

Sexual Offences and Interview

A Practical Guide

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The Sexual Offences Act 2003 came into force on 1st May 2004. Sexual Offences committed after midnight on the 30 April 2004 are subject to the Act Older offences are covered by the old law.

RAPE (section 1)

The elements of rape are:

- a. A intentionally penetrates the vagina, anus or mouth of another person (B) with his penis;
- b. B does not consent to the penetration, and
- c. A does not reasonably believe that B consents. .

Rape is still a crime of basic intent, for men only, and drunkenness is no defence. It carries life imprisonment.

Rape and Interviews

It is essential to take great care in allegations of rape. If the allegation is in respect of a female over 16 years of age you should ensure:

1. That she has made a sworn statement of complaint.
2. That she has been medically examined or if not why not.
3. That, if it is oral sex, buccal samples have been taken.
4. That a blood/urine sample has been taken from her and the time that the sample was taken.
5. That the results of such examinations are known to you or that you have noted the refusal to note them.

If you decide that the Defendant is to comment or is not to comment in interview disclosure must be carefully examined. If you are satisfied that it is insufficient for the Defendant to comment upon it say so on the custody record and on tape in interview.

Be wary of introductory questions such as questions about life in general. Rarely relevant to the inquiry at hand, they often provide fruitful sources of cross-examination. One's sexual activities with a spouse (or lack of them) are not likely to cause a person to rape someone, nor are the viewing of legal pornography or one's masturbatory habits.

False and /or malicious complaints are sometimes made and care should be taken to ensure that if a complainant has a motive to lie that should be set out in detail in interview as the C.P.S. will exercise care when reviewing such allegations.

If there has been any delay ask the interviewing officer what explanation was given for the delay and if the Defendant has something to add to that explanation ensure that he does so on tape.

Corroboration is not essential but should be looked for. Ask the officer what corroboration there is for the allegation.

Be wary of emotive and oppressive questioning. Remember that this is supposedly a fact finding exercise and not bruising cross-examination. If it is oppressive stop the interview and draft a prepared statement.

It is the Defendant's opportunity to put his side of the case, not the officer's opportunity to belittle him.

Assault by penetration (section 2)

Indecent assault was one global offence under the Sexual Offences Act 1956. The 2003 Act breaks sexual assault down into two offences of assault by penetration and sexual assault.

The elements of assault by penetration are:

(A) intentionally penetrates the vagina or anus of (B) with a part of their body or anything else

- a. The penetration is sexual
 - b. (B) does not consent to the penetration, and
 - c. (A) does not reasonably believe that B consents.
- This does not cover penetration of the mouth.
 - Penetration is of any part of A's body or by anything else (e.g. bottle).
 - Offences can be committed by males and females.
 - The offence is indictable only with maximum penalty of life imprisonment.

Sexual assault (Section 3)

The elements of the offence of sexual assault are:

- a. (A) intentionally touches (B)
 - b. The touching is sexual
 - c. B does not consent to the touching, and
 - d. A does not reasonably believe that B consents.
- Touching is widely defined and includes with any part of the body, or with anything else, and can be through clothing.
 - Touching includes touching amounting to penetration e.g. kissing.
 - Males or females can offend.
 - The offence is either way with six months in the Magistrates' court or 10 years imprisonment in the Crown Court.

Causing sexual activity without consent (Section 4)

The elements of this offence are:

- a. (A) intentionally causes (B) to engage in sexual activity
- b. (B) does not consent
- c. (A) does not reasonably believe that (B) consents

This offence covers situations where, for example:

- a victim is forced to carry out a sexual act such as self-masturbation,
- to engage in sexual activity with a willing or unwilling third party

- to engage in sexual activity with the offender e.g. woman forces a man to penetrate her.
- can be committed by words alone.
- The mode of trial and sentence varies depending on whether there is or is not penetration.
- One of the purposes of this offence, is to create a female equivalent of the offence of rape.
- Life imprisonment if penetration. Otherwise an either way offence carrying a maximum of 10 years imprisonment.

Offences against children

The 2003 divides offending into that against those under 13, 16 and 18.

Offences against children under 13

- Sections 5-8 apply the main offences to children under 13.
- A child under 13 cannot legally consent.
- The offences overlap to a very significant extent with sections 9 to 15.
- The Crown must prove only that intentional sexual activity occurred and the age of the complainant at the date of the sexual activity.

Rape of a child under 13 (Section 5)

- Section 5 makes it an offence for a male to intentionally to penetrate with his penis the vagina, anus or mouth of a child under 13.
- Consent is not a defence.

- In cases where a defendant admits sexual activity with a child under 13 but argues consent, the court should hold a Newton hearing.

Assault of a child under 13 by penetration (Section 6)

- Section 6 makes it an offence for a person intentionally to penetrate sexually the vagina, or anus of a child under 13 with a part of his body, or with anything else.
- There is an alternative verdict of sexual assault.

Sexual assault of a child under 13 (Section 7)

- Section 7 makes it an offence for a person to touch sexually a child under 13.

Causing or inciting a child under 13 to engage in sexual activity (Section 8)

- Section 8 makes it an offence for a person intentionally to cause or incite a child (B) under the age of 13 to engage in sexual activity.
- There is no defence of mistaken reasonable belief in age of the complainant. Don't raise this in interview.
- The sexual activity need not actually take place.

Sections 5 and 6 are indictable only and carry a maximum sentence of life imprisonment.

Section 7 is triable either way and carries a maximum sentence of 14 years on indictment.

Section 8 is indictable only and carries a maximum sentence of life imprisonment if the

activity involves:

- a. Penetration of B's anus or vagina;
- b. Penetration of B's mouth with a person's penis;
- c. Penetration of a person's anus or vagina by B; or
- d. Penetration of a person's mouth with B's penis.

Non-penetrative activity is either way and carries a maximum sentence of 14 years on indictment.

Interviews

If the activity has occurred and the child is under the age of 13 there is no "defence" to put forward. A no comment interview may be thought to be essential in such circumstances. You cannot test the prosecution case if you admit the two things that they have to prove. The only purpose in commenting would be to put forward the contention that you did not know the age of the complainant (for a Newton Hearing later). However, it may be best dealt with in a prepared statement.

If the matter is denied a commented interview should occur **if the complainant has already been video interviewed**. If she has not I would suggest that you await the results of such an interview as the allegations will only be clear at that time.

In children under 13 the medical evidence of penetration is crucial. Pre-pubertal children's hymens are far more likely to show signs of damage.

If the Defendant is aware that the complainant has been sexually active this should be included in interview.

Here particularly guard against the pornography, sex with spouse, depression questions. Avoid responses to the is she attractive questions.

Offences against children under 16 (sections 9 - 13)

Sections 9-12 – relate to **adult** defendants.

Sexual activity with a child (Section 9)

- (A) aged 18 or over intentionally touches (B)
- the touching is sexual, and
- either (B) is under 16 and (A) does not reasonably believe that (B) is 16 or over, or (B) is under 13

Causing or inciting a child to engage in sexual activity (Section 10)

- aged 18 or over intentionally causes or incites another person (B) to engage in an

activity

- the activity is sexual, and
- either (B) is under 16 and (A) does not reasonably believe that B is 16 or over, or (B) is under 13.

Engaging in sexual activity in the presence of a child (Section 11)

- aged 18 or over intentionally engages in sexual activity
- (A's) purpose is to obtain sexual gratification when (B) is present or can observe
- (A) knows or believes that (B) is aware of the activity or intends that (B) should be aware
- Either (B) is under 16 and (A) does not reasonably believe that (B) is 16 or over, or

Causing a child to watch a sexual act (Section 12)

The elements of the offence are:

- (A), aged 18 or over, intentionally causes a child under 16 (B) to watch another person engaging in an activity, or to look at an image of any person engaging in an activity
- (A's) purpose is to obtain sexual gratification
- the activity is sexual, and
- either (B) is under 16 and (A) does not reasonably believe that (B) is 16 or over, or
- (B) is under 13.

Child sex offences committed by children or young persons (Section 13)

It is an offence if a person under 18 commits an offence if (s)he does anything which would be an offence under sections 9 -12.

The penalty is reduced to:

Summary conviction – 6 months or fine. On indictment – imprisonment not 5 years.

- Consent is irrelevant.
- There is a defence of reasonable belief that the child is 16 or over. (but not if child 13 or under)
- There is no requirement under s11 that (B) is actually aware of the activity, although there is a requirement that (B) is present or can observe. Observation can be via a web-cam. Observation includes an image (section 79)

The offences in sections 9 and 10 are indictable only with a maximum sentence of 14 years where penetration occurs within subsection (2) of those sections. In all other cases the offence is either way with a maximum sentence of 14 years on indictment.

The offences in sections 11 and 12 are either way and carry a maximum sentence of 10 years on indictment.

The factors in assessing the seriousness of the offences in sections 9-12 will be:

- the nature of the sexual activity;
- the age and vulnerability of the victim;
- the age gap between child and offender;

- breach of trust;
- any aggravating features.

Interviews

The danger age is between ages 13-16. The reasonableness of belief that the complainant is 16 or over (if that is the Defence) must be set out in detail. Be sure here from whom the complaint comes. Expect less from medical examinations but check if the complainant has started menstruating.

Meeting a child following sexual grooming (Section 15)

- Applies to adults.
- There must be communication (a meeting or any other form of communication) on at least two previous occasions.
- The communication can take place anywhere in the world.
- The offender must either meet the child or travel to the pre-arranged meeting or arrange for the child to travel;
- The person must have an intention to commit any offence under Part One of the Act
- The child is under 16 and the adult does not reasonably believe that the child is over 16.
- The offence is either way and carries a maximum of 10 years imprisonment on indictment.

Offences against children under 18

Abuse of position of trust offences (Sections 16-24)

Protects young people aged 16 and 17 from those who hold a position of trust or authority in their lives.

- The prohibited sexual behaviour is identical to that prohibited in sections 9-12
- The prosecution has to prove that (B) is under 18. If so, (A) is presumed not to have reasonably believed that (B) was over 18 unless (A) adduces evidence to raise an evidential burden. Once (A) satisfies the evidential burden, the prosecution is required to prove that (A) did not have any reasonable belief. The defence of reasonable belief does not apply where (B) is under 13.
- The prosecution has to prove that (A) knew or could reasonably be expected to know that (s) he was in a position of trust to (B). Positions of trust are defined in section 21 and 22 .
- If (A) and (B) are legally married that is a defence (section 23)
- (A) has a defence where (s)he can prove that a sexual relationship pre-dated the relationship of trust with (B) only where the sexual relationship was lawful (section 24).
- Each offence under sections 16 -19 is either way and carries a maximum sentence of 5 years on indictment.

Familial child sex offences

Family relationships are defined in section 27.

- First, parent, grandparent, brother, sister, step-parent, half-brother, half-sister, uncle, aunt, foster parent etc, will always be family members;
- Partner of the other's parent or cousins, will only be family members if A lives, or has lived in the same household or is or has been involved in the caring, supervising or sole charge of the child;
- Those who are currently living in the same household e.g. an au pair who has responsibility for the child.

Sexual activity with a family member (Section 25)

- (A) intentionally touches (B)
- the touching is sexual
- the child is a person under 18
- If (B) is aged 13-17 the offender is deemed to know the age and the family relationship of (B) unless (s)he adduces sufficient evidence to raise the issue.
- Once raised it is for the prosecution to prove it is not the case. This does not apply where (B) is under 13.
- Consent to touching is irrelevant;
- There are defences if the parties are lawfully married (section 28) and where the sexual relationship pre-dated the family relationship (section 29).

Inciting a child family member to engage in sexual activity (Section 26)

- (A) intentionally inciting (B) to either touch (A) or allow himself to be touched by (A);
- the touching is sexual;
- the two presumptions of age and knowledge of the family relationship are the same

as section 25. Does not apply if (B) is under 13;

- the evidential burden on (A) applies;
- consent is irrelevant;
- defences of marriage and pre-existing sexual relationship also apply
- Where the offences involve penetration they are indictable only with a maximum sentence of 14 years. In any other case they are either way offence with a maximum sentence of 14 years on indictment.

Where the offender is under 18 the offence (whether penetration occurred or not) is either way with a maximum of 5 years on indictment (subsection (5) of each section).

Indecent photographs of children (Sections 45 and 46)

Child here means under 18.

There are a number of exceptions:

- Under section 1 (1)(a) of the 1978 Act taking, permitting etc, section 1(1)(b) distribute or show and section 1(1)(c) possession with a view to distribution, it is for the defendant to prove that the photo of the child alone or of the child and the Defendant was of the child aged 16 or 17 and at the time of the offence charged he was married or lived as partners in an enduring family relationship;
- Defendant must then raise an issue that the child consented to the taking or making of the picture, and that the Defendant had a reasonable belief in that consent;
- Defence, unless the prosecution proves otherwise, that the photo was shown to anyone other than the child;
- In relation to possession of the photo with a view to distribution, the defendant has

an evidential burden to show that the child consented or reasonably believed the child consented to his or her possession of the photo;

- Same exceptions apply to possession of photographs under section 160 of the 1988 Act;

Abuse of children through prostitution or pornography offences (Sections 47-50)

Offences specifically to tackle the use of children in the sex industry, where a child is under 18.

- Section 47 – paying for sexual services of a child;
- Section 48 – causing or inciting child prostitution or pornography;
- Section 49 – controlling a child prostitute or a child involved in pornography;
- Section 50 – arranging or facilitating child prostitution or pornography.
- Consent is not in issue for a child aged 16 or 17;
- There is a defence of reasonable belief that the child was over 18 (applies if child 13-17);
- The definition of 'payment' is very wide;
- A person is involved in pornography if an image of the child is recorded.
- Either way with a maximum sentence of 14 years on indictment if the child is under 16, except for offences involving penetration in section 47
- Section 47 - indictable only. Maximum sentence of 14 years (life if child under 13, if 16 or 17 either way, maximum of 7 years irrespective of whether or not penetration occurs.)

Offences against persons with a mental disorder

1. Offences against persons with a mental disorder impeding choice (sections 30-33);
 2. Offences where there are inducements etc. to persons with a mental disorder (sections 34-37); and
 3. Offences by care workers against persons with a mental disorder (sections 38-41).
- A person who has learning disabilities also falls within the definition of mental disorder.
 - Medical evidence will usually be required to prove that a person has a mental disorder.

Offences against persons with a mental disorder impeding choice (Sections 30-33)

- The sexual activity is the same activity as for the child sex offences (sections 9-12).
- The victim is, unable to refuse because of or for a reason related to a mental disorder.
- The offender knows or could reasonably be expected to know of the disorder and therefore the victim is likely to be unable to refuse.
- The victim is unable to refuse if (s)he lacks the capacity to choose to agree to the activity, or is unable to communicate such a choice to the offender (subsection (2) of sections 30-33).
- Where the sexual activity in sections 30 and 31 involves penetration, the offence is indictable only -life imprisonment, otherwise either way with a maximum sentence of 14 years. Offences under sections 32 and 33 are either way -10 years on indictment.

Offences where there are inducements etc. to persons with a mental disorder (Sections 34-37)

- Protects those able to refuse or consent but vulnerable due to mental impairment to inducement, threat or deception.
- D knows that the complainant has a mental disorder and agreement to the activity is obtained by the defendant by means of an inducement, threat or deception.
- Penalties under section 34-37 correspond with the same penalties under sections 30-33.

Offences by care workers against persons with a mental disorder (Sections 38-41)

- This applies to a National Health body or to a private agency whether the person is in a care home, hospital or at home.
- Volunteers and employees are included.
- The victim has to have a mental disorder and the defendant knows or could reasonably be expected to know that.
- The defendant is in a relationship of care with the victim.
- Prosecution must prove the mental condition, defendant is then deemed to know of it, unless (s)he adduces sufficient evidence to raise the issue that (s)he reasonably did not.
- The defences of marriage (section 43) and pre-existing sexual relationship (section 44) apply.
- Sexual activity (section 38) and causing/inciting sexual activity (section 39) amounting to penetration is indictable only, 14 years imprisonment. If the activity does not involve penetration it is either way with a maximum sentence of 10 years on indictment. Section 40 and 41 are either way maximum sentence of 7 years on

indictment.

Interviews

- Ensure that there is proof of mental impairment or disorder.
- Ensure that there is a relationship of care.
- Consider how the complainant is to give evidence and ensure that there is a proper complaint and if appropriate medical evidence