

# THE SEXUAL OFFENCES (SCOTLAND) ACT 2009

## Background to the Sexual Offences (Scotland) Act 2009

There has been widespread public, professional and academic concern that Scots law on rape and other sexual offences is out-dated and derives from a time when sexual attitudes were very different from those of contemporary society.

In June 2004, Scottish Ministers asked the Scottish Law Commission (SLC) to "examine the law relating to such offences and the evidential requirements for proving such offences and to make recommendations for reform."

The Scottish Law Commission's "Report on Rape and Other Sexual Offences" was published in December 2007.

The report concluded that the existing law is a fragmented mixture of common law and statute law and is far from clear to ordinary members of the public. The Commission felt that codification would be a significant improvement. Codification in this context means enshrining the law in writing.

The 2009 Act creates a whole new set of statutory sexual offences which are intended to cover the majority of our existing offences both at common law and in statutory form.

The Act rectifies a number of inconsistencies which exist in our current law. e.g. As it stands, it is an offence for an adult male to have sexual intercourse with a 14 year old female whereas there is no offence if an adult female engages in sexual intercourse with a 14 year old boy

Another example is that offences against boys and girls are dependant on the age of puberty i.e. 12 years of age for girls and 14 years of age for boys.

These are only two examples of inconsistencies which the new Act addresses.

The issue of whether a person consents to sexual activity is central to all our existing offences (with the exception of a female child under 12 years of age and a male child under the age of 14 years). However, the term "lack of consent" has never been specifically defined by the courts. The Act sets down a definition of "consent" in an attempt to provide clarity to everyone involved in the judicial system including members of the public.

There are a number of situations in which we libel charges as a breach of the peace where the conduct in question is of a sexual nature. The Scottish Law Commission wanted the public to know that these offences will now be categorised as a sexual offence and the Act accommodates the Commission's view to a large extent.

When the Act comes into force on the 1 December 2010, it will abolish the common law offences of Rape, Sodomy and Lewd libidinous practices or behaviours together with a number of statutory offences.

The Act, however, does not abolish the common law offence of indecent assault. This means that if we have conduct which does not fall within the scope of the Act, we can, if appropriate, still libel indecent assault

The Act classifies certain conduct as a "**type of wrong**".

Having done so, the Act thereafter, **in general**, applies these wrongs to victims who are:

- adults of full capacity
- young children
- older children
- persons suffering from mental disorder and
- those in respect of whom the accused holds a position of trust.

This however, does create considerable repetition.

**Note**-It is important to note **that they are not identical** and care should be taken to ensure that any applicable section is fully understood.

The Act uses the letter "A" to denote the offender and "B" to denote the victim. It also introduces a third party "C" at some points. For consistency, this course adopts the same position.

## Rape (s.1)

This offence is committed when A

- penetrates
- the vagina, anus or mouth of B
- with A's penis
- without B's consent
- *and* without any reasonable belief that B was consenting

**Note:** This is wider than our existing common law where the offence of rape can only be committed by penile penetration of B's vagina.

## Lack of Consent

Consent is now defined as "free agreement" (s.12) and is central to the offence. The Act does not provide a definition of "free agreement".

However, the Act lists a number of situations where free agreement is absent.

The list is not exhaustive- there can be other situations which are not listed whereby there is no "free agreement". The existing case law will still be of assistance in proving the lack of consent.

## Statutory list of situations where there is no free agreement (s13)

- B is incapable of consenting because of the effect of alcohol or any other substance.
- B agrees because of violence used or threats of violence made to B or any other person.
- B agrees because B is unlawfully detained by A
- B agrees but is deceived by A as to the nature or purpose of the conduct

- A induces B to agree by impersonating someone known personally to B
- Where someone else agrees to B's participation

In addition, if B is either asleep or unconscious, then there is no "free agreement" to what took place and therefore no consent. (s.14).

### Reasonable belief (s.16)

The term "reasonable belief" is not defined within the Act.

It will be for the court or jury to decide whether A had a belief that was reasonable and in reaching that decision, regard is to be had to what steps, **if any**, A had undertaken to ascertain whether the other party was consenting.

**NOTE-** the section does not say that belief will never be reasonable if A cannot point to any particular steps to ascertain whether there was consent.

### Sexual Assault by Penetration (s.2)

This offence is committed when, without B's consent or any reasonable belief that B was consenting, A:-

- sexually penetrates
- B's vagina or anus (whether intentionally or recklessly),
- with anything at all

This includes A's penis, any other parts of A's body or any other object.

There is an obvious overlap here with the s.1 rape in that both of these offences can be committed by penetration with A's penis. This is designed to cover the situation whereby e.g. B was blindfolded and is not sure whether the penetration was by the penis or not

This type of conduct would be libelled as an indecent assault under our existing common law.

Note- the penetration must be of B's vagina or anus and does not include mouth.

### Sexual Assault (s.3)

This section lists a number of acts which, if one or more of them are carried out by A (either intentionally or recklessly), will constitute the offence of sexual assault.

The offence is committed when A does any of the following to B without B's consent and without any reasonable belief that B was consenting:-

- Penetrates sexually by any means and to any extent, the vagina, anus or mouth of B.
- Touches B sexually.
- Engages in any form of sexual activity in which A has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B.
- Ejaculates semen onto B.
- Emits urine or saliva onto B sexually

The section tries to capture those offences which do not fall within s.2, which are currently labelled as indecent assault under the existing common law.

Remember- the common law offence of indecent assault will not be abolished by this Act. Therefore, if the situation is **not** one of the ones listed, and it is appropriate to do so, you can still label the common law offence of indecent assault

### Coercion offences

#### Sexual Coercion (s.4)

This offence is committed when A causes B to take part in a sexual activity without B's consent and where A has no reasonable belief that B is consenting.

Whilst this section can apply to sexual activity between A and B, it is primarily intended to capture the situation whereby A compels B to have sex with a third party or to have sexual conduct with an animal, or an object. It also applies where A compels B to, for example, to masturbate him or herself.

Unlike the previous 3 offences, this offence cannot be committed recklessly. It can only be committed intentionally.

### Coercing a person to be present during a sexual activity s.5

This offence can be committed in two ways:-

1. When A, for a specified purpose, intentionally engages in sexual activity and he causes B to be present during the activity.
2. Where a third person is engaging in a sexual activity and A causes B, again for a specified purpose, to be present during that activity.

In both cases, A must be acting without B's consent and with no reasonable belief that B is consenting.

The specified purpose referred to above can be either one or both of the following:-

For A's own sexual gratification

or

In order to humiliate, distress or alarm B

### Coercing a person to look at a sexual image (s.6)

This offence is committed when A - again for A's own sexual gratification or to humiliate, distress or alarm B - causes B to look at a sexual image without B's consent and where A has no reasonable belief that B is consenting.

A sexual image is an image of one or more of the following:

- A engaging in a sexual activity
- A's genitals
- another person engaging in a sexual activity
- another person's genitals
- an imaginary person engaging in a sexual activity (e.g. a cartoon image, or computer generated characters etc)
- an imaginary person's genitals

## Communicating indecently

This offence creates 2 offences and relates to unwanted sexual communication.

Subsection 1 offence- "communicating indecently"  
and

Subsection 2 offence- "causing a person to see or hear an indecent communication"

We will look at each of these in turn.

## Communicating indecently

This offence is committed when A intentionally sends a sexual written communication or directs a sexual verbal communication to B without B's consent and where A has no reasonable belief that B is consenting.

Once again, this offence only applies where A is doing it for A's own sexual gratification or to humiliate, distress or alarm B.

The sexual written communication can be in any form e.g. a book, a section of a magazine or a letter written by the accused.

The sexual verbal communication can be in any form. e.g. sounds of sexual activity or even sign language.

## Causing a person to see or hear an indecent communication

This offence can only be committed when the circumstances in subsection 1 are not present.

Subsection 1 covers the sending or directing of a communication whereas this sub-section covers the situation where A hasn't sent or directed the communication to B, but has caused B to see or hear it.

## Sexual exposure

This offence is committed when A, for A's own sexual gratification or to humiliate, distress or alarm B, intentionally exposes A's genitals in a sexual manner with the intention that B will see them.

Again, this offence only applies to exposure of the genitals to B without B's consent and where A has no reasonable belief that B is consenting.

## Voyeurism (s.9)

This offence is committed when A does any of the following:-

- Observes B doing a private act
- Operates any equipment which would allow A or any other person to observe B doing a private act
- Records B doing a private act which would allow A or any other person to look at the recording of B doing the act
- Installs equipment, constructs or adapts a structure which would allow A or any other person to do any of the things mentioned in 1, 2 and 3 above.

This offence is designed to catch those persons (A), who spy on B when B is engaged in a private act. A does this without B's consent and with no reasonable belief that B is consenting. Again, the offence is only committed

when A does this for A's own sexual gratification or to humiliate, distress or alarm B.

A "private act" includes situations where B is in what he or she believes to be a private place and B's genitals, buttocks or breasts are exposed or covered only with underwear. It also includes where B is using the lavatory or is engaged in a sexual activity which he or she would not normally do in a public place.

### Administering a substance for sexual purposes (s.11)

This offence is committed when A gives a substance to B or causes B to take a substance which A hopes will overpower or stupefy B, therefore enabling A or any other person to engage in a sexual activity with B.

"Substance" is not defined but can mean drugs or alcohol.

### Offences against young children (ss 18-26)

A young child is a child who has not yet reached the age of 13.

The previous offences contained in sections 1-9 can all be committed against a young child. However, a young child is incapable of consenting to any form of sexual activity. This means that the offences specifically relating to a young child do not make any reference to:-

B consenting, or

A acting without a reasonable belief that B was consenting.

Otherwise, all other elements of the offences listed in sections 1-9 are identical to the offences relating to young children contained in section 18-26 of the Act. The offences are:-

s.18 Rape of a young child

s.19. Sexual assault on a young child by penetration.

s.20. Sexual assault on a young child

s.21. Causing a young child to participate in a sexual activity

- s.22. Causing a young child to be present during a sexual activity
- s.23. Causing a young child to look at a sexual image
- s.24. Communicating indecently with a young child
- s.25. Sexual exposure to a young child
- s.26. Voyeurism towards a young child

### Offences against older children (ss 28-37)

An older child is a child (B) who has reached the age of 13 but is still under the age of 16.

### Intercourse with an older child (s.28)

This section prohibits adults having any form of intercourse with children aged 13, 14 and 15.

The offence is committed when A, being a person who is 16 years of age and over, penetrates B's vagina, anus or mouth, when B is an older child.

An older child is incapable of consenting to intercourse with an adult. This means that this offence does not make any reference to:-

B consenting or

A acting without a reasonable belief that B was consenting.

The remaining sections involving sexual activity between an adult and an older child are contained with sections 29-36 and are:-

- s.29. Engaging in penetrative sexual activity with or towards an older child
- s.30. Engaging in sexual activity with or towards an older child
- s.31. Causing an older child to participate in a sexual activity
- s.32. Causing an older child to be present during a sexual activity
- s.33. Causing an older child to look at a sexual image

s.34. Communicating indecently with an older child

s.35. Sexual exposure to an older child.

s.36. Voyeurism towards an older child.

An older child is incapable of consenting to any of the sexual conduct listed on the previous screen with an adult. This means that these offences do not make any reference to:-

B consenting or

A acting without a reasonable belief that B was consenting.

Otherwise, all other elements of the offences listed in sections 2-9 are identical to the corresponding offences relating to older children contained in sections 29-36 of the Act.

### Sexual activity between older children (s.37).

The Act recognises that consensual touching, kissing and sexual conversations between older children are generally considered to be part of growing up. The Act does not seek to criminalise such conduct.

However, the Act prohibits certain types of sexual activity between older children.

#### The Act prohibits:

- Penile penetration of vagina, anus or mouth

And

- Touching of the vagina, anus or penis with the mouth

In effect, the Act prohibits any form of intercourse or oral sex between older children. There are 2 offences:

- 1- If A penetrates B or touches B's vagina, anus or penis with his or her mouth, then A commits the offence of "engaging, while an older child, in sexual conduct with or towards another older child".

- 2- If B consents to the above activity, then B commits the offence of “engaging, while an older child, in **consensual** sexual conduct with or towards another older child”.

### Sexual abuse of trust involving children (s.42)

In addition to the all offences against children (young and old), this section makes it an offence for A, who is 18 years of age or over, to engage in any sexual activity with B where:-

- B is under 18 years of age  
and
- A is in a position of trust in relation to B

A in a position of trust in relation to B when:

B is in an institution by virtue of a court order and A looks after persons under 18 in that institution.

B is in a children’s home provided by the local authority and A looks after persons who are under 18 at the home.

B is cared for in:

- a hospital
- accommodation provided by an independent health care service
- a residential establishment
- accommodation provided by a school care accommodation service or secure accommodation service

B is receiving education at a school and A looks after persons who are under 18 at the school

B is receiving education at a further or higher education institution and A looks after B in that institution

(Note- "looks after" means where A regularly cares for, teaches, trains, supervises or is in sole charge of B).

A has or had any parental responsibilities/rights in respect of B.or A treats B as a child of A's family, so long as at the time, B is a member of the same household as A

## Sexual abuse of trust involving mentally disordered persons

### (s.42)

Like children, the Act makes it an offence for A to have sexual activity with B where B suffers from a mental disorder **and** where A holds a position of trust in respect of B.

A is in a position of trust where A

(a) is a person providing care services to B

(b) is a person who

(1) is an individual employed in or contracted to provide services in or to, or

(2) not being the Scottish Ministers, is a manager of, a hospital, independent health care service or state hospital in which B is being given medical treatment