

*These notes relate to the Sexual Offences (Scotland) Act
2009 (asp 9) which received Royal Assent on 14 July 2009*

SEXUAL OFFENCES (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – Mentally Disordered Persons

Section 17 – Capacity to consent

51. This section deals with the capacity of those with a mental disorder to consent to sexual activity. Subsection (1) provides that it relates to the offences in sections 1 to 9, where lack of consent is an essential element.
52. Subsection (2) states that a mentally disordered person is incapable of consenting to conduct (i.e. any conduct which falls within sections 1 to 9) where, by reason of the mental disorder, he or she is unable to do any of the things listed in sub-paragraphs (a) to (c). This test for capacity mirrors the one set out in section 311(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003.