/her police statement, or from defence witnesses) which leads to the conclusions that he/she believed the complainer was over 18 years of age, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer had reached the age of 18 and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to prove that it does.

Section 45(1)(b)

In this case it is said by the defence that the accused reasonably believed that the complainer was not someone in relation to whom he/she was in a position of trust. That would be a defence. You will recollect the definition I gave of the circumstances in which a position of trust exists, in the context of this case. It is said there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his/her police statement, or from defence witnesses) which leads to the conclusions that the accused believed that he was not in a position of trust towards him/her, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer was not a person in relation to whom he/she was in a position of trust and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to prove that it does.

Section 45(2)(a)

It is a defence to this charge that the person was the spouse or civil partner of the accused. On the evidence, if you accept it, that defence is open to this accused.

It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to prove that it does.

Section 45(2)(b)

It is a defence to this charge that a sexual relationship existed between the complainer and the accused immediately before the position of trust came into being. (Adapt the following as appropriate) That does not apply where the accused had fulfilled or exercised any parental responsibilities or parental rights, past, or present, in respect of the complainer, or the complainer is treated by the accused as one of his/her family, and in all these instances the complainer is a member of the same household.

To decide this issue you will need to look carefully at the evidence about the relationship between the parties, and decide. It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply, not for the accused to show it does.

Section 46: Sexual abuse of trust of a mentally disordered person

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023](#).

Charge [x] is a charge of sexual abuse of trust of a person with a mental disorder, under section 46 of the 2009 Act.

The crime is committed where an accused engages in sexual activity with, or directed towards, a complainer who has a mental disorder and in respect of whom the accused is in a position of trust.

In such circumstances, it is irrelevant whether the complainer consented to sexual activity with the accused.

The conduct

In this case it is said that the accused [*describe the sexual conduct alleged*].

You must be satisfied that the conduct took place and that it was *sexual* conduct. An activity is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

[*Where appropriate:* In this case it is not disputed the conduct was sexual].

The conduct must be intentional. Intentional means deliberate. Whether an activity is deliberate can be inferred from what is proved to have been said and/or done and from the nature of the behaviour.

[*Where appropriate:* In this case it is not disputed the conduct was intentional].

Mental disorder

The complainer must have had a mental disorder at the time of the conduct.

[*Select whichever of the following is appropriate:*]

- It is not in dispute that, on the date specified in the charge, the complainer had a mental disorder. So you do not need to consider that matter further.

Or

- A mental disorder is: a mental illness; a personality disorder; or a learning disability, however caused or manifested.

[Where appropriate: A person does not have a mental disorder by reason only of:

- (a) sexual orientation;
- (b) sexual deviancy;
- (c) transsexualism;
- (d) transvestism;
- (e) dependence on, or use of, alcohol or drugs;
- (f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; or
- (g) acting as no prudent person would act.]

[The positions of the Crown and defence could be stated] You must consider the evidence and decide whether you are satisfied that the complainer had a mental disorder at the time of the conduct in the charge.

- **Where there is a defence that the accused reasonably believed that the complainer did not have a mental disorder - Section 47(1)(a)**

In this case it is said by the defence that the accused believed that the complainer did not have a mental disorder at the time of the conduct, and that it was reasonable for him to believe that. If you are satisfied of that, that is a defence to this charge.

However, the accused's belief must have been held on reasonable grounds. Whether an accused had a reasonable belief is an inference to be drawn from any evidence which you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence that would entitle you to conclude that the accused reasonably held that belief:

[Here that evidence could be summarised]

On the other hand the Crown remind you that:

[Here the Crown's position could be summarised]

If you accept that the accused believed that the complainer did not have a mental disorder, and if you also accept that it was reasonable for the accused to believe that, you must acquit even if the accused was, in fact, mistaken.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply.

Position of trust

The offence is only committed if, at the time of the conduct, the accused was in "a position of trust" in respect of the complainer.

[Select whichever of the following is appropriate:]

- In this case it is not in dispute that, at the time of the conduct, the accused was in a position of trust in respect of the complainer and so you need not consider that matter further.

Or

- A person is in a position of trust in respect of another person if he provides care services to that person.

[For the definition of "care service" see: [section 47 of the Public Service Reform \(Scotland\) Act 2010](#).]

[For the definition of "the provision of care services" see: [section 46](#)]

Or

- A person is in a position of trust in respect of another person if he manages, is employed in, or is contracted to provide, services in or to:
 - a hospital
 - an independent health care service
 - a state hospital

in which the complainer is being given medical treatment.

[The positions of the Crown and defence could be stated] You must be satisfied that the accused was in a position of trust in respect of the complainer in this sense.

- **Where there is a defence that the accused reasonably believed that the complainer was not a person in respect of whom the accused was in a position of trust - Section 47(1)(b)**

In this case it is said by the defence that the accused believed that the complainer was not someone in relation to whom the accused was in a position of trust, and that it was reasonable for the accused to believe that. If you are satisfied of that, that is a defence to this charge.

The accused's belief must be held on reasonable grounds. Whether an accused had a reasonable belief is an inference to be drawn from any evidence which you accept. It does not need to be corroborated.

In this case the defence suggest that there is evidence that would entitle you to conclude that the accused reasonably held that belief:

[Here that evidence could be summarised]

On the other hand the Crown remind you that:

[Here the Crown's position could be summarised]

If you accept that the accused believed that the complainer was not someone in relation to whom the accused was in a position of trust, and if you also accept that it was reasonable for the accused to believe that, or if you are left in reasonable doubt about those things, you would acquit.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply.

Other defences – if raised:

- **That the parties were married or in a civil partnership - [Section 47\(2\)\(a\)](#)**

It is a defence to this charge that the complainer was the spouse or civil partner of the accused at the time of the conduct. If you conclude that the accused and complainer were married / were civil partners at the time of the conduct, or if you are left with a reasonable doubt about that, then you must acquit.

It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply.

- **That the parties were in a sexual relationship immediately prior to position of trust being established - [Section 47\(2\)\(b\)](#)**

It is a defence to this charge that a sexual relationship existed between the complainer and the accused immediately before the accused came to be in a position of trust in respect of the complainer. [*The positions of the Crown and defence could be stated*].

If you conclude that a sexual relationship existed between the complainer and the accused immediately before [state the nature of the position of trust], or if you are left with a reasonable doubt about that, then you must acquit.

It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply.

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is alleged to have been committed. They do not need to be corroborated. That the accused acted intentionally and the accused's purpose do not need corroboration.

[*One or more of the following directions should be given where relevant:*]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a de recenti statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[*Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".*]

Additional directions

[*One or more of the following directions on "myths" should be given where relevant:*]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Summary

For the Crown to prove this charge, you must be satisfied that:

1. *[If in dispute:]* The complainer had a mental disorder;
2. *[If raised:]* The accused had no reasonable belief that the complainer did not have a mental disorder;
3. *[If in dispute:]* The accused was in a position of trust in respect of the complainer;
4. *[If raised:]* The accused had no reasonable belief that he/she/they was/were not in a position of trust in respect of the complainer;
5. The accused engaged in the act alleged in the charge;
6. The accused did so intentionally; and
7. It was a sexual act.

Section 47 Defences, if raised

[Section 47\(1\)\(a\)](#)

In this case it is said by the defence that the accused reasonably believed that the complainer did not have a mental disorder. That would be a defence. It is said there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his police statement, or from defence witnesses) which leads to the conclusions that he/she believed the complainer did not suffer from a mental disorder, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer did not have a mental disorder and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that it does not apply, it is not for the accused to prove that it does.

Section 47(1)(b)

In this case it is said by the defence that the accused reasonably believed that the complainer was not someone in relation to whom he/she was in a position of trust. That would be a defence. You will recollect the definition I gave of the circumstances in which a position of trust exists, in the context of this case. It is said that there is evidence (derived from cross examination of Crown witnesses, or from the accused, or from his police statement, or from defence witnesses) which leads to the conclusions that he/she believed he was not in a position of trust towards him/her, and that that belief was reasonable.

The belief must have been based on reasonable grounds even if they turn out to have been mistaken. It is for you to decide if you accept any evidence suggesting that the accused believed that the complainer was not a person in relation to whom he/she was in a position of trust and, if so, if that belief was based on reasonable grounds. If you do, the accused would be acquitted.

It is for the Crown to meet that defence, and to satisfy you beyond reasonable doubt that it does not apply.

Section 47(2)(a)

It is a defence to this charge that the person was the spouse or civil partner of the accused. On the evidence, if you accept it, that defence is open to this accused.

It is for the Crown to meet this defence and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to show it does.

Section 47(2)(b)

It is a defence to this charge that a sexual relationship existed between the complainer and the accused immediately before (the accused began providing care services to the complainer / the complainer was admitted to hospital-adapt as appropriate)

To decide this issue you will need to look carefully at the evidence about the relationship between the parties, and decide.

It is for the Crown to meet this defence, and to satisfy you beyond reasonable doubt that it does not apply. It is not for the accused to show it does.

(IN MOST CASES)

In this case, however, I direct you that no issue of reasonable belief arises for consideration.