Decisions about sex for people with learning disabilities

Opportunities for people with learning disabilities to have sexual relationships have changed enormously over the past two decades.

When I started working in this area more than 20 years ago, it was in large institutions that generally kept people segregated from society. However, this did not prevent men from coming in and sexually abusing the residents, nor did it stop several men with learning disabilities seeking sex in public toilets (McCarthy and Thompson, 1997).

Staff generally discouraged relationships between residents in the institutions, which forced many to have sex in undignified places, anxious they would get into trouble if found out, even if they were being sexually abused (McCarthy and Thompson, 1996). These institutions, which have now closed, typically failed to provide residents with respect for their relationships or protection from abuse.

The majority of people with learning disabilities live in their family homes, although others live in supported accommodations such as flats or group homes. While these might provide respectful settings for privacy and intimacy, there are often still obstacles to overcome. These include persuading family and paid carers to accept sex is happening, and providing practical support for partners to visit. Support over these issues is so rare that sexual contact generally continues to take place behind the backs of carers (Lesseliers et al., 2010).

Closing day centres and large...
Residential services reduces the time people with learning disabilities spend together. Without care, this will further restrict the opportunities for them to meet potential partners and form relationships.

While a move towards integration may make it easier for people with learning disabilities to have relationships with others who do not have learning disabilities, they are often exploited for money or sex in these relationships. Often they tolerate this because of the value attached to having a boyfriend or girlfriend (McCarthy and Thompson, 1997).

Some people with severe learning disabilities will not be capable of giving informed consent to sexual relationships.

Balancing their right to have relationships with the significant risk of abuse can be challenging. Fortunately, we now have a robust legal framework to guide us in this area.

**Consent to sex**

In England and Wales, the relevant legislation is in the Sexual Offences Act 2003 and the Mental Capacity Act 2005.

For people aged 16 and over, section 74 of the Sexual Offences Act says: “A person consents if he agrees by choice and has the freedom and capacity to make that choice.” Without consent, an offence has been committed.

There is additional legal protection specifically for people with a mental disorder if a potential abuser knowingly takes advantage of their vulnerability. This includes making threats or giving inducements, such as a man saying he will marry a woman with learning disabilities if she has sex with him, when he has no intention of doing so. It is also forbidden by law for all staff and volunteers to have sex with the people they support.

The courts have been sensitive to the possibility that people with learning disabilities may have a good understanding of sexual issues but being unable to say no in certain sexual situations. In *R v C (C, R v [2009] UKHL 42 (50 July 2009)),* a woman with mental health needs was found to be powerless to refuse sexual requests from a man she felt intimidated by. This means a person with learning disabilities may be able to consent to sex with some people but not others.

If a person lacks capacity to make a decision about having a sexual relationship, under the Mental Capacity Act (MCA) nobody has the right to decide that such a relationship is in his or her best interests (DH, 2005). For example, if a man with learning disabilities lacks capacity to decide to have sex, staff cannot make arrangements for him to use a prostitute.

However, if a person with learning disabilities is already involved in sexual contact but staff have concerns about his or her capacity to consent, they do not necessarily have the right to stop the contact. For example, if a member of staff finds two people with learning disabilities involved in intimate contact, both individuals’ capacity to consent should be considered. If there is reasonable belief that one of them lacks capacity to consent, the staff member needs to consider what is in that individual’s best interests; separating the two people to make sure it does not happen again may not be in their best interests if, for example, they have a strong friendship.

The final principle of the MCA requires us to try to limit restrictions on people’s rights and freedom.

**Consent to marriage and civil partnership**

There are distinct cultural differences in attitudes to people with learning disabilities marrying. In many communities, unreasonable obstacles are put in the way, such as having to prove commitment in a way that is not required of others.

In some south Asian communities, having a learning disability is not seen as a reason not to have an arranged marriage. Around 25% of cases reported to the forced marriage unit involve people with learning disabilities (Foreign and Commonwealth Office, 2010).

It is the responsibility of the person conducting a marriage ceremony to ensure that both parties understand the contract: “They are married if they understand that by that act they have agreed to cohabit together and with no other person” (*Harrod v Harrod* (1854) 1 K&R 4, p 16).

People with learning disabilities can also enter into civil partnerships. However, they face enormous challenges to “come out” as gay or lesbian, and it may be some time before significant numbers are able to make this choice for themselves (Abbot and Howath, 2005).

According to the Civil Partnership Act 2004, civil partnerships may be void if: “Either of [the parties] did not validly consent to its formation, whether as a result of duress, mistake, unsoundness of mind or otherwise”.

**Supporting people to have relationships**

The MCA requires us to assume that all people are able to make their own decisions, including those about sex, and that they should be given all possible support to make these decisions (DH, 2005). This means people with learning disabilities should have access to sex education, which can be provided by nurses.

There are many examples of people with learning disabilities championing the right to make decisions about their sex lives, including setting up dating agencies, and campaigning to “stay up late” so that a night out with a partner does not have to end when the support worker leaves (www.stayuplate.org). There is also an online docu-soap called *The Specials* about a group of young people with learning disabilities who share a house in Brighton (www.the-specials.com), which addresses relationship issues.

**Assessing capacity**

If the possibility of a sexual relationship arises, people with learning disabilities may need to be assessed for capacity to consent. Nurses may be the right people to do this if they are comfortable talking about sexual issues and have a good rapport with the person concerned.

While general knowledge about sex will be relevant to individuals’ ability to consent, the assessment should look specifically at their understanding of the sexual relationship they may be involved in. For example, a man having sex with men does not need to know about contraception, but he may need to know about HIV and other sexually transmitted infections (STIs).

Ideally, the person with learning
CASE STUDY: CAPACITY TO CONSENT TO SEX AND CONTRACEPTION

Pamela is 23 years old and has Down’s syndrome. She has been seeing her boyfriend Nigel for about a year. Nigel also has learning disabilities and has known Pamela since their school days. They see each other regularly at college. Pamela lives with her family, who are very supportive of the relationship and often have Nigel in their home. One day Pamela asks her mother if Nigel can stay the night.

After the shock of coming to terms with her daughter becoming an adult, Pamela’s mother plays for time and says she will think about it. She is not sure how much her daughter understands about sex.

A community nurse from the local learning disabilities team is asked to work with both individuals separately. Over several sessions, she finds that Pamela has learnt a lot from school, college and television about sex. This includes knowing that sex should feel nice, that she can say no, and that a man may put his penis in her vagina which could make her pregnant.

The nurse then explores Pamela’s ideas about getting pregnant. Pamela says she would like to have children, but not until she is married. She agrees that it is a good idea to go on the pill.

The nurse concludes that Pamela lacks capacity to make a decision about contraception as she is unrealistic about the support she would need to have a child. However, the nurse concludes Pamela does have capacity to make a decision about having sex with her boyfriend if there was no risk of pregnancy.

The GP makes a best-interests decision, supported by Pamela’s mother, to prescribe contraception, even though the possibility of pregnancy is very low in women with Down’s syndrome.

**References**


**Concerns about abuse**

People with learning disabilities are often victims of sexual abuse, and men with learning disabilities are often the perpetrators (Bruder and Kroese, 2005).

Concerns about the sexual abuse of adults should be reported to the police and local authority under the safeguarding adults procedures (DH, 2000). The MCA will apply to decisions in this process, including whether to collect any forensic evidence if the person concerned lacks capacity to agree to this.

In cases where abuse involving a person lacking capacity has been established, care must be taken to act with the appropriate authority. This could mean the following:

- Asking the Court of Protection to make a decision about removing a person from a setting where he or she may be at risk of ongoing sexual abuse;
- Authorising the constant supervision of a man with learning disabilities to prevent him sexually abusing others through the Court of Protection or deprivation of liberty safeguards.

**Conclusion**

Where there are concerns about an adult with learning disabilities being involved in a sexual relationship, the law provides a clear decision-making process. Central to this is the need to decide whether the person has capacity to consent to the sexual contact.

People with learning disabilities who have received appropriate sex education may be in a position to make sexual decisions themselves, and may want support to manage their relationships like everyone else.

For those who lack capacity to consent to sex, best-interests decisions must be made that address the risks of sexual exploitation. The Court of Protection should be used to resolve disputes about capacity, and to authorise best interests decisions that restrict an individual’s opportunities for sexual contact. NT