

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Consent and Reasonable Belief

Section 12 – Meaning of “consent” and related expressions

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

Section 13 – Circumstances in which conduct takes place without free agreement

37. This section builds on the general definition of consent in section 12. It provides that, in the particular situations which are set out in subsection (2), there is no free agreement to sexual activity by a victim, and hence no consent. It is a non-exhaustive list and therefore *does not* imply that in situations which are not listed in subsection (2) there *is* free agreement.
38. Subsection (2)(a) provides that there is no consent if the victim is so intoxicated through alcohol or any other substance that he or she is incapable of giving consent. The exact point at which the victim reaches this level of intoxication will be a matter to be decided by the court but once it has been reached then any acting by the victim will not amount to consent.
39. Subsection (2)(b) provides that there is no consent in situations in which the victim agrees or submits to sexual activity because of violence used against him or her or another person, or because of threats of violence against him or her or another person.
40. Subsection (2)(c) provides that there is no consent if the victim agrees or submits to sexual activity because he or she is unlawfully detained by the accused. The detention need not necessarily involve the use of direct force or violence.
41. Subsection (2)(d) provides that the victim does not consent to sexual activity when the accused has deceived him or her and, as a result, the victim is mistaken as to the nature or the purpose of the activity.
42. Subsection (2)(e) provides that there is no consent if the victim agrees or submits to sexual activity with the perpetrator as a result of the perpetrator impersonating someone whom the victim knows personally.
43. Subsection (2)(f) provides that there is no consent if the only expression or indication of the victim’s consent to sexual activity is from someone other than the victim.
44. Subsection (3) provides that in each of the paragraphs of subsection (2), the references to “A” and “B” are to be read in the same way as they are read in sections 1 to 9. Therefore, “A” is the person accused of the offence and “B” is the victim or complainer.

Section 14 – Consent: capacity while asleep or unconscious

45. Section 14 provides that a person is incapable, while asleep or unconscious, of giving consent to any conduct.

Section 15 – Consent: scope and withdrawal

46. This section makes further provision as to the meaning of consent for sections 1 to 9 of the Bill. It deals with two separate aspects of consent.
47. Subsection (2) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.
48. Subsections (3) and (4) deal with the withdrawal of consent. Subsection (3) provides that consent may be withdrawn at any time before or during that sexual activity. Consent may therefore be withdrawn before the activity begins or while the sexual activity is taking place. Subsection (4) provides that, if consent is withdrawn, the activity takes place without consent.

Section 16 – Reasonable belief

49. This section makes further provision in respect of determining, for the purposes of Part 1 of the Bill, whether a person's belief as to consent or knowledge, in relation to the sexual activity that has taken place, was reasonable.
50. It will be for a court or the jury to determine in each particular case what amounts to reasonable belief but this section provides that, in determining whether such belief is reasonable, regard is to be had to whether the accused took any steps to ascertain whether there was consent, or, as the case may be, knowledge, and if so, to what those steps were.