

# FALSELY ACCUSED

## DEFINITIONS OF SEXUAL OFFENCES UNDER THE 2003 ACT

The Sexual Offences Act 2003 received Royal Assent on 20<sup>th</sup> November 2003 it came into effect on the 1<sup>st</sup> May 2004 and is the most far-reaching and comprehensive legislative reform in the area for over 50 years.

This Act represents a major overhaul in the sexual offences framework. Sexual crime, and the fear of sexual crime, has a profound and damaging effect on the lives of individuals and communities.

A responsibility rests on the Government adequately to protect everyone in society from such crimes. Amongst the important measures contained in this Act, it seeks to clarify issues surrounding consent in rape and sexual assault cases; it gives children the greatest possible protection against sexual abuse; for the first time, it provides a specific set of offences to protect persons with a mental disorder; and it tackles the commercial exploitation of people for sexual purposes through prostitution and trafficking.

It also strengthens the protection for society from convicted sex offenders living in the community. Improve monitoring of offenders and build in safeguards against evasion and retrials.

Throughout the Act, the maximum penalties for offences have been reviewed and, where necessary, amended to reflect the seriousness of the behaviour involved.

### Section 1: Rape

1. Section 1 makes it an offence for a person (A) intentionally to penetrate with his penis the vagina, anus or mouth of another person (B) without that person's consent if A does not reasonably believe that B consents.
2. The section redefines the physical act of rape by including penile penetration of the mouth. The offence also covers surgically reconstructed genitalia, for example as a result of gender reassignment surgery.
3. Rape and rape of a child under 13 are the only offences in the Act which can only be committed by a man, because they relate to penile penetration.
4. This offence differs from the offence of rape in the Sexual Offences Act 1956 in that it requires that the defendant does not have a "reasonable belief" in consent, rather than that he does not have an "honest belief" in consent.
5. The offence is triable on indictment only and has a maximum penalty of life imprisonment.

### Section 2: Assault by penetration

6. Section 2 makes it an offence for a person (A) intentionally to penetrate the vagina or anus of another person (B). The offence is committed where the penetration is by a part of A's body (for example, a finger) or anything else (for example, a bottle or vibrator); the penetration is sexual; and B does not consent to the penetration and A does not reasonably believe that B consents.
7. "Sexual" is defined in section 78.

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8. The requirement that the penetration is sexual means that practitioners who conduct intimate searches and medical procedures without a sexual motive are excluded from the offence.

9. It is not necessary for the victim to know, or explain what they were penetrated with. This means that the offence can be used in cases where, for example, the victim is a child, or a person with a learning disability, or a person who was blindfolded at the time of the alleged incident, and where the evidence is not clear enough to justify a rape charge.

10. The offence is triable on indictment only and has a maximum penalty of life imprisonment.

## Section 3: Sexual Assault

11. Section 3 makes it an offence for a person (A) intentionally to touch sexually another person (B) without that person's consent, if he does not reasonably believe that B consents.

12. "Sexual" is defined in section 78.

13. "Touching" covers all physical contact, including touching with any part of the body, with anything else and through anything, for example, through clothing. This could include for example, where a person rubs up against someone's private parts through the person's clothes for sexual gratification. It also includes penetration. However, where there is sufficient evidence, forced penile penetration of the vagina, anus or mouth would normally be charged as "rape" and forced penetration of the vagina or anus with any other part of a person's body or another object would normally be charged as "assault by penetration".

14. The offence is triable summarily or on indictment and has a maximum penalty of 10 years imprisonment.

## Section 4: Causing a person to engage in sexual activity without consent

15. Section 4 makes it an offence for a person (A) intentionally to cause another person (B) to engage in sexual activity without that person's consent, if he does not reasonably believe that B consents.

16. "Sexual" is defined in section 78.

17. This offence covers a range of circumstances. A may cause B to engage in sexual activity with A. An example of this would be where a woman compels a man to penetrate her. A could also force B to carry out a sexual act on B, for example, where an abuser makes his victim engage in masturbation involving only the victim. The offence also applies where A forces B to engage in sexual activity with another person, whether that third party is a willing participant or another victim. An example of the former would be where a man forces a woman to give oral sex to a fellow abuser, and of the latter, where a man forces two non-consenting women to touch one another in a sexual way.

18. The maximum penalty for the offence is staggered to allow for sentences to reflect the gravity of the crime. Where the offence does not include sexual penetration (of or by the victim) the offence is triable summarily or on indictment and has a maximum penalty of 10 years imprisonment (the same as the maximum penalty for a non-penetrative sexual assault). Where sexual penetration (by the penis or anything else) is involved, the offence is triable on indictment only and a maximum penalty of life imprisonment applies.

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## Definitions

### What does 'consent' mean?

The definition of a sexual offence often revolves around consent. In simple terms, it's all about permission (or agreement). This is something that must be clearly established between two people before any kind of sexual act or behaviour. If an individual is accused of a sex offence, they must show that they reasonably believed consent had been given by the other person.

***Mens rea***: The *mens rea* of rape has been changed significantly by the Sexual Offences Act 2003. Under the old law, section 1(2)(b) of the Sexual Offences Act 1956 stated that the *mens rea* required was that: 'at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it'. Recklessness no longer forms part of the *mens rea* of rape. The Sexual Offences Act 2003 requires an intentional penetration and that the defendant did not reasonably believe that the victim was consenting. Section 1(2) of the 2003 Act states:

"Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps [the defendant] has taken to ascertain whether [the victim] consents."

### Only reasonable mistakes negative *mens rea*

Prior to the Sexual Offences Act 2003, the controversial case of DPP v Morgan (1976), ruled an honest mistake that the victim was consenting could negative *mens rea*, even though the mistake was not reasonable. The law has now been changed by the Sexual Offences Act 2003. The defendant, who makes a mistake and thinks that the victim was consenting, will only lack *mens rea* if that mistake was reasonable. This is because the *mens rea* of rape is now defined in terms of reasonableness: the defendant will have *mens rea* if he 'does not reasonably believe' that the victim was consenting. So a defendant has *mens rea* where he honestly believes that a victim is consenting, but has not taken due care to discover that s/he was not actually consenting.

**Burden of proof**: The burden of proof is normally on the prosecution to prove the existence of the elements of an offence beyond reasonable doubt. However, because of the problems that there have been in the past with the prosecution of the offence of rape, the Sexual Offences Act 2003 has reversed the burden of proof in relation to the issue of consent and *mens rea* in certain circumstances. It does this by creating a rebuttable presumption, and where particular lies were used, an irrebutable presumption.

**The rebuttable presumption**: Section 75 of the Sexual Offences Act 2003 creates a rebuttable presumption that the complainant did not consent and the defendant had *mens rea* where:

- \* Violence or the threat of violence was used against the complainant or a third person,
- \* The complainant was unlawfully detained,
- \* The complainant was asleep or otherwise unconscious when the offence was committed,
- \* Due to a physical disability, the complainant was unable to communicate a consent, or
- \* The complainant had been given a substance, which was capable of causing them to be

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stupefied, or overpowered at the time of the attack.

In these circumstances an evidential burden of proof is on the defendant. He has to adduce sufficient evidence to raise an issue of consent and the absence of *mens rea*, in order for the burden of proof to pass back to the prosecution.

The irrebuttable presumption

The Sexual Offences Act 2003 s. 76 creates an irrebuttable presumption that the victim did not consent and the defendant had *mens rea*. This irrebuttable presumption applies where specific types of lies have been used to dupe the victim into having sexual intercourse. These lies are where:

“(2)(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.”

Before the 2003 Act, such lies would have effectively lead to the imposition of an irrebuttable presumption that the victim did not consent, but the prosecution would still have had to prove the existence of *mens rea*. The earlier case law on the issue is of interest in illustrating the type of lies that could be used. In *Flattery* (1877) the defendant told the victim that he was performing a surgical operation, when in fact he was having sexual intercourse with her. This was a lie as to the nature of sexual intercourse. In *Williams* (1923) the defendant was a singing teacher, who had a 16-year-old pupil. She consented to sexual intercourse when he said it was a method of improving her breathing. Again, this was a lie as to the nature of sexual intercourse.

Other types of lies will not give rise to an irrebuttable presumption. In *R v Linekar* (1995) a woman working as a prostitute was seeking clients outside a cinema in London. The defendant approached her and they agreed that he would pay her £25 for sexual intercourse. They went to the balcony of some flats nearby and had sexual intercourse, but afterwards the defendant ran away without paying. He was eventually found and charged with rape but at the trial it was stated that, as she consented to the sexual intercourse, there was no rape. Although the defendant had lied that he would pay for sexual intercourse in order to gain her consent, he had not impersonated her husband or boyfriend, nor lied as to the nature and quality of the act. In these circumstances s. 76 would not apply.

There are likely to be arguments before the courts that ss.75 and 76 violate the European Convention on Human Rights, and in particular the right to a fair trial in article 6.

To see full text of the 2003 Act go to:

<http://www.cps.gov.uk/legal/section7/sexoffencesact2003.htm>

## **The Sexual Offences Act 2003 (Prescribed Police Stations) Regulations 2004**

Can be found at

<http://www.hms0.gov.uk/si/si2004/20040875.htm>

# **FALSELY ACCUSED**

**The Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004**

Can be found at

[http://www.crimeline.info/si2004\\_soa.pdf](http://www.crimeline.info/si2004_soa.pdf)