

SEXUAL OFFENCES ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Sexual Offences

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.