

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part One – Rape Etc

Section 1 – Rape

5. This section creates a statutory offence of “rape”. Subsection (1) provides that a person will commit the offence of rape by intentionally or recklessly penetrating, with their penis, the victim’s vagina, anus or mouth, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.
6. Subsection (2) defines “penetration” for the purposes of this section. It is defined as a continuing act from entry of the penis until its withdrawal.
7. Subsection (3) provides that there may be circumstances where penetration is initially consented to but consent is subsequently withdrawn. In these circumstances, a person will have committed rape only if the penetration of the victim’s vagina, anus or mouth takes place (or continues to take place) after the point at which consent is withdrawn.
8. Subsection (4) defines the terms “penis” and “vagina”.

Section 2 – Sexual assault by penetration

9. This section creates a statutory offence of “sexual assault by penetration”. Subsection (1) provides that a person commits the offence of sexual assault by penetration by intentionally or recklessly sexually penetrating the victim’s vagina or anus, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.
10. Subsection (2) defines “penetration” for the purposes of this section. It is defined as a continuing act from entry of whatever is intruded until it is withdrawn.
11. Subsection (3) caters for the scenario where penetration is initially consented to but consent is subsequently withdrawn. It modifies the definition of penetration in subsection (2) to a person will have committed the offence if the penetration of the victim’s vagina or anus takes place (or continues to take place) after the point at which consent is withdrawn.
12. Subsection (4) provides that the reference in subsection (1) to penetration “with any part of A’s body” includes penetration with A’s penis. This means that there is an overlap between the conduct which constitutes sexual assault by penetration under this section, that which constitutes rape under section 1 and that which constitutes sexual assault at section 3. This is deliberate and intended to cover circumstances where the victim knows that he or she was penetrated, but is unable to say whether penetration was penile or not (for example, due to being blindfolded).

Section 3 – Sexual assault

13. This section creates a statutory offence of “sexual assault”. The constituent elements of the offence are set out in subsections (1) and (2).
14. Subsection (1) provides that such an offence is committed only if the victim did not consent to the sexual conduct in question and the perpetrator had no reasonable belief that the victim was consenting.
15. Subsection (2) sets out five separate sexual acts, each of which constitute the offence of sexual assault. It also provides that, in each case, in order to commit an offence the perpetrator must either act intentionally or recklessly when carrying out one of these sexual acts. The five sexual acts are:
 - (a) penetrating the victim’s vagina, anus or mouth by any means in a sexual way;
 - (b) touching the victim in a sexual way;
 - (c) having any other sexual physical contact with the victim, whether directly or through clothing and whether with a body part or implement;
 - (d) ejaculating semen onto the victim; and
 - (e) emitting urine or saliva onto the victim sexually.
16. Subsections (3), (4) and (5) deal with penetration. Subsections (3) and (4) define penetration as a continuing activity and provide for circumstances where penetration is initially consented to but consent is then withdrawn before penetration has ended. This is similar to section 1(2) and (3) (see paragraphs 6 and 7 above). Subsection (5) provides that penetration “by any means” in subsection (2) includes with the perpetrator’s penis. This means there is an overlap between the conduct which constitutes sexual assault under this section, that which constitutes rape under section 1 and that which constitutes sexual assault by penetration at section 2. This is deliberate and is intended to cover circumstances where the victim knows that he or she was penetrated, but is unable to say whether penetration was penile or not (for example due to being blindfolded).

Section 4 – Sexual coercion

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

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

18. This section creates the offence of “coercing a person into being present during a sexual activity”. Subsection (1) provides that there are two circumstances in which the offence is committed. These are first, that the perpetrator intentionally engaged in a sexual activity in the presence of the victim or, secondly, that the perpetrator intentionally caused the victim to be present while a third person engaged in a sexual activity. In either instance, the offence is committed only if the victim did not consent to being present during the sexual activity and the perpetrator did not have any reasonable belief that the victim consented.
19. Subsection (2) provides that an offence is committed only where the perpetrator has acted for the purpose of obtaining sexual gratification or humiliating, distressing or alarming the victim
20. Subsection (3) provides that, for the purposes of this offence, the requirement that the victim is present, or that an activity is carried out in his or her presence, includes situations other than in which the person engaging in the sexual activity can be observed by means of an image (such as an image on a screen which is generated by a webcam). It

is not essential that it be proved that the victim can be proved to have actually observed the activity; it is enough that the activity was in a place where it was capable of being observed by the victim.

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

21. This section creates the offence of “coercing a person into looking at a sexual image”. Subsections (1) and (2) provide that an offence is committed if a person intentionally (and for the purpose of obtaining sexual gratification or for the purpose of humiliating, distressing or alarming the victim) causes the victim to look at a sexual image. The offence is only committed if the victim did not consent to looking at the image and the accused had no reasonable belief that the victim so consented. Furthermore, the accused does not commit the offence if he or she had intended to direct or send the image to someone other than the victim (e.g. by email).
22. Subsection (3) defines a “sexual image” for the purposes of this section. A “sexual image” is an image of a person, whether real or imaginary, engaging in a sexual activity or an image of the genitals of a person, whether real or imaginary.

Section 7 – Communicating indecently etc.

23. This section creates two offences, each relating to unwanted sexual communication. Both subsections (1) and (2) provide that the offences are committed only where the victim did not consent to the activity and the perpetrator had no reasonable belief that the victim consented. For an offence to be committed, the accused must intend to communicate with the victim.
24. Subsection (1) creates the offence of “communicating indecently”. It is committed if a person, in the circumstances set out in paragraph 23 above, intentionally sends the victim a sexual written communication by whatever means, or directs a sexual verbal communication at the victim, by whatever means.
25. Subsection (2) creates the offence of “causing a person to see or hear an indecent communication”. It is committed if, in circumstances other than specified in subsection (1), a person causes the victim to see a sexual written communication or to hear a sexual verbal communication, in each case by whatever means and in the circumstances described in paragraph 23 above.
26. Subsection (3) provides that an offence under subsection (1) or (2) is committed only where the perpetrator’s purpose is to obtain sexual gratification, or to humiliate, distress or alarm the victim.
27. Subsection (4) defines “written communication” and “verbal communication” for the purpose of this section.

Section 8 – Sexual exposure

28. This section creates the offence of ‘sexual exposure’. Subsection (1) provides that the offence of sexual exposure is committed if a person intentionally exposes his or her genitals in a sexual manner to another person with the intention that the person will see them without that person’s consent and without any reasonable belief that the person consented.
29. Subsection (2) provides that an offence under subsection (1) is committed only where the accused’s purpose is to obtain sexual gratification or to humiliate, distress or alarm the victim.

Section 9 – Voyeurism

30. **Section 9** creates the offence of “voyeurism”. It is committed if a person does any of the things mentioned in subsections (2) to (5).

31. Subsection (2) provides that a person commits an offence if that person observes the victim engaging in a private act. Subsection (3) provides that a person commits an offence if that person operates equipment with the intention of enabling himself or another person to observe the victim engaging in a private act. Subsection (4) provides that a person commits an offence if that person records the victim engaging in a private act with the intention that he or another person will look at an image of the victim doing the act. Subsection (5) provides that a person commits an offence if that person installs equipment (such as a video camera) or constructs, or adapts a structure or part of a structure (e.g. by drilling a “peep hole”) with the intention of enabling himself, or a third person, to commit any of the offences in subsections (2) to (4). In all cases, the offences are committed where the victim does not consent and the accused has no reasonable belief that the victim consented.
32. Subsections (6) and (7) provide that an offence under subsections (2) to (4) is committed only where the perpetrator’s purpose is to obtain sexual gratification (whether for himself or a third person in the case of the offences at subsections (3) and (4)) or to cause humiliation, distress or alarm to the victim.

Section 10 – Interpretation of section 9

33. **Section 10** defines the meaning of certain terms for the purposes of section 9. Subsection (1) provides a definition of a “private act”. Subsection (2) provides that the reference to “operating equipment” in section 9(3) includes enabling or securing its activation by another person without that person’s knowledge (so the offence would be committed if a person used a camera designed to be activated automatically by the presence of another person in the room). Subsection (3) provides that the reference to a “structure” in section 9(5) includes tents, vehicles, vessels and other temporary or movable structures.

Section 11 – Administering a substance for sexual purposes

34. This section creates the offence of “administering a substance for a sexual purpose” where a person intentionally gives a victim an intoxicant, or otherwise causes an intoxicant to be taken by the victim without the victim knowing, and without reasonable belief that the victim knows, for the purpose of stupefying or overpowering the victim in order that the perpetrator, or any other person, may engage in a sexual activity with the victim. It is immaterial whether or not any sexual activity actually takes place.
35. Subsection (2) extends the offence to apply to certain situations in which the victim does in fact know that he or she is taking the intoxicating substance. In such a situation, a person will commit an offence if he or she intentionally induces in the victim a reasonable belief that the substance is either substantially weaker than it really is, or is of a substantially smaller quantity than it really is. The fact that the victim knows that he or she is taking an intoxicant is to be disregarded.