

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Consent and Reasonable Belief

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

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