

3 The law

The definition of rape has changed in recent years. Each definition is relevant depending on when the offence is alleged to have occurred.

Offences committed before 28 July 2003

Prior to 28 July 2003 rape was an offence under common law. The punishment was set out in the Offences Against the Person Act 1861, the maximum sentence being life imprisonment. Under common law, the offence of rape could only be committed against a woman and related only to vaginal intercourse. It did not include non-consensual anal or oral sex.

Offences committed before 28 July 2003 will fall under common law.

Offences committed on or after 28 July 2003 but before 2 February 2009

Prior to 2 February 2009 rape continued to be an offence under common law as above. However, Article 18 of the Criminal Justice (Northern Ireland) Order 2003 (which came into effect on 28 July 2003) redefined rape as; any act of non-consensual intercourse by a man with a person. The victim can therefore be either male or female. Intercourse can be vaginal or anal. It does not include non-consensual oral sex.

Offences committed on or after 28 July 2003 but before 2 February 2009 will be dealt with under common law using the definition contained in the Criminal Justice (Northern Ireland) Order 2003.

Offences committed on or after 2 February 2009

The offence of rape is now defined by Article 5 of the Sexual Offences (Northern Ireland) Order 2008.

A person commits the offence of rape where he intentionally penetrates the vagina, anus or mouth of another person with his penis, and that person does not consent to the penetration, and the defendant does not reasonably believe that person consents. It carries a maximum sentence of life imprisonment.

The Sexual Offences (Northern Ireland) Order 2008 also changed the law relating to consent and belief in consent.

The meaning of consent was not defined in previous legislation. Instead, the meaning was established in case law.

The word “consent” is now defined in the Sexual Offences (Northern Ireland) Order 2008. A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. The essence of this definition is the agreement by choice. The law does not require the victim to have resisted physically. The question of whether the victim consented is a matter for the jury to decide although the prosecutor will take account of all the circumstances surrounding the offence in deciding whether the Test for Prosecution is met (see page 81).

The meaning of consent can have particular relevance in cases where there has been, or is, a pre-existing relationship between the defendant and the victim, or where domestic violence has existed prior to the sexual offence. The definition of consent contained in the 2008 Order will help juries in deciding whether the victim was able to, and did in fact, give his or her consent at the time.

The defendant must show that his belief in consent was reasonable. In deciding whether the belief of the defendant was reasonable, a jury must have regard to all the circumstances, including any steps he has taken to ascertain whether the victim consented. In certain circumstances, it is presumed that the victim did not consent to sexual activity and the defendant did not reasonably believe that the victim consented, unless he can show otherwise. Examples of circumstances where the presumption applies are where the victim was unconscious, drugged, abducted or subject to threats or fear of serious harm.

Offences committed on or after 2nd February 2009 will fall under the Sexual Offences (Northern Ireland) Order 2008.

The Sexual Offences (Northern Ireland) Order 2008

Rape and other sexual offences are abhorrent crimes which deeply affect the lives of victims and their families, and cause great concern within the community. The new law recognises the damage done by sexual offences, while protecting the right of adults to a private sex life.

The Sexual Offences Order is the first major overhaul of sexual offences legislation in Northern Ireland for more than a century, setting out a strong, clear and modern approach, in the same way as the Sexual Offences Act 2003 did for England and Wales.

Under the new law, it is now an offence for anyone to have any sexual activity with a young person under the age of 16. It doesn't need to be full sexual intercourse - any activity of a sexual nature with someone under 16 is illegal.

Legal definitions under the Sexual Offences (NI) Order 2008

Rape and sexual assault are crimes of violence. For the purposes of this handbook, sexual violence and abuse can be defined as ‘any behaviour perceived to be of a sexual nature which is unwanted and takes place without consent or understanding.’

Legal definition of rape under the Sexual Offences (NI) Order 2008

Rape is now defined as penetration by the penis of somebody’s vagina, anus or mouth, without their consent. Rape can be committed against men or women, but as it involves penile penetration it can only be committed by men.

The legal definition of rape can be defined as:

A person (A) commits an offence if –

- (i) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (ii) B does not consent to the penetration, and
- (iii) A does not reasonably believe that B consents.

Legal definition of assault by penetration under the Sexual Offences (NI) Order 2008

Under this new law, it is an offence to penetrate the vagina or anus of someone else with any part of the body or with an object, if the penetration is for sexual motives and if the person does not consent.

‘Assault by penetration’ is defined as:

A person (A) commits an offence if -

- (i) he/she intentionally penetrates the vagina, or anus of another person (B) with a part of their body or something else,

- (ii) the penetration is sexual,
- (iii) B does not consent to the penetration, and
- (iv) A does not reasonably believe that B consents.

Legal definition of sexual assault under the Sexual Offences (NI) Order 2008

This law covers any kind of intentional sexual touching of somebody else without their consent. It includes touching any part of their body, clothed or unclothed, either with a part of the body or with an object.

'Sexual assault' is defined as:

A person (A) commits an offence if -

- (i) he/she intentionally touches another person (B),
- (ii) the touching is sexual,
- (iii) B does not consent to the touching, and
- (iv) A does not reasonably believe that B consents.

Legal definition of causing sexual activity without consent under the Sexual Offences (NI) Order 2008

The Sexual Offences Order makes it illegal to force a person to take part in any kind of sexual activity. For instance it would apply to a woman who forces a man to penetrate her against his will, or an abuser who makes their victim engage in masturbation.

Causing a person to engage in sexual activity without consent can be defined as:

A person (A) commits an offence if –

- (i) he/she intentionally causes another person (B) to engage in an activity,
- (ii) the activity is sexual,
- (iii) B does not consent to engaging in the activity, and
- (iv) A does not reasonably believe that B consents.

Legal definition of consent under the Sexual Offences (NI) Order 2008

For rape and sexual assault to be proved in court, it has to be shown that the victim did not consent to the activity and that the defendant did not reasonably believe that the victim consented.

When it comes to sex between adults, the consent of both parties is key. Put simply, rape and sexual assaults are sexual acts – acts which would otherwise be legal, but which are carried out without the consent of one of the people involved.

The 2008 Order provides that, ‘a person consents if he/she agrees by choice and has the freedom and capacity to make that choice.’

The Order also provides that if a defendant in court wants to claim they believed the other person was consenting, they will have to show they have **reasonable grounds** for that belief.

Until now, if a defendant could prove they honestly believed consent had been given, however unreasonable that belief was, they would have been acquitted.

If someone is threatened with immediate violence, was drugged by their attacker so as to be incapable of making a decision about consent, or was unconscious or asleep, it is extremely unlikely that they have the freedom to consent. Again, the Order now sets down circumstances like these where the courts will start from the presumption that the victim did not consent.

A man can be found guilty of raping his partner, even if they were living together at the time of the offence, if it can be proved that the intercourse took place without consent.

Administering a substance with intent

The Sexual Offences (NI) Order 2008 also makes it an offence to give someone a substance – for instance spiking a drink – without their consent, and with the intention of stupefying them so that sexual activity can take place. Sexual activity might be stripping someone or taking pornographic photos of them. Someone can be charged with this offence as well as any charge for the sexual activity which takes place subsequently. Or they can be charged even when the intended sexual activity did not take place, for example if someone sees what is going on and intervenes to stop it.

Other offences based on intent

The Order also provides for two new offences of 'committing an offence with intent' and 'trespass with intent'. These offences cover situations where abusers commit one offence (e.g. use violence, burglary, kidnap) or trespass on private property with the intention of committing a sexual offence.

Other offences

Other offences in the Order include exposure, voyeurism, and sex with animals or with corpses. Voyeurism applies to watching people without their consent when they are involved in private acts. It includes setting up, viewing or recording people through electronic equipment such as webcams or cameras. There is also an offence of sexual activity in public toilets.

3. The law

If you have been raped or sexually assaulted:

- you are not to blame. The person who raped or assaulted you is to blame;
- the new law recognises the damage done by sexual offences, while protecting the right of adults to a private sex life;
- the new law is about putting the victim first;
- the new law is designed to protect everyone from abuse and exploitation;
- the law recognises that you have a right to be treated sensitively and with respect by the criminal justice system.

Further information on the changes in the law can be found at <http://www.nidirect.gov.uk/index/health-and-well-being/wrong.htm>.