

## SEXUALITY LEARNING DISABILITY AND THE LAW

The following is an overview and good practice guidance not legal advice.

The law is there to:

- Enable and support people with learning disabilities to exercise the same rights as other citizens and
- Protect citizens from sexual violence and exploitation.

From the age of 18 (or from the age of 16 in the case of sexual intercourse and medical consent) people with learning disabilities have the right to make their own decisions. This includes participating in consensual sexual activity that is lawful. These rights are only constrained where the person is assessed as lacking the capacity to consent. Staff need to be aware of the processes and procedures for assessing capacity and seek advice where necessary. (Link to section on capacity and consent below.)

Staff are often faced with situations which challenge them. It is important to work within the law while acknowledging individual rights. The following are summaries of key legislation in England and Wales which underpin sexual health and sex and relationships work with people who have a learning disability.

### **Human Rights Act (1998)**

This gives legal effect in the UK to the fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR). These rights affect matters of life and death as well as rights in everyday life, what you can say and do, your beliefs and many basic entitlements. The rights are not absolute. Government have the power to limit or control them in times of severe need or emergency. Everyone has the responsibility to respect the rights of others and not exercise your rights in a way which is likely to stop them from being able to exercise theirs.

Many rights are subject to the national law of the country – eg. legal age re consent to marriage.

The articles and protocols (legal statements explaining different rights) of the Human Rights

### **Act covers some of the following rights and freedoms:-**

Article 2: The right to life.

Article 3: Freedom from torture, inhuman or degrading treatment or punishment.

Article 5: The right to liberty and personal freedom.

Article 6: The right to a fair trial.

Article 7: No punishment without law.

Article 8: The right to privacy and family life (includes freedom to express one's sexuality and the right to have and form social relationships).

Article 9: Freedom of thought, conscience and religion.

Article 10: Freedom of expression.

Article 12: The right to marry and have a family.

Article 14: Freedom from discrimination.

Article 17: No one has the right to destroy or abuse rights.

The Convention of Rights in articles 8, 9 and 12 are of particular relevance to a sexuality policy.

### **Sexual Offences Act (2003)**

This provides a comprehensive legislative framework for sexual offences, setting out clear boundaries for what is and is not acceptable.

The Act refers to 'people with mental disorder'. Mental disorder is defined by the Mental Health Act 2007 as any disorder or disability of mind, whether permanent or temporary.

**Sections 30 to 33** relate to offences against people who cannot legally consent to sexual activity because of a mental disorder impeding choice.

**Sections 34 to 37** relate to offences against people who may or may not legally be able to consent to sexual activity but are vulnerable to inducements, threats or deception because of a mental disorder. The Act does not intend to interfere with the right to a full and active life, including sexual life, of people with mental disorder who have capacity to consent. Neither does it intend to prevent care workers from providing legitimate care including sex education. However, it does recognise the importance of protecting people with mental disorders from sexual abuse by people with whom they are in a relationship of care.

**Sections 38 to 44** contain offences for people who are engaged in providing care, assistance and services to someone with a mental disorder (including people with learning disabilities). These sections are intended to protect people with learning disabilities from abuse. While it is acknowledged that the majority of people working with vulnerable adults are conscientious, responsible people, the law must be able to deal with the minority who betray the trust placed in them.

Among the offences listed in this Act are:

- sexual activity with a person with a mental disorder
- causing or inciting a person with a mental disorder to engage in sexual activity
- sexual activity in the presence of a person with a mental disorder
- causing a person with a mental disorder to watch a sexual act.

Definitions under the 2003 Act:

(1) Consent. A person consents if he agrees by choice, and has the freedom and capacity to make that choice.

(2) Capacity. A person might not have sufficient capacity because of his age or because of a mental disorder.

(3) Sexual Penetration (for the purposes of this Part of the Act), touching or any other activity is sexual if a reasonable person would consider that-

(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

Paragraph (a) covers activity that the reasonable person would always consider to be sexual because of its nature, such as sexual intercourse. Paragraph (b) covers activity that the reasonable person would consider, because of its nature, may or may not be sexual depending on the circumstances or the intentions of the person carrying it out, or both: for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason.

### **Mental Capacity Act 2005**

The principles rooted in best practice, common law and are compliant with the Human Rights Act.

Basic principles:

- Everyone is presumed to have capacity to make decisions unless it is proved otherwise.
- All practicable steps have been taken to help them make the decision.
- Everyone has the right to make 'unwise' decisions.
- Any decision made on behalf of someone without capacity must be made in their 'best interests'.
- The decision maker must try to take the option that is least restrictive on the person's rights, liberty and freedom of action, while still achieving the necessary goal.

### **Capacity:**

Having capacity to make a decision means:

- Able to take in information in a form appropriate to the individual.
- Able to retain information for long enough to make a decision.
- Weigh up the pros and cons of the decision.
- Able to communicate the decision somehow.

If the person is unable to do any one of these then they do not have the relevant capacity. Capacity is task specific to a particular decision at a particular time. It does not matter if the capacity is temporary, or the person retains capacity to make other decisions, or if the person's capacity fluctuates. Capacity is the ability to consent and not consent itself.

### **Consent:**

Consent is freely making an informed choice with all the relevant information.

All sexual activity between individuals must be consensual. Any sexual act that takes place between two or more people where one of them is not consenting, or does not have the capacity to consent, is classed as sexual assault or rape.

The following may be considered when assessing whether an individual has the capacity to consent to a sexual relationship:

- They understand what sexual acts are
- They understand they can say 'no' to anything they do not want to do
- They can understand what behaviour is inappropriate, eg. Sexual acts between members of the same family are not normal, and are illegal
- They can understand, in general terms, the possible consequences of a sexual act, eg. pregnancy or sexually transmitted disease

The ability of a person to give consent should be judged in each particular circumstance and time. Advice of professionals, such as psychologists, psychiatrists, speech and language therapists and independent advocates may be sought if there is doubt that a person can give consent. Consent does not have to be verbal. Care must be taken to ensure that service users are given the opportunity to communicate consent in the manner that they are used to. This could be using Makaton, picture boards etc. Where appropriate, advocates can be used. Whatever methods are used to communicate with the service user the interpretation of what they want and understand must be recorded.

#### **Exemptions to the Mental Capacity Act:**

No matter what the circumstances, no one, not the court or anyone else can make decisions on behalf of another about:

- Marriage or civil partnership
- Consenting to sexual relations
- Consenting to divorce
- Consenting to adoption
- Consenting to anything under the Human Fertilisation and Embryology Act.

The Mental Capacity Act also has a Code of Practice which applies to everyone including family carers and all support staff have a "duty to have regard to it".

Although the code is guidance and not law, it can be taken in to account in any legal proceedings. The code should be followed unless the reasons are based on the individual and are evidenced.

#### **Care Act 2014**

References in the Care Act are to promoting wellbeing and safeguarding including paying regard to the individual's views, wishes, feelings and beliefs; to ensure that decisions are made having regard to all the individual's circumstances; the importance of the individual participating as fully as possible in decisions about them; the need to protect people from abuse and neglect. The Care Act also refers to supporting people to keep physically, sexually, financially and emotionally safe. As well as safeguarding it includes guidelines on advocacy and capacity issues, supports the creation of strong multi-agency partnerships that provide timely and effective prevention of and responses to abuse or neglect and support the development of a positive learning environment across partnerships and at all levels to help break down cultures that are risk-averse.

## **References**

Care and Support Statutory Guidance, Issued under the Care Act 2014, Department of Health 2014.

Learning Disabilities, Sex and the law. A practical guide fpa 2005.

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