

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – Children

Older Children

Section 38 – Penetration and consent for the purposes of section 37

105. This section makes further provision as to the meaning of penetration and consent for the purposes of section 37.
106. Subsections (3) to (8) mirror the approach taken in Part 1 of the Bill. Subsections (3) and (4) provide that for the purposes of section 37 “consent” means “free agreement” (as defined in section 12) and that free agreement to sexual conduct is absent in the circumstances specified in section 13(2). Subsection (5) provides that a person is incapable, while asleep or unconscious, of consenting to any conduct (as with section 14).
107. Subsection (6) (like section 15) provides that consent given to particular sexual conduct does not, of itself, imply consent to any other type of sexual conduct.
108. Subsections (7) and (8) (like section 15) deal with the withdrawal of consent. Subsection (7) provides that consent to the sexual conduct may be withdrawn at any time before or during that conduct. Subsection (8) reinforces this by providing that any sexual conduct which takes place after consent is withdrawn takes place without consent.