

SEXUAL OFFENCES ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Sexual Offences

Section 1: Rape

10. **Section 1** makes it an offence for a person (A) intentionally to penetrate with his penis the vagina, anus or mouth of another person (B) without that person's consent if A does not reasonably believe that B consents. **Subsection (2)** provides that whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. This and the offence in section 5 are the only offences that can only be committed by a male, because they relate to penile penetration. **Subsection (3)** provides that sections 75 and 76 apply to this offence. Sections 75 and 76 deal with evidential and conclusive presumptions about consent.

Section 2: Assault by penetration

11. **Section 2** covers the situation where a person (A) intentionally penetrates the vagina or anus of another person (B). The offence is committed where the penetration is by a part of A's body (for example, a finger) or anything else, (for example, a bottle); where the penetration is sexual (as defined in section 78), so that it excludes, for example, intimate searches and medical procedures; where B does not consent to the penetration; and where A does not reasonably believe that B consents. What is said in the note to section 1 about whether a belief in consent is reasonable also applies here. This and all subsequent offences in the Bill save the offence at section 5 can be committed by a male or female, against a male or female. **Subsection (3)** provides that sections 75 and 76 apply to this offence. Sections 75 and 76 deal with evidential and conclusive presumptions about consent.

Section 3: Sexual assault

12. **Section 3** makes it an offence for a person (A) intentionally to touch sexually another person (B) without that person's consent, if he does not reasonably believe that B consents. What is said in the note to section 1 about whether a belief in consent is reasonable also applies here. The meaning of "touching" is explained at section 79(8); "sexual" is defined at section 78. The effect of these sections is that the offence covers a wide range of behaviour including, for example, rubbing up against someone's private parts through the person's clothes for sexual gratification. **Subsection (3)** provides that sections 75 and 76 apply to this offence. Sections 75 and 76 deal with evidential and conclusive presumptions about consent.

Section 4: Causing a person to engage in sexual activity without consent

13. **Section 4** makes it an offence for a person (A) intentionally to cause another person (B) to engage in sexual activity (as defined in section 78) without that person's consent, if he

does not reasonably believe that B consents. What is said in the note to section 1 about whether a belief in consent is reasonable also applies here. A may cause B to engage in sexual activity with A (for example, a woman who compels a man to penetrate her); on B himself (for example, where one person forces someone else to masturbate himself); or with another person (for example, where one person makes someone else masturbate a third person). *Subsection (3)* provides that sections 75 and 76 apply to this offence. Sections 75 and 76 deal with evidential and conclusive presumptions about consent.

Section 5: Rape of a child under 13

14. **Section 5** makes it an offence for a person intentionally to penetrate with his penis the vagina, anus or mouth of a child under the age of 13. Whether or not the child consented to this act is irrelevant.

Section 6: Assault of a child under 13 by penetration

15. **Section 6** makes it an offence for a person intentionally to penetrate sexually the vagina or anus of a child under the age of 13 with a part of his body, such as a finger, or with anything else, such as bottle or other object. The penetration must be sexual, as defined in section 78. Whether or not the child consented to the act is irrelevant.

Section 7: Sexual assault of a child under 13

16. **Section 7** makes it an offence for a person to touch sexually a child under the age of 13. The meanings of “touching” and “sexual” are the same as for section 3. Whether or not the child consented to the act is irrelevant.

Section 8: Causing or inciting a child under 13 to engage in sexual activity

17. **Section 8** makes it an offence for a person intentionally to cause or incite a child under the age of 13 to engage in sexual activity. In relation to caused sexual activity, the offence covers the same situations as does the offence under section 4 except that, for this offence, whether or not the child consented to engaging in the sexual activity is irrelevant. This section also covers the situation where incitement takes place but the sexual activity itself does not. For example, a person may incite a child to engage in sexual activity with him (for example, where a person incites the child to masturbate him), or on the child himself (for example, where a person incites the child to strip) or with a third person (for example, where someone incites the child to have sexual intercourse with his friend).

Section 9: Sexual activity with a child

18. **Section 9** makes it an offence for a person (A) aged 18 or over to intentionally engage in sexual touching of a child under 16. Where the child is aged 13 or over but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. “Touching” is explained at section 79(8) and covers all forms of physical contact including penetration; “sexual” is defined at section 78. Whether or not the child consented to the activity is irrelevant.

Section 10: Causing or inciting a child to engage in sexual activity

19. **Section 10** makes it an offence for a person (A) aged 18 or over, intentionally to cause or incite a child aged under 16 to engage in sexual activity (as defined at section 78). Where the child is aged 13 or over, but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. The sexual activity which is caused or incited may be activity with A (for example, where A causes or incites the child to have sexual intercourse with him), on the child himself (for example, where A causes or incites the child to strip for A’s sexual gratification) or with a third person (for example, where A causes or incites the child to have sexual intercourse with A’s friend). The incitement constitutes an offence whether or not the activity incited actually takes place.

Whether or not the child consented to the activity caused or incited, or to the incitement, is irrelevant.

Section 11: Engaging in sexual activity in the presence of a child

20. **Section 11** makes it an offence for a person (A) aged 18 or over intentionally to engage in sexual activity (as defined in section 78), in order to gain sexual gratification, when a child aged under 16 is present or in a place from which A can be observed. Where the child is aged 13 or over but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. The offence is committed if A knows or believes that the child is aware that he is engaging in the activity or intends that the child should be aware of this. This offence would cover, for example, A masturbating himself in front of a child, or A masturbating himself in the presence of the child to whom he is describing what he is doing, perhaps because the child is covering his face. It would also cover the situation where A performs a sexual act in a place where he knows that he can be seen by a child, for example via a webcam.

Section 12: Causing a child to watch a sexual act

21. **Section 12** makes it an offence for a person (A) intentionally to cause a child aged under 16, for the purpose of the sexual gratification of A, to watch a third person engaging in sexual activity or to look at an image of a person engaging in sexual activity. Where the child is aged 13 or over but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. The definition of sexual activity is at section 78. A person who, for his own sexual gratification, forces a child to watch two people have sex, or who forces a child to watch a pornographic film, would commit this offence.

Section 13: Child sex offences committed by children or young persons

22. **Section 13** makes it an offence for a person aged under 18 to do anything that would be an offence under any of sections 9 to 12 if he were aged 18 or over. The purpose of this section is to provide a lower penalty where the offender is aged under 18. In practice (although there is no provision about this in the Act) decisions on whether persons under 18 should be charged with child sex offences will be made by Crown Prosecutors in accordance with the principles set out in the Code for Crown Prosecutors. In deciding whether it is in the public interest to prosecute these offences, where there is enough evidence to provide a realistic prospect of conviction, prosecutors may take into consideration factors such as the ages of the parties; the emotional maturity of the parties; whether they entered into a sexual relationship willingly; any coercion or corruption by a person; and the relationship between the parties and whether there was any existence of a duty of care or breach of trust.

Section 14: Arranging or facilitating commission of a child sex offence

23. **Section 14** makes it an offence for a person (A) intentionally to arrange or facilitate any action which he intends to do, intends another person to do or believes that another person will do, in any part of the world, which will involve an offence being committed against a child under any of sections 9 to 13.
24. An example of the first two limbs of the offence is where A approaches an agency requesting the agency to procure a child for the purpose of sexual activity either with himself or with a friend. The offence is committed whether or not the sex takes place. An example of the third limb of the offence is where A intentionally drives another person (X) to meet a child with whom he knows X is going to have sexual activity. A may not intend X to have child sexual activity, but he believes that X will do so if he meets that child.
25. **Subsection (2)** provides an exception for anyone whose actions are intended to protect the child. **Subsection (3)** defines the concept of acting for the protection of a child as

acting to protect a child from pregnancy or sexually transmitted infection, to protect the physical safety of a child or to promote the emotional wellbeing of a child by the giving of advice. The exception only applies if the person is not causing or encouraging an activity that would constitute an offence under sections 9 to 13 and if he is not acting for the purpose of obtaining sexual gratification. An example would be where a health worker believes that a person is having sex with a child under 16. He advises that it is unlawful to have sex with children under 16 but supplies him with condoms because he believes that the person will otherwise have sex with the child without using any protection.

Section 15: Meeting a child following sexual grooming etc.

26. **Section 15** makes it an offence for a person (A) aged 18 or over to meet intentionally, or to travel with the intention of meeting, a child aged under 16 in any part of the world, if he has met or communicated with that child on at least two earlier occasions, and intends to commit a “relevant offence” against that child either at the time of the meeting or on a subsequent occasion. An offence is not committed if A reasonably believes the child to be 16 or over.
27. The section is intended to cover situations where an adult (A) establishes contact with a child through, for example, meetings, telephone conversations or communications on the Internet, and gains the child’s trust and confidence so that he can arrange to meet the child for the purpose of committing a “relevant offence” against the child. The course of conduct prior to the meeting that triggers the offence may have an explicitly sexual content, such as A entering into conversations with the child about the sexual acts he wants to engage her in when they meet, or sending images of adult pornography. However, the prior meetings or communication need not have an explicitly sexual content and could for example simply be A giving the child swimming lessons or meeting her incidentally through a friend.
28. The offence will be complete either when, following the earlier communications, A meets the child or travels to meet the child with the intent to commit a relevant offence against the child. The intended offence does not have to take place.
29. The evidence of A’s intent to commit an offence may be drawn from the communications between A and the child before the meeting or may be drawn from other circumstances, for example if A travels to the meeting with ropes, condoms and lubricants.
30. *Subsection (2)(a)* provides that A’s previous meetings or communications with the child can have taken place in or across any part of the world. This would cover for example A emailing the child from abroad, A and the child speaking on the telephone abroad, or A meeting the child abroad. The travel to the meeting itself must at least partly take place in England or Wales or Northern Ireland.

Section 16: Abuse of position of trust: sexual activity with a child

Section 17: Abuse of position of trust: causing or inciting a child to engage in sexual activity

Section 18: Abuse of position of trust: sexual activity in the presence of a child

Section 19: Abuse of position of trust: causing a child to watch a sexual act

31. These sections re-enact and amend the offence of abuse of position of trust under sections 3 and 4 of the Sexual Offences (Amendment) Act 2000. The sections each provide that it is an offence for a person (A) aged 18 or over intentionally to behave in certain sexual ways in relation to a child aged under 18, where A is in a position of trust (as defined in section 21) in respect of the child. The prohibited behaviour in each of the sections is identical to that prohibited by the child sex offences in sections

9, 10, 11 and 12 respectively, except that for the abuse of position of trust offences, the child may be 16 or 17.

32. Except where the child is under 13, one of the requirements of the offence is that A does not reasonably believe that the child is 18 or over, and A is subject to an evidential burden in relation to this aspect of the offence (*subsection (3)* of each section). An evidential burden means that, unless A shows from the evidence that there is an arguable case as to whether he reasonably believed the child to be 18 or over, it is presumed that he did not reasonably believe this. Where the child is under 13, the offence is committed regardless of any belief A might have in relation to the child's age.
33. The effect of *subsection (1)(d)* (or in the case of section 18, *subsection (1)(e)*) is that, where A is in a position of trust by virtue of one of the first four categories of position of trust set out at section 21, the prosecution must prove, in addition to the other requirements, that he knew or could reasonably have been expected to know of the facts placing him in a position of trust with the child. *Subsection (4)* of each section puts an evidential burden on A in this respect. This means that, unless A shows from the evidence that there is an arguable case as to whether or not he knew or could reasonably have been expected to know of the facts giving rise to the position of trust, it is presumed that he did know or could reasonably have been expected to know them. The first four categories of position of trust all concern situations where A looks after persons under 18 at an institution and the child is at that institution. Subsection (4) is designed to cover cases where, for example, the institution where A works is very large or has a number of different sites, and A may not therefore know that the child is at the institution.

Section 20: Abuse of position of trust: acts done in Scotland

34. *Section 20* provides that any act that would, if done in England, Wales or Northern Ireland, constitute an offence under sections 16 to 19 of this Act, also constitutes an offence under those sections if carried out in Scotland.

Section 21: Positions of trust

Section 22: Positions of trust: interpretation

35. *Section 21* defines "position of trust" for the purposes of the offences in sections 16, 17, 18 and 19. *Subsection (1)(b)* of section 21 also provides a power for the Secretary of State to specify further conditions that will constitute a position of trust. The power is subject to the affirmative parliamentary procedure (section 137(2)).
36. The conditions in *subsections (2) to (5)* use the term "looks after". This term is defined, in broad terms, at *subsection (2)* of section 22.
37. *Subsection (2)* applies where the child is detained following conviction for a criminal offence, for example in a secure training centre or a young offenders institution.
38. *Subsection (3)* applies to a wide range of settings in which young people are accommodated, including foster care; residential care (local authority, private or voluntary, including secure accommodation); and semi-independent accommodation.
39. *Subsection (4)* covers places where young people with medical conditions, physical or learning disabilities, mental illness or behavioural problems might be accommodated and includes NHS, private and voluntary accommodation.
40. *Subsection (5)* covers the situation where the child is receiving education in an educational institution. This concept is further explained at *subsection (4)* of section 22. The effect of that subsection is that where the child is registered at a college but receives education at another college with which the former has arrangements, A will still be in a position of trust in relation to the child if A works at the former college.
41. *Subsection (6)* covers children's guardians appointed under Northern Ireland legislation.

42. *Subsection (7)* includes persons who, in their capacity as, for example, Connexions Personal Advisers ("CPAs") look after children on an individual basis. The definition of looking after a child on an individual basis, for the purposes of this subsection, and *subsections (10) (11) and (13)* is at section 22(3). The reference at this definition to contact "by other means" (section 22(3)) is designed to include persons such as CPAs whose normal means of providing support to children is by telephone or via the Internet.
43. *Subsection (8)* covers those who have unsupervised contact with children in the context of their duties under section 20 or 21 of the Children Act 1989 and equivalent legislation in Northern Ireland. Such persons arrange accommodation for children who, for whatever reason, are not being looked after by those who have parental responsibility for them, and check that their welfare is being looked after once such accommodation has been found. They include local authority staff such as social workers and family centre staff who visit the accommodation in which a child has been placed in order to oversee the child's welfare.
44. *Subsection (9)* covers persons who have unsupervised contact with children by virtue of their appointment as children and family reporters under section 7 of the Children Act 1989 or under Article 4 of the Children (Northern Ireland) Order 1995. These persons present reports for the court relating to children's welfare.
45. *Subsection (10)* covers personal advisers who look after children on an individual basis (as defined at section 22(3)) having been appointed by a local authority under the Children Act 1989. Such personal advisers generally provide help and support to children aged 16-17 who have been in local authority care.
46. *Subsection (11)* covers persons who supervise children pursuant to a care order, supervision order or educational supervision order under various provisions in the Children Act 1989 or the Children (Northern Ireland) Order 1995 and, in that capacity, look after children on an individual basis (again, as defined at section 22(3)).
47. *Subsection (12)* covers a range of persons who, in the course of their duties, regularly have unsupervised contact with children. These are officers of the Children and Family Court Advisory and Support Service appointed to act as children's guardians under section 41(1) of the Children Act 1989; persons appointed as children's guardians in relation to adoption proceedings under Rules 6 and 18 of the Adoption Rules 1984; and persons appointed under Rule 9.5 of the Family Proceedings Rules 1991 to act as children's guardians ad litem in private law Children Act 1989 proceedings and cases determining wardship.
48. *Subsection (13)* includes adults who supervise children under bail supervision, a community sentence (for example a probation order, combination order, community service order, supervision order, attendance centre order) and children under conditions following release from detention resulting from a criminal conviction (e.g. those released on licence from a young offenders institution) This would include members of Youth Offending Teams provided they have sufficient contact and connection with the child or someone providing counselling or drug rehabilitation services to the child pursuant to the terms of a court order.

Section 23: Sections 16 to 19: marriage exception

49. *Section 23* provides that A will not commit an offence under sections 16 to 19 if he can prove that, at the time of the sexual activity, B was aged 16 or over and he and B were lawfully married to each other.

Section 24: Sections 16 to 19: sexual relationships which pre-date position of trust

50. *Section 24* provides A with a defence to abuse of position of trust offences if he can prove that his sexual relationship with B pre-dated his relationship of trust with B. So if A could prove that he and B had a sexual relationship before A went to work at the

school at which B is a pupil, he would not commit an offence by continuing that sexual relationship. The effect of *subsection (2)* is to limit this to the situation where the sexual relationship that pre-dated the relationship of trust was lawful, so it would not cover for example a relationship with a child of under 16.

Section 25: Sexual activity with a child family member

51. **Section 25** makes it an offence for a person (A) intentionally to touch a family member (as defined in sections 27) aged under 18, where the touching is sexual. The meaning of touching is explained at section 79(8). It covers all forms of physical contact including sexual intercourse. The definition of sexual is at section 78. Additional elements of the offence are that A must know, or be in a position where he could reasonably be expected to know, that the child is his family member and that, except where the child is under 13, he does not reasonably believe that the child is 18 or over.
52. So if, for example, A has never met the child before, and so does not know, and could not reasonably be expected to know, that she is his sister, and reasonably believes she is over 18, he will not commit this offence by engaging in sexual activity with her, even though she is in fact his sister, and only 14.
53. In relation to both these last two elements of the offence A is under an evidential burden (*subsections (2) and (3)*). This means that unless A shows from the evidence that there is an arguable case about these issues, it is presumed that he did not reasonably believe the child to be 18 or over, and that he knew or could reasonably have been expected to know that the child was his family member. Whether or not the child consented to the touching is irrelevant.

Section 26: Inciting a child family member to engage in sexual activity

54. **Section 26** makes it an offence for a person (A) intentionally to incite a child family member (defined in section 27) aged under 18 either to touch A or to allow himself to be touched by A, where the touching is sexual. The meaning of touching is at section 79(8). It covers all forms of physical contact including sexual intercourse. The definition of sexual is at section 78. An example of this offence would be where A encourages B to masturbate A or cajoles B into agreeing to have sex with him. The offence is committed whether or not the sexual touching takes place. So where in the above example A has encouraged B to masturbate him, but the masturbation does not take place because another person enters the room, the offence is nevertheless complete. The two additional elements of the offence (and the evidential burdens) described in relation to section 25 apply to this section too (*subsections (1)(d) and (e), (2) and (3)*). Whether or not the child consented to the incitement, or the activity being incited is irrelevant.

Section 27: Family relationships

55. **Section 27** lists the relationships relevant for the purposes of sections 25 and 26. Section 67 of the Adoption and Children Act 2002 provides that an adoptive child is the child of the adoptive parents and not the biological parents. Adoptive relationships are therefore covered by *subsection (1)(a)*. The categories at *subsections (2) to (4)* also apply (by virtue of *subsection (1)(b)*) to the adoptive child's biological family relationships. These relationships fall into three categories.
56. The first category of relationships is listed in *subsection (2)*. Definitions of the relationships mentioned at subsection (2) are at *subsection (5)(a) to (c)*. Persons whose relationships fall within this category will always be each other's family members for the purposes of sections 25 and 26. Even where there is no blood relationship and the relationship can therefore cease – as in the case of foster parents – this offence may be committed for as long as the victim is under 18. So for example even where A is no longer a child's foster parent, A will commit an offence by having sex with that child while the child is under 18.

57. The second category of relationships is listed in *subsection (3)*. The relationship between A and a child will only fall within this category for the purposes of sections 25 and 26 if A lives, or has lived, in the same household as the child or is, or has been, regularly involved in caring for, training or supervising or being in sole charge of the child. *Subsection (3)(a)* relates to step-parents, *(3)(b)* relates to cousins, *(3)(c)* relates to step-siblings and *(3)(d)* relates to foster-siblings. The definition of foster parent is at *subsection (5)(c)* and the definition of step-parent, stepbrother and stepsister is at *subsection (5)(e)*. An example within this category would be a person (A) who lives or has lived in the same house as his first cousin who is under 18. If the cousins had never lived in the same household, A would not commit this offence by having a sexual relationship with the cousin. As with the first category, if the relationship ceases (for example A ceases to be the partner of the child's mother), the offence will still be committed if A has sex with the child while the child is under 18.
58. An example of the third category of relationships (at *subsection (4)*) would be where a child is living in the same household as an au pair who looks after him. This category of relationship differs from the other two categories in that an offence will not be committed if A has a sexual relationship with the child after the relationship has ceased, even where the child is under 18. So, in this example, if the au pair were to leave the household and/or cease to have responsibility for the child, then the relationship would no longer be relevant for the purposes of sections 25 or 26

Section 28: Sections 25 and 26: marriage exception

59. This section provides A with a defence to the offences under sections 25 and 26 if he can prove that at the time of the act the child was aged 16 or over and he was lawfully married to the child.

Section 29: Sections 25 and 26: sexual relationships which pre-date family relationships

60. This section provides A with a defence to the offences under sections 25 and 26 if he can prove that his sexual relationship with the child pre-dated the start of the familial relationship as defined in section 27. Thus, for example, where two divorced people meet because their respective 16 and 17 year old children are engaged in a sexual relationship and the parents decide to marry, if all four persons were to move into the same household the criminal law would not interfere in the ongoing sexual relationship between the children, even though they would otherwise have been brought within the scope of the offence. This defence is not available where A and the child are related as set out in section 27(2) (whether by blood or adoption). The effect of *subsection (2)* is to limit this to the situation where the sexual relationship was lawful so it would not cover for example a relationship with a child of under 16.

Section 30: Sexual activity with a person with a mental disorder impeding choice

Section 31: Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity

Section 32: Engaging in sexual activity in the presence of a person with a mental disorder impeding choice

Section 33: Causing a person, with a mental disorder impeding choice, to watch a sexual act

61. All the offences in these sections are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder and because of that mental disorder, or for reasons related to it, B is unable to refuse involvement in the sexual activity. "Mental disorder" is stated at section 79(6) to have "the meaning given by section 1 of the Mental Health Act 1983". In section 1(2) of

that Act, subject to section 1(3), mental disorder is defined as “mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind.” A person with a “learning disability” would fall within this definition. The definition of sexual activity is at section 78. *Subsection (2)* of each section contains a definition of what is meant by B being unable to refuse.

62. The offences are divided according to the different types of sexual activity (the types of sexual activity covered are the same as for the child sex offences (sections 9 to 12)).
63. **Section 30** covers touching, which as section 79(8) explains, includes any type of physical contact including penetration.
64. **Section 31** covers the situation where A causes or incites B to engage in sexual activity, for example, where A causes B to have sexual intercourse with A’s friend, or incites him to do so, even if the incitement does not result in B engaging in sexual activity.
65. **Section 32** covers the situation where, for the purpose of obtaining sexual gratification, A engages in sexual activity in the presence of B, or in a place from which B can observe him. The offence is only committed, however, where A knows or believes that B is aware of the sexual activity or intends him to be aware of it. B might be aware of the sexual activity because he is watching it at A’s behest or because A is describing what he is doing to B.
66. **Section 33** covers the situation where A, for his sexual gratification, causes B to watch a third person engaging in sexual activity or to look at an image of a person engaging in sexual activity. “Image” is defined in section 79(4)).

Section 34: Inducement, threat or deception to procure sexual activity with a person with a mental disorder

Section 35: Causing a person with a mental disorder to engage in or to agree to engage in sexual activity by inducement, threat or deception

Section 36: Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder

Section 37: Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception

67. Like the previous set of offences, these sections are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder. However, for these offences, there is no need to prove that B is unable to refuse. Instead, the offences address the situation where A uses inducements, threats or deceptions to obtain B’s agreement to the sexual activity. The definition of mental disorder is at section 79(6); the definition of sexual activity is at section 78. An inducement might be A promising B presents of anything from sweets to a holiday; a threat might be A stating that he will hurt a member of B’s family; and a deception might be A stating that B will get into trouble if he does not engage in sexual activity, or persuading him that it is expected that friends should engage in sexual activity. The division of the sections according to the type of sexual activity involved is similar to that in the previous set of offences.

Section 38: Care workers: sexual activity with a person with a mental disorder

Section 39: Care workers: causing or inciting sexual activity

Section 40: Care workers: sexual activity in the presence of a person with a mental disorder

Section 41: Care workers: causing a person with a mental disorder to watch a sexual act

68. Like the previous two sets of offences, these sections are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder. The difference here is that A and B must be in a relationship of care. There is no need to prove that B is unable to refuse. The definition of mental disorder is at section 79(6); the definition of sexual activity is at section 78. The relationships of care that are covered by these offences are set out at section 42. The offences are divided according to the different types of sexual activity involved. The division is the same as for sections 30 to 33 and what is said in the notes for those sections about the different types of sexual activity covered applies here too. The prosecution must prove, in addition to the other requirements, that the defendant knew or could reasonably have been expected to know that B had a mental disorder. *Subsection (2)* of each section puts an evidential burden on A in this respect. This means that, unless A shows from the evidence that there is an arguable case as to whether or not he knew or could reasonably have been expected to know of B's mental disorder, it is presumed that he did know or could reasonably have been expected to know of this.

Section 42: Care workers: interpretation

69. This section defines a relationship of care for the purposes of sections 38 to 41. An example of a relationship covered by *subsection (2)* is where A is a member of staff in a care home and B is a resident there. An example of a relationship covered by *subsection (3)* is where A is a receptionist at the clinic that B attends every week. *Subsection (4)* covers any situation where A provides care, assistance or services to B in connection with B's mental disorder. An example of a relationship covered by *subsection (4)* is where A takes B on outings every week or treats B for his learning disability with complementary therapies in B's own home. In all cases, A must have, or be "likely to have", regular face to face contact with B. The "likely to have" limb is to cover persons who provide care to B in these situations from day one of their involvement with B.

Section 43: Sections 38 to 41: marriage exception

70. This section provides A with a defence to the offences under sections 38 to 41 if he proves he was lawfully married to B at the time of the sexual activity and B was over 16.

Section 44: Sections 38 to 41: sexual relationships which pre-date care relationships

71. This section provides A with a defence to the offences under sections 38 to 41 if he proves that his sexual relationship with B pre-dated his relationship of care with B. But the sexual relationship must have been lawful for this defence to apply. So if A and B had a lawful sexual relationship before B developed his mental disorder and A started caring for him, A would not commit an offence by continuing that sexual relationship.

Section 45: Indecent photographs of persons aged 16 or 17

72. This clause redefines a "child" for the purposes of the Protection of Children Act 1978 ("the 1978 Act") as a person under 18 years, rather than under 16 years, of age. This change means the offences under that Act of taking, making, permitting to take,

distributing, showing, possessing with intent to distribute, and advertising indecent photographs or pseudo-photographs of children will now also be applicable where the photographs concerned are of children of 16 or 17 years of age. The same change applies to the offence of possessing an indecent photograph or pseudo-photograph of a child at section 160 of the Criminal Justice Act 1988 (section 160(4) applies the 1978 Act definition of “child”).

73. However, the clause also creates a number of conditions which if satisfied will mean that the defendant is not guilty of an offence under section 1(1)(a), (b) or (c) of the 1978 Act (provided that the offence charged relates to a photograph and not a pseudo-photograph).
74. The conditions in relation to an offence under section 1(1)(a) of the 1978 Act (taking or making indecent photographs) are as follows:
75. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that at the time of the taking or making of the photograph he and the child were married or living together as partners in an enduring family relationship (section 1A(1)).
76. Secondly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented to the photograph being taken or made, or as to whether the defendant reasonably believed that the child consented (section 1A(4)).
77. Thirdly, the photograph must not be one that shows a person other than the child and the defendant (section 1A(3)).
78. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 1(1)(a) of the 1978 Act. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution also prove that the child did not consent and that the defendant did not reasonably believe that the child consented (section 1A(4)).
79. The conditions in relation to an offence under section 1(1)(b) of the 1978 Act (distributing or showing indecent photographs) are as follows;
80. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over, and that either at the time of distributing or showing it, or at the time of obtaining it, he and the child were married or living together as partners in an enduring family relationship (section 1A(1) and (2)).
81. Secondly, the photograph must not be one that shows a person other than the child and the defendant (section 1A(3)).
82. If either of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 1(1)(b) of the 1978 Act. But if both the conditions are satisfied, the defendant is not guilty of the offence unless the prosecution prove that the showing or distribution was to a person other than the child (section 1A(5)).
83. The conditions in relation to an offence under section 1(1)(c) of the 1978 Act (being in possession of indecent photographs with a view to their being distributed or shown) are as follows:
84. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that either at the time of his possession of it with a view to distributing or showing it, or at the time when he obtained it, he and the child were married or living together as partners in an enduring family relationship (section 1A(1) and (2)).
85. Secondly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented (or the defendant reasonably believed that the child consented) to the photograph's being in the defendant's possession, and also as to

whether the defendant had the photograph in his possession with a view to distributing or showing it to a person other than the child (section 1A(6)).

86. Thirdly, the photograph must not be one that shows a person other than the child and the defendant (section 1A(3)).
87. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 1(1)(c) of the 1978 Act. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution also prove either that the child did not so consent and that the defendant did not reasonably believe that the child so consented, or that the defendant had the photograph in his possession with a view to its being distributed to a person other than the child.
88. Similar provision is made in relation to an offence under section 160 of the Criminal Justice Act 1988 (possession of indecent photograph of a child). The conditions are as follows:
89. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that at the time when he possessed the photograph, or at the time when he obtained it, he and the child were married or living together as partners in an enduring family relationship (section 160A(1) and (2)).
90. Secondly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented to the photograph being in his possession or as to whether the defendant reasonably believed that the child so consented (section 160A(4)).
91. Thirdly, the photograph must not be one that shows a person other than the child and the defendant (section 160A(3)).
92. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in section 160 of the Criminal Justice Act 1988. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution prove that the child did not consent and that the defendant did not reasonably believe that the child consented (section 160A(4)).

Section 46: Criminal proceedings, investigations etc.

93. This clause creates a limited defence to the offence of “making” an indecent photograph or pseudo-photograph of a child, under section 1(1)(a) of the Protection of Children Act 1978. “Making” covers, for example, the situation where a person downloads an image from the Internet or copies a computer hard drive. The defence applies where a person “making” such a photograph or pseudo-photograph can prove that it was necessary for him to do so for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings. The defence also applies to a member of the Security Service or GCHQ (Government Communications Headquarters) who can prove that it was necessary for him to “make” the photograph or pseudo-photograph for the exercise of the functions of the Security Service or GCHQ.

Section 47: Paying for sexual services of a child

94. **Section 47** makes it an offence for any person (A) intentionally to obtain for himself the sexual services of a child (B) aged under 18, where those services have been paid for or where payment has been promised. The offence covers the situation where A pays for the services or promises payment either directly to B or to a third party (C) (for example where C is B’s pimp) or where A knows that another person (D) has paid for the services or promised such payment. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over) However, where B is under 13, A will commit the offence regardless of any reasonable belief he may have about B’s age. *Subsection (2)* defines payment widely. It covers not only a payment of money but any financial advantage. This includes the discharge of an obligation to pay (for

example, B owes A a debt for a car but A agrees to waive the debt if B provides him with sexual services) and the provision of goods or services gratuitously or at a discount (for example, where A provides drugs to B at no or reduced cost on condition that B provides sexual services to A).

Section 48: Causing or inciting child prostitution or pornography

95. **Section 48** makes it an offence for a person (A) intentionally to cause or incite a child under 18 (B) into prostitution or involvement in pornography anywhere in the world. The offence is aimed at persons who recruit into prostitution or pornography (whether on a one-off basis or longer term) those who are not involved or not currently involved in it. This could be where A makes a living from the prostitution of others and encourages new recruits to work for him or another (whether those recruits do actually then engage in prostitution or not). It could also cover the situation where A and B live together and A compels B to become involved in pornography, for example in order to pay their rent, or for any other reason. Unlike the prostitution offence at section 53, there is no requirement that the causing or inciting of a child prostitute must be done for gain. The prostitution or pornography can take place, or be intended to take place, in any part of the world. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over). However, where B is under 13, A will commit the offence regardless of any reasonable belief he may have about B's age. The terms "pornography" and "prostitute" are defined in section 51.

Section 49: Controlling a child prostitute or a child involved in pornography

96. **Section 49** makes it an offence for a person (A) intentionally to control any of the activities of a child (B) that relate to the child's prostitution or involvement in pornography in any part of the world. The offence is committed even if B's activities in relation to prostitution or pornography are controlled for part of the time by another person. An example of the behaviour that might be caught by this offence is where A requires or directs B to charge a certain price or to use a particular hotel for her sexual services or to pose for a certain photographer and B complies with this request or direction. The prostitution or pornography can take place in any part of the world. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over). However, where B is under 13, A will commit the offence regardless of any belief he may have about B's age. The terms "pornography" and "prostitution" are defined in section 51.

Section 50: Arranging or facilitating child prostitution or pornography

97. **Section 50** makes it an offence for a person (A) to arrange or facilitate the involvement of a child (B) in prostitution or pornography in any part of the world. This offence would cover for example, delivering B to a place where he will be used to make pornography or making arrangements for B's prostitution to take place in a particular room. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over). However, where B is under 13, A will commit the offence regardless of any reasonable belief he may have about B's age. The terms "pornography" and "prostitution" are defined in section 51.

Section 51: Sections 48 to 50: Interpretation

98. **Section 51** defines the terms "pornography", "prostitute" and "prostitution" as used in sections 48 to 50.

Section 52: Causing or inciting prostitution for gain

99. **Section 52** makes it an offence for a person (A) intentionally to cause or incite a person (B) into prostitution anywhere in the world where A does so for or in expectation of gain for himself or for a third party. Although this offence is not specifically limited to where B is aged 18 or over, it is aimed at cases where B is an adult, as the offence at section 48 specifically covers cases where B is under 18. Although prostitution by adults aged 18 or over is not an offence in itself, this offence is intended to cover those who, for gain, recruit others into prostitution, whether this be by the exercise of force or otherwise. The terms “prostitute” and “gain” are defined at section 54.

Section 53: Controlling prostitution for gain

100. **Section 53** makes it an offence for a person (A) intentionally to control another person’s activities relating to prostitution, in any part of the world, where A does so for, or in the expectation of, gain for himself or a third party. This offence covers the same behaviour as section 49, but is limited to prostitution. Although this offence is not specifically limited to cases where the person controlled is aged 18 or over, it is aimed at those cases, as the offence at section 49 specifically covers cases where the person controlled is under 18. The terms “prostitution” and “gain” are defined at section 54.

Section 54: Sections 52 and 53: interpretation

101. **Section 54** provides definitions for the terms “gain”, “prostitute” and “prostitution” as used in sections 52 and 53. Subsection (1) defines “gain” as any financial advantage, including the discharge of a debt or obligation to pay, or the provision of goods or services (including sexual services) for free, or at a discount. The reference to “sexual services” would cover someone who controls the activities of a number of women in prostitution, where the gain he derives from them is their engaging in sexual intercourse with him. It also covers the goodwill of any person likely to bring such a financial advantage. So in relation to the offence at section 52, for example, this would cover A inciting B to work as a prostitute for C, where A expects this will lead to C providing him (A) with cheap drugs at a later date. The definitions of “prostitute” and “prostitution” as used in sections 52 and 53 are those set out in section 51.

Section 55: Penalties for keeping a brothel used for prostitution

102. **Section 55** amends the Sexual Offences Act 1956 to create a new offence of keeping a brothel used for prostitution. The new offence is triable either way with a maximum penalty on indictment of 7 years imprisonment.

Section 56: Extension of gender-specific prostitution offences

103. **Section 56** introduces Schedule 1 (extension of gender-specific prostitution offences) to the Act. Schedule 1 widens the offences of “permitting the premises to be used for prostitution” (at section 35 of the Sexual Offences Act 1956), “loitering or soliciting for purposes of prostitution” and the provisions relating to cautions for this offence (at sections 1 and 2 of the Street Offences Act 1959), “kerb crawling” and “persistent soliciting of women for the purpose of prostitution” (at sections 1 and 2 of the Sexual Offences Act 1985), otherwise unchanged by this Act, to cover all people involved, irrespective of their gender.

Section 57: Trafficking into the UK for sexual exploitation

104. **Section 57** makes it an offence for a person (A) intentionally to arrange or facilitate the arrival into the UK of a person (B), where A intends to do anything that would result in the commission of a relevant offence involving B, or believes that another person is likely to do something to, or in respect of, B that would result in the commission of a relevant offence involving B. In both cases, the relevant offence must take place after

B's arrival in the UK but may take place anywhere in the world. "Relevant offence" is defined at *subsection (1)* of section 60.

105. This section re-enacts with amendments the offence in section 145 of the Nationality, Asylum and Immigration Act 2002.
106. A may intend the relevant offence to be committed, or believe that it is likely to be committed, in any part of the world. This is to ensure that an offence will be committed where, for example, A traffics B into the UK as an interim destination but intends to traffic B on to another country so he can be subjected to a sexual offence there.
107. A may intend to commit the relevant offence himself, or believe that another person will do so. So for example, it will be an offence for A to make arrangements to bring B into the UK believing that C will then, for gain, force B into prostitution in Germany (causing prostitution for gain will be a relevant offence). It is A's belief that is important, so the offence would still be committed if C never actually caused B to work as a prostitute.
108. A will only commit the offence if he intends that B should be the victim of an offence committed by A, or believes that B will be the victim of an offence committed by C. This will ensure that airline companies, road hauliers etc who are transporting someone without any such intent or belief are not captured. The offence is intended, however, to cover A if he is part of the enterprise of trafficking for sexual exploitation even if he is one link in a chain of people helping to traffic B. Provided A has the necessary intent or belief, the section will cover, for example, his recruiting B in B's country of origin, his making arrangements for transport and food for B's journey, his forging of immigration documents for B and his other involvement in bringing B to the UK.

Section 58: Trafficking within the UK for sexual exploitation

109. **Section 58** makes it an offence for a person (A) intentionally to arrange or facilitate travel within the UK of a person (B) where A intends to do anything to, or in respect of, B that would result in the commission of a relevant offence involving B, or where he believes that another person is likely to do something to, or in respect of, B that would result in the commission of a relevant offence involving B. In both cases, the relevant offence must take place during or after the journey but may take place anywhere in the world. "Relevant offence" is defined at *subsection (1)* of section 60. This offence is intended to apply both to UK nationals who are moved from one place to another in the UK to be sexually exploited as well as to others, including foreign nationals, who are, for example, trafficked to London from central Europe and then moved from London to another part of the UK to be sexually exploited.

Section 59: Trafficking out of the UK for sexual exploitation

110. **Section 59** makes it an offence for a person (A) intentionally to arrange or facilitate the departure from the UK of a person (B) where A intends to do anything to, or in respect of, B that would result in the commission of a relevant offence involving B or A believes that another person is likely to do something to, or in respect of, B that would result in the commission of a relevant offence involving B. In both cases, the relevant offence must take place after B's departure and may take place anywhere in the world. "Relevant offence" is defined at *subsection (1)* of section 60.
111. The offence is designed to cover the situation where B is in the UK, either because he is ordinarily resident here or because he has been trafficked here, but is then trafficked by A to another part of the world to be subjected to a sex offence.

Section 60: Sections 57 to 59: interpretation and jurisdiction

112. **Section 60** gives, for the purposes of the above sections, the definition of "relevant offence". The definition includes acts done outside England and Wales and Northern

Ireland which, if they had been done in either of those territories, would constitute an offence under Part 1 of the Bill or under section 1(1)(a) of the Protection of Children Act 1978 (or the equivalent offences in Northern Ireland). It is irrelevant for the purposes of this definition whether the act in question also constitutes an offence in the country in which it is carried out.

113. The section also defines the territorial extent and jurisdiction of the above sections. The offences will cover acts committed by any person in the UK. They will also cover acts committed outside the UK by any body incorporated under UK law such as a UK company, or by any of the categories of British person listed at *subsection (3)* of the section when abroad, irrespective of whether or not the act in question is a criminal offence under the law in the country in which it is committed.

Section 61: Administering a substance with intent

114. **Section 61** makes it an offence for a person (A) intentionally to administer a substance or to cause any substance to be taken by another person (B) where A knows that B does not consent to taking that substance and where A intends to stupefy or overpower B so that any person can engage in sexual activity involving B.
115. The offence is intended to cover use of so-called “date rape drugs” administered without the victim’s knowledge or consent, but would also cover the use of any other substance with the relevant intention. It would cover A ‘spiking’ B’s drinks with alcohol where B did not know he was consuming alcohol, but it would not cover A encouraging B to get drunk so that A could have sex with B, where B knew that he was consuming alcohol.
116. The substance may be administered to B in any way, for example, in a drink (as in the example given above), by injection or by covering B’s face with a cloth impregnated with the substance.
117. The offence applies both where A himself administers the substance to B, and where A causes the substance to be taken by B, for example where A persuades a friend (C) to administer a substance to B, so that A can have sex with B, because C knows B socially and can more easily slip the substance into B’s drink than A can.
118. However, the intended sexual activity need not involve A. In the example given above it could be intended that C or any other person would have sex with B.
119. The term “sexual”, used in this section in the phrase “sexual activity”, is defined in section 78. The sexual activity in this offence could involve A having sexual intercourse with or masturbating B; could involve A causing B to commit a sexual act upon himself (for example, masturbation); or could involve B and a third party engaging in sexual activity together, regardless of whether the third party had administered the substance.
120. The offence would be made out where A administers the substance or causes B to take it (with the relevant intent) regardless of whether any sexual activity took place, for example because a friend of B saw what was happening and intervened to protect B.

Section 62: Committing an offence with intent to commit a sexual offence

121. **Section 62** makes it an offence for a person (A) intentionally to commit any criminal offence with intent to commit any relevant sexual offence as defined in *subsection (2)*. This offence is intended to capture the situation where A commits a criminal offence but does so with the intention of committing a subsequent sexual offence, regardless of whether or not the substantive sexual offence is committed. It would apply, for example, where A kidnaps B so that he can rape him but is caught by the police before committing the rape. It would also apply where A detained B in his flat with this intention, or assaulted B to subdue him so that he could more easily rape him. If A does commit the intended offence, he could be charged with the substantive sexual offence in addition to this offence.

Section 63 Trespass with intent to commit a sexual offence

122. **Section 63** makes it an offence for A to intend to commit a “relevant sexual offence” (defined at *subsection (2)* of section 62) whilst he is on any premises where he is a trespasser, either knowing, or being reckless as to whether, he is trespassing. A person is a trespasser if he is on any premises without the owner’s or occupier’s consent, or other lawful excuse. This offence is intended to capture, for example, the situation where a person (A) enters a building owned by B, or goes into B’s garden or garage without B’s consent, and he intends to commit a sexual offence against the occupier. The offence applies regardless of whether or not the substantive sexual offence is committed. A will commit the offence if he has the intent to commit a relevant sexual offence at any time while he is a trespasser. The intent is likely to be inferred from what the defendant says or does to the intended victim (if there is one) or from items in possession of the defendant at the time he commits the trespass (for example, condoms, pornographic images, rope etc.). A separate offence is needed to cover trespass (as opposed to relying on section 62) because trespass is a civil tort and not a criminal offence.

Section 64: Sex with an adult relative: penetration

Section 65: Sex with an adult relative: consenting to penetration

123. **Section 64** makes it an offence for a person (A) aged 16 or over intentionally to penetrate sexually a relative (B) who is aged 18 or over if he knows or could reasonably have been expected to know that B is his relative. **Section 65** makes it an offence for a person (A) aged 16 or over to consent to being penetrated sexually by a relative (B) aged 18 or over if he knows or could reasonably have been expected to know that B is his relative. For either offence to be committed the penetration must be “sexual”, as defined at **Section 78**. This requirement ensures that penetration for some other purpose, for example where one sibling helps another to insert a pessary for medical reasons, is not caught by this offence. *Subsection (2)* of each section defines “relative” for the purposes of each offence.
124. Adoptive relatives are excluded from each offence. Paragraph 47 of Schedule 6 makes a consequential amendment to the Adoption and Children Act 2002, to the effect that the provision in the 2002 Act that makes an adoptive child a child of the adoptive parents does not apply in relation to these offences. So, for example, it will not be an offence under either of these sections for an adoptive brother and sister aged over 18 to have sexual intercourse.
125. The effect of *subsection (3)* of each section is that, unless A shows from the evidence that there is an arguable case as to whether or not he knew or could reasonably have been expected to know that B is his relative, it is presumed that he did know or could reasonably have been expected to know it.

Section 66: Exposure

126. **Section 66** makes it an offence for a person intentionally to expose his genitals where he intends that someone will see them and be caused alarm or distress. It is not necessary for A’s genitals to have been seen by anyone or for anyone to have been alarmed or distressed. For example, if a person exposes his genitals to some passers-by, he may (depending on his state of mind) commit the offence regardless of whether they actually see his genitals or whether they have been alarmed or distressed by seeing them.

Section 67: Voyeurism

127. **Section 67** makes it an offence, under *subsection (1)* for a person, (A), to observe, for the purpose of his own sexual gratification, another person doing a private act, for instance by looking through a window or peephole at someone having sexual intercourse, where A knows the person observed does not consent to being looked at for this purpose.

128. *Subsection (2)* covers a person (A) operating equipment with the intention of enabling another person, for his sexual gratification, to observe a third person (B), doing a private act, where A knows that B does not consent to being so viewed. This would cover, for example, a landlord (A) operating a webcam to allow people on the internet for their sexual gratification to view live images of his tenant (B) getting undressed, if A knew that B did not consent to this.
129. *Subsection (3)* covers a person (A) recording another person (B) doing a private act with the intention of looking at the recording for his own sexual gratification, or intending other people to look, for their sexual gratification, at the recording, and where he knows that B does not consent to the recording of that act with that intention. This would therefore cover the person (A) who secretly films someone (B) masturbating in B's bedroom to show to others for their sexual gratification. Proof that the intention was the sexual gratification of others could be derived from, for example, the fact that the image was posted on a pornographic website, or in a pornographic magazine. A will be caught by the offence whether or not those looking at the image know that the person filmed did not consent to being filmed with that intention.
130. *Subsection (4)* would cover someone who, for example, drilled a spy-hole or installed a two-way mirror in a house with the intention of spying on someone for sexual gratification or allowing others to do so. A would be caught even if the peephole or mirror was discovered before it was used.

Section 68: Voyeurism: interpretation

131. *Section 68* defines “private act”, and “structure” for the purposes of section 67.

Section 69: Intercourse with an animal

132. *Section 69* makes it an offence for a man intentionally to penetrate the vagina or anus of a living animal with his penis where he knows or is reckless as to whether that is what he is penetrating. The reference to vagina or anus in this context is further explained at *subsection (8)* of section 79. *Subsection (2)* of section 69 makes it an offence for a person intentionally to cause or allow her vagina or his or her anus to be penetrated by the penis of a living animal where he or she knows or is reckless as to whether that is what is doing the penetrating. This offence is related solely to penile penetration in relation to animals and does not replace existing legislation covering cruelty to animals.

Section 70: Sexual penetration of a corpse

133. *Section 70* makes it an offence for a person (A) intentionally to penetrate any part of the body of a dead person (B) with his penis, any other body part (for example his finger), or any other object, where that penetration is sexual. The offence is committed when A knows or is reckless as to whether he is penetrating any part of a dead body. This is intended to cover when A knows he is penetrating a dead body, for example in a mortuary, or where A is reckless as to whether B is alive or dead. It will not cover situations where A penetrates B fully believing B to be alive, but in fact B is dead, or where B unexpectedly dies during intercourse. The penetration must be sexual. A definition of sexual is given in section 78. This is to exclude legitimate penetration of corpses, for example that which occurs during an autopsy.

Section 71: Sexual activity in a public lavatory

134. *Section 71* makes it an offence intentionally to engage in sexual activities in a public lavatory. *Subsection (1)(a)* defines a public lavatory. The term “sexual” for the purposes of this clause is defined in *subsection (2)*. A definition distinct from that in section 78 is used in section 71 so as to include only sexual activities that a reasonable person would take to be sexual without knowledge of the purpose of the person carrying out the activity.

Section 72: Offences outside the United Kingdom

135. *Subsection (1)* of section 72 makes it an offence in England and Wales and Northern Ireland for a British citizen or UK resident (subject to *subsection (2)*) to commit certain acts overseas against a child under 16 (or, in Northern Ireland, under 17). The date referred to in *subsection (2)* is the commencement date of Part 2 of the Sex Offenders Act 1997, which this section re-enacts. The act done must amount to a sexual offence listed in Schedule 2 and must also amount to an offence in the country where it was committed. The exact description of the offence does not need to be the same in both countries. For example, the provisions could apply to someone who raped a child in another country although that offence was described differently under the law in that country. *Subsection (4)* provides that the defendant can require the prosecution to prove that what was done was an overseas offence.

Section 73: Exceptions to aiding, abetting or counselling

136. **Section 73** provides that, in certain defined circumstances, a person is not guilty of aiding, abetting or counselling a sexual offence under sections 5, 6 and 7 (offences against children under 13), section 9 (sexual activity with a child), section 13 (where the offence would be an offence under section 9 if the offender were over 18) and sections 16, 25, 30, 34 and 38 (where the victim is a child under 16).
137. The exception applies where the person is acting for the purpose of protecting a child from pregnancy or sexually transmitted infection, for the purpose of protecting the physical safety of a child, or for the purpose of promoting a child's emotional well-being. In this last case, however, the exception only applies where the person provides advice.
138. In all cases, the person must not be causing or encouraging the commission of an offence or a child's participation in it. Nor must the person be acting for the purpose of obtaining sexual gratification. So a person who was providing advice to a child under 16 about sexual health or contraception, in order to protect the child from becoming pregnant would not fall within the exception if he was at the same time meaning to encourage the child to have sex or was giving that advice in order to get sexual gratification for himself.

Section 74: "Consent"

139. **Section 74** defines "consent" for the purposes of this Part. This definition is relevant to many sections in the Part including, for example, the offence of rape (section 1). The section refers to a person's capacity to make a choice. A person might not have sufficient capacity because of his age or because of a mental disorder.

Section 75: Evidential presumptions about consent

140. This section applies to the offences of rape (section 1), assault by penetration (section 2), sexual assault (section 3) and causing a person to engage in sexual activity without consent (section 4). The section provides for presumptions that may be challenged by the defendant. The presumptions arise in the circumstances described in *subsection (2)*. The difference between paragraphs (a) and (b) of *subsection (2)* is that paragraph (a) covers violence and threats of violence used against the complainant whereas paragraph (b) covers violence and threats of violence used against a person other than the complainant. The violence or threat must occur either at the time of the relevant act or immediately before it began.
141. The effect of *subsection (3)* is that where, for example, the relevant act for which the person is being prosecuted is penetration, but the penetration is the culmination of a series of sexual activities, then if the violence or threat occurred immediately before the first sexual activity (as opposed to before the penetration), the presumptions still arise.

142. Where the prosecution proves that the defendant did a relevant act (as defined in section 77), that the circumstances described in *subsection (2)* existed and that the defendant knew that those circumstances existed, the complainant will be presumed not to have consented to the relevant act and the defendant will be presumed not to have reasonably believed that the complainant consented. In order for these presumptions not to apply, the defendant will need to satisfy the judge from the evidence that there is a real issue about consent that is worth putting to the jury. In practice (although this is not mentioned in the Act) the evidence produced may be from evidence that the defendant himself gives in the witness box, or from evidence given on his behalf by a defence witness, or resulting from evidence given by the complainant during cross-examination. If the judge is satisfied that there is sufficient evidence to justify putting the issue of consent to the jury, he will so direct; if not, he will direct the jury to find the defendant guilty.

Section 76: Conclusive presumptions about consent

143. This section creates conclusive presumptions about lack of consent and the absence of belief in consent in situations where the defendant deceived the complainant into sexual activity. *Subsection (2)(a)* covers the situation where, for example, the defendant intentionally tells the complainant that digital penetration of her vagina is necessary for medical reasons when in fact it is for his sexual gratification. *Subsection (2)(b)* covers the situation where, for example, the defendant impersonates the complainant's partner and thereby causes the complainant to consent to the relevant act. Where the prosecution prove that the defendant did a relevant act (as defined in section 77) and that any of the circumstances described in *subsection (2)* existed, it is conclusively presumed that the complainant did not consent to the relevant act and that the defendant did not believe that the complainant consented to the relevant act. The defendant will therefore be convicted.

Section 77: Sections 75 and 76: relevant acts

144. *Section 77* defines the relevant acts to which the provisions in sections 75 and 76 apply.

Section 78: "Sexual"

145. *Section 78* defines "sexual" for the purposes of this Part. This definition is relevant to many of the offences under this Part. For example, section 2(1)(b) refers to penetration which is sexual and section 3(1)(b) refers to touching which is sexual.
146. There are two alternative limbs to the definition of "sexual" in section 78. Paragraph (a) covers activity that the reasonable person would always consider to be sexual because of its nature, such as sexual intercourse. Paragraph (b) covers activity that the reasonable person would consider, because of its nature, may or may not be sexual depending on the circumstances or the intentions of the person carrying it out, or both: for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. Where the activity is, for example, oral sex, it seems likely that the reasonable person would only need to consider the nature of the activity to determine that it is sexual. But where it is digital penetration of the vagina, the reasonable person would need to consider the nature of the activity (it may or may not be sexual), the circumstances in which it is carried out (eg a doctor's surgery) and the purpose of any of the participants (if the doctor's purpose is medical, the activity will not be sexual; if the doctor's purpose is sexual, the activity also is likely to be sexual).
147. If, from looking at the nature of the activity, it would not appear to the reasonable person that the activity might be sexual, the activity does not meet the test in either paragraph (a) or (b), even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity.

Section 79: General interpretation

148. **Section 79** gives a number of definitions relevant to offences in this Part. *Subsection (2)* is needed so that where, for example, a person consents at the time of entry to penetration, but then withdraws his consent and the penetration continues, the person penetrating may be guilty of rape or assault by penetration.