

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part One – Rape Etc

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as a continuing activity and provide for circumstances where penetration is initially consented to but consent is then withdrawn before penetration has ended.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).