

RAPE AND ASSAULT BY PENETRATION: INFORMATION FOR SURVIVORS OF SEXUAL VIOLENCE



It is believed that 5% of adult women experience rape. This legal guide is designed to give information about two offences under the Sexual Offences Act 2003 (the SOA 2003): rape and assault by penetration.

Rights of Women publishes a number of other legal guides that may be useful (on issues including Sexual Assault and Criminal Injuries Compensation) as well as our handbook **From Report to Court: A Handbook for Adult Survivors of Sexual Violence**. For further information about these and other Rights of Women publications contact us or visit our website at www.rightsofwomen.org.uk.

Language

Sexual violence is most commonly perpetrated by men against women (although we recognise that this is not always the case). Consequently, in this information sheet we refer to the abuser throughout as “he”. Similarly, we will use the terms “defendant” to describe the abuser and “complainant” to describe the survivor of sexual violence as these are the terms most commonly used in the law.

Different complainants

Sexual violence affects women from all ages and backgrounds, regardless of economic

or social status, race, religion or immigration status. The criminal law of England and Wales that deals with sexual violence should protect all women from violence (Scotland and Northern Ireland have different arrangements). This means that the police have the same obligation to assist and protect you whether you are a British citizen, an overstayer, an asylum seeker, or someone with leave to remain in the UK as a spouse, student or worker. If you want to discuss the implications of contacting the police or cooperating with a criminal investigation contact our Criminal Law Advice Line. Further information about the line and its opening times can be found at the end of this legal guide.

Which law applies?

The SOA 2003 was a significant overhaul of the law that deals with sexual violence. It removed from the law a number of offences like indecent assault and buggery and replaced them with new offences such as **rape** and **assault by penetration**.

The SOA 2003 came into force at **midnight on 1 May 2004**. This means that any rape or assault that took place **after** midnight on 1 May 2004 will be dealt with under the SOA 2003 as explained in this legal guide. If the rape or assault took place **before** midnight on 1 May 2004 then the law that deals with the offence may be the **Sexual Offences Act 1956** and this legal guide will not apply. If you do not know when the offence was committed and it cannot be proved that it occurred either before or after midnight on 1 May 2004 then the defendant may still be convicted of an offence (under section 55 **Violent Crime Reduction Act 2006**).

The age of the complainant

Under the SOA 2003 a person can legally consent to sexual activity if she or he is 16 years old or over. If a child is under 13 years old then in law she is held **not to be able to consent** to sexual activity (even if she expressed consent or believes that she is able to decide whether or not to consent to sexual activity). A person who is between the ages of 13 and 16 has the capacity or ability to consent to sexual activity but it is against the law for her or him to do so.

Consequently, a number of offences under the SOA 2003 refer to the age of the complainant. Section 1 SOA 2003 creates the offence of rape while section 5 creates the offence of rape of a child under 13.

This legal guide is designed to assist adult survivors of sexual violence. It will not discuss child sex offences or offences that relate to under 13 year olds. See **Other useful contacts** for details of organisations that may be of assistance to children and their families.

Consent

Both rape and assault by penetration are **non-consensual sexual offences**. This means that they are offences because the complainant did not consent to the sexual activity concerned. Consent can be expressed, for example, through a verbal statement that a person wishes to engage in sexual activity, or implied, for example, by their behaviour. Consent can be given immediately before sexual activity is entered into or it can be given through a couples' habit or behaviour (for example, a couple may regularly wake each other up with consensual sexual activity). Consent may also be given for a specific act but not others, for example, a woman may consent to sexual touching but not to penetration, or she may consent to vaginal penetration but not to anal penetration.

Under section 74 SOA 2003 consent is defined as having the **freedom** and **capacity** to choose.

Having the **freedom** to choose means being able to exercise real choice about whether to engage in sexual activity or not. A complainant may not be able to refuse sexual activity because violence or threats are used against her or she is detained against her will. She may have been denied access to her children or financial support. Whether or not a particular threat is capable of preventing her from being able to choose will depend on a number of factors, including the complainant's age and

personal circumstances as well as whether it is likely the particular threat would be carried out.

Having the **capacity** to choose refers to the ability a person has to make a particular choice. There is no definition of capacity in the SOA 2003 but case law states that a person will not have the capacity to consent if she has no real understanding of what is involved. A woman will not therefore have the capacity to consent to sexual activity if she does not have enough knowledge or understanding of what is involved to make a decision. If a complainant does not have the capacity to consent to sexual activity because, for example, she has severe learning difficulties, then a defendant may be charged with sexual activity with a person with a mental disorder impeding choice (under section 30 SOA 2003).

In order for an offence to have been committed the defendant **must not have reasonably believed** that the complainant consented to the sexual activity. A defendant could not argue that he believed in the complainant's consent because of the way she was dressed because this could not reasonably effect the defendant's belief (or lack of belief) in consent. A defendant will not have a reasonable belief in consent if:

- he knows or believes that the complainant has not consented;
- he is reckless (indifferent to) whether or not she has consented.

This means that a man who has sexual intercourse with a woman without attempting to find out whether she consents to sexual activity or not has committed the same crime as the man who knowingly has sexual intercourse with a woman without her consent.

Whether the defendant's belief in the complainant's consent is reasonable or not is

determined by looking at all the circumstances of the case. This includes any steps that the defendant took to find out whether the complainant was consenting (such as asking her).

Finally, the SOA 2003 outlines certain situations where in law it will be harder or impossible for the defendant to argue that the complainant consented to the activity and that the defendant reasonably believed that she consented. These include where the defendant deceives the complainant as to his identity or gives her a substance without her knowledge or consent that has the effect of overpowering her. These situations are known as "presumptions". For further information on consent and the presumptions see **From Report to Court**.

Voluntary intoxication, capacity and sexual activity

In order to consent to sexual activity a person must have the freedom and capacity to choose (see above). However, there may be some circumstances where a woman's capacity to choose to enter into sexual activity is affected because she has voluntarily consumed alcohol or another substance (this is often referred to as **voluntary intoxication**).

If a complainant has temporarily lost her capacity to choose whether or not to have sexual intercourse and sexual intercourse takes place then (depending on whether the defendant has a reasonable belief in her consent) the defendant will have committed rape. Whether or not a woman has lost the capacity to consent depends on her ability to understand and make a decision at the time the sexual activity took place. While some people may be able to consume significant quantities of alcohol

without losing their capacity to consent others may not. A person's response to alcohol may also differ from day to day. A complainant may have lost the capacity to consent without having lost consciousness. If the complainant is asleep or unconscious when the sexual activity occurs then there is a presumption that the complainant did not consent and that the defendant did not reasonably believe that she consented.

Where the complainant has consumed significant quantities of alcohol or another substance but did in fact consent to sexual activity then no offence is committed, even if the woman concerned would not have consented if she had not consumed the alcohol or substance.

While the new definition of consent introduced by the SOA 2003 was designed to ensure that more perpetrators of sexual violence are convicted of criminal offences, there may be practical issues that make it difficult for an offence to be investigated or prosecuted. For example, it may be that the complainant cannot remember the incident either well or at all because of her use of alcohol or drugs. A woman may be questioned on whether or not she can be sure of what happened if her ability to remember the incident has been affected by the fact that she drank a significant quantity of alcohol.

Rape

Under section 1(1) SOA 2003 a defendant is guilty of rape if:

- he intentionally penetrates the complainant's vagina, anus or mouth with his penis;
- the complainant did not consent to the penetration; and

- the defendant did not reasonably believe that the complainant consented.

The new offence of rape in section 1(1) SOA 2003 includes oral and anal penetration with a penis. This is a change from the previous law which was only concerned with vaginal penetration and used other offences to criminalise these forms of sexual violence.

In law "penetration" is considered to be a continuing act, so if a man penetrates a woman with her consent, but then she withdraws her consent, his continuing penetration following her withdrawal of consent will be rape. The slightest amount of penetration is enough for an offence to have been committed.

A number of terms are used in relation to rape that appear to differentiate between different types of rape depending on who the defendant is and what relationship he has (if any) with the complainant. For example, reference may be made to marital rape, acquaintance rape, date rape or stranger rape. None of these phrases have any legal meaning as it is not relevant what relationship, if any, a defendant has or had to a complainant. Nor is it relevant if the act complained of occurred within a relationship. If the defendant intentionally penetrates with his penis the vagina, anus or mouth of the complainant without her consent where he does not reasonably believe in her consent the defendant has committed rape, regardless of the circumstances in which the incident occurred.

Criminal proceedings and sentencing

Although all criminal proceedings start in the Magistrates' court, rape can only be dealt with

by the Crown Court. The maximum sentence someone convicted of the offence can receive is life imprisonment. For further information on sentencing see **From Report to Court**.

Assault by penetration

Under section 2(1) SOA 2003 a defendant is guilty of assault by penetration if:

- he intentionally penetrates the vagina or anus of another person with a part of his body or anything else;
- the penetration is sexual;
- the complainant does not consent to the penetration; and
- the defendant does not reasonably believe that she consents.

The sections on consent and penetration discussed above also apply to this offence.

The penetration may be by a part of the defendant's body (his finger or tongue) or with an object (such as a vibrator or bottle). If the penetration is using the defendant's penis then the relevant offence is rape rather than assault by penetration. A defendant can be tried for assault by penetration in circumstances where the complainant does not know what she was penetrated with because the offence can be committed with any object.

Penetration of the mouth **is not** included in this offence (as it is in rape, see above). However,

sexual penetration of a woman's mouth (for example, with the defendant's tongue) would be considered sexual assault. See Rights of Women's legal guide **Understanding Sexual Assault and Causing Someone to Engage in Sexual Activity**.

Criminal proceedings and sentencing

Although all criminal proceedings start in the Magistrates' court, assault by penetration is considered to be as serious an offence as rape. It can only be dealt with by the Crown Court and the maximum sentence someone convicted of the offence can receive is life imprisonment. For further information on sentencing see **From Report to Court**.

The law relating to sexual violence is complex and we have provided a basic overview of the law and terminology. We would strongly advise you to seek legal advice by telephoning our legal advice line.

For further information on sexual offences, their investigation and prosecution please see our handbook *From Report to Court: A Handbook for Adult Survivors of Sexual Violence*. The handbook is available to download free of charge from our website.

Please note that the law referred to in this legal guide is as it stood at the date of publication. The law may have changed since then and accordingly you are advised to take up to date legal advice. Rights of Women cannot accept responsibility for any reliance placed on the legal information contained in this guide. This legal guide is designed to give general information only.

© Rights of Women June 2008

For free, confidential, legal advice on family law issues including divorce and relationship breakdown, children, domestic violence and lesbian parenting call our Family Law Advice Line on **020 7251 6577 (telephone)** or **020 7490 2562 (textphone)** on **Mondays 11am–1pm, Tuesdays and Wednesdays 2–4pm and 7–9pm, Thursdays 7–9pm and Fridays 12noon–2pm.**

For free, confidential, legal advice on criminal law issues including domestic and sexual violence call our Criminal Law Advice Line on **020 7251 8887 (telephone)** or **020 7490 2562 (textphone)** on **Tuesdays 11am–1pm and Thursdays 2–4pm.**

For free, confidential, legal advice on immigration and asylum law, including in relation to financial support issues call our Immigration and Asylum Law Advice Line on **020 7490 7689 (telephone)** or **020 7490 2562 (textphone)** on **Mondays 2–4pm and Wednesdays 11am–1pm.**

Other useful contacts

Criminal Injuries Compensation Authority	0300 003 3601	www.justice.gov.uk/victims-and-witnesses/cica
Crown Prosecution Service (for information about the CPS)		www.cps.gov.uk
National Domestic Violence Helpline (for information and advice from Women’s Aid and Refuge)	0808 2000 247	www.womensaid.org.uk
Rape Crisis Federation (for details of local services)		www.rapecrisis.org.uk
Victim Support Line	0845 303 0900	www.victimsupport.org

Rights of Women, 52 – 54 Featherstone Street, London EC1Y 8RT

Office: 020 7251 6575

Email: info@row.org.uk

Website: www.rightsofwomen.org.uk

Charity number: 1147913

Funded by London Councils

