

*These notes refer to the Sexual Offences Act 2003 (c.42)
which received Royal Assent on 20 November 2003*

SEXUAL OFFENCES ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Sexual Offences

Section 38: Care workers: sexual activity with a person with a mental disorder

Section 39: Care workers: causing or inciting sexual activity

Section 40: Care workers: sexual activity in the presence of a person with a mental disorder

Section 41: Care workers: causing a person with a mental disorder to watch a sexual act

68. Like the previous two sets of offences, these sections are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder. The difference here is that A and B must be in a relationship of care. There is no need to prove that B is unable to refuse. The definition of mental disorder is at section 79(6); the definition of sexual activity is at section 78. The relationships of care that are covered by these offences are set out at section 42. The offences are divided according to the different types of sexual activity involved. The division is the same as for sections 30 to 33 and what is said in the notes for those sections about the different types of sexual activity covered applies here too. The prosecution must prove, in addition to the other requirements, that the defendant knew or could reasonably have been expected to know that B had a mental disorder. *Subsection (2)* of each section puts an evidential burden on A in this respect. This means that, unless A shows from the evidence that there is an arguable case as to whether or not he knew or could reasonably have been expected to know of B's mental disorder, it is presumed that he did know or could reasonably have been expected to know of this.