

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part One – Rape Etc

Section 2 – Sexual assault by penetration

9. This section creates a statutory offence of “sexual assault by penetration”. Subsection (1) provides that a person commits the offence of sexual assault by penetration by intentionally or recklessly sexually penetrating the victim’s vagina or anus, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.
10. Subsection (2) defines “penetration” for the purposes of this section. It is defined as a continuing act from entry of whatever is intruded until it is withdrawn.
11. Subsection (3) caters for the scenario where penetration is initially consented to but consent is subsequently withdrawn. It modifies the definition of penetration in subsection (2) to a person will have committed the offence if the penetration of the victim’s vagina or anus takes place (or continues to take place) after the point at which consent is withdrawn.
12. Subsection (4) provides that the reference in subsection (1) to penetration “with any part of A’s body” includes penetration with A’s penis. This means that there is an overlap between the conduct which constitutes sexual assault by penetration under this section, that which constitutes rape under section 1 and that which constitutes sexual assault at section 3. This is deliberate and 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).