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Adults with Incapacity-Sexual Relationships and the Criminal Law

The Mental Welfare Commission has been contacted by professionals with concerns about

- the position of staff supporting people with mild learning disabilities where there is uncertainty about their capacity to consent to sexual relationships but there is no concern about the relationship being exploitative
- the position of the person engaging in sexual relations with the adult in the same circumstances.

The notes below outline some of the issues to be considered. For further guidance on sexual relationships and people with mental health problems or learning disabilities, see the Commission's good practice guidance, *Consenting Adults?*¹

Judgement in case of LY²

The case of LY demonstrates some of the dilemmas. The local authority concerned applied to the Sheriff for directions to assist with a dilemma they faced in relation to a woman, LY. From around 2005, the local authority had concerns about LY's relationship with an older man with whom she had two children. It was alleged that LY, who had learning difficulties, had been subjected to violence and had been forced into prostitution. Emergency procedures were triggered in September 2009 following an allegation of attempted rape. Following an assessment that she lacked capacity to consent to sexual relations, a guardianship order was granted by the sheriff in February 2010 for a year and renewed several times, most recently on April 2016. The guardianship order includes a power to *"decide the appropriate level of care for LY in respect of health and social issues restricted to promotion of the development of her personal resources and insight in respect of her lack of capacity in the area of sexual relationships and informed consent relative thereto."* In addition there is a power to decide who she has contact with and to supervise any such contact and a power to monitor, supervise and restrict, if necessary, the use of her mobile phone.

In 2013 the local authority applied under section 3 of the Adults with Incapacity (Scotland) Act 2000 (AWI Act) for directions on the exercising of their functions under the Act because LY formed a relationship with a new boyfriend that, following discussion with the multi-agency group addressing her protection, was agreed to be a positive step that improved LY's self-esteem. LY had a child by him and he was supportive throughout the pregnancy. There was a consensus that this was a loving relationship.

¹ http://www.mwscot.org.uk/media/51782/updated_consenting_adults.pdf

² <https://www.scotcourts.gov.uk/search-judgments/judgment?id=d1e88fa6-8980-69d2-b500-ff0000d74aa7>

However, due to LY having been assessed as not having capacity to consent to sexual relations, the local authority were concerned that anyone having a sexual relationship with her might be at risk of a charge of rape in terms of section 1 of the Sexual Offences (Scotland) Act 2009, read alongside section 17 of the Act. Section 1 provides that sexual intercourse without consent or a reasonable belief of consent constitutes rape. Section 17 provides that a person is deemed incapable of consenting to conduct where, by reason of mental disorder, the person is (1) unable to understand what the conduct is (2) form a decision as to whether to engage in the conduct or (3) communicate any such decision. See the Scottish Government Guidance on the 2009 Act.³

There was also anxiety about whether supporting a person to have a sexual relationship risked staff being liable to prosecution, either under section 4 of the 2009 Act (intentionally causing a person to participate in a sexual act), or other statutory or common law offences where section 17 of the Act applied.

After careful consideration, the sheriff concluded that as the application was predicated upon LY's having been assessed as incapable of consenting to sexual relations, he could not give directions which 'in any way would condone the crime of rape.' If the adult is indeed incapable of consenting to the sexual relationship, it is not possible for a guardian to, in effect, consent on behalf of the adult.

He suggested that consideration be given to revisiting the question of whether the adult was capable of consenting to sexual relations. This might involve an expert re-assessment of capacity, followed by an application for variation of the guardianship order.

Rights v protection

Other professionals have asked us for advice in quite similar circumstances. Where a relationship is not exploitative, they have had concerns about supervising someone on a continuous basis to ensure they do not have a sexual relationship.

We agree that this will often be inappropriate. As was acknowledged in the LY case, to do so could involve an intolerable degree of intrusion in the person's life. It may also be problematic in terms of human rights legislation, such as the right to private and family life in Article 8 of the European Convention on Human Rights (ECHR) and the principles of the AWI Act (benefit, least restriction, take account of past and present wishes of the adult).

³ <http://www.gov.scot/Topics/archive/law-order/8980/rape-sexual-offences-bill/guidance>

Regard should also be had to the UN Convention on the Rights of Persons with Disabilities – Article 16 sets out the duty of States to take all appropriate measures to protect persons with disabilities from exploitation and abuse, but Article 12 makes clear that persons with disabilities ‘enjoy legal capacity on an equal basis with others in all aspects of life’, that states should provide the support disabled persons may require in exercising their legal capacity, and that measures relating to the exercise of legal capacity ‘reflect the rights, will and preferences of the person’.

In other words, the Convention would expect that any restrictions on an adult entering into a sexual relationship could be objectively justified by a need to protect the person from abuse, and are not a discriminatory denial of the person’s right to make choices about sexual relationships.

All that said, legally, if the person is formally assessed as lacking capacity to consent to a sexual relationship, there are difficulties in condoning or supporting such a relationship.

In some cases where the adult’s capacity to consent to a sexual relationship is doubtful, a local authority may look at preventing sexual exploitation by an application for welfare guardianship under the Adults with Incapacity Act on the basis of a generalised assessment of incapacity, and with wide powers given to the guardian (sometimes the parents) including to decide ‘with whom the person should consort’. We believe this is potentially problematic.

The power to determine with whom a person should consort is extremely broad, with significant implications for the person’s rights under Article 8 of ECHR. This may be appropriate if a person is extremely vulnerable to financial or emotional exploitation. We are aware from applications intimated to us that one of the ways the power ‘to determine with whom the adult consorts’ is used is for the purpose of preventing a sexual relationship. It should be borne in mind that that an adult may not have capacity to determine with whom they consort e.g. in protecting themselves from financial or emotional exploitation but have capacity to consent to a sexual relationship.

Using broad powers for the more specific purpose of determining sexual relationships may have varying consequences. On the one hand having broad powers may avoid the dilemmas that arose for the local authority in the case of LY, where they had an assessment of incapacity with regard to consent in sexual matters and specific powers which they had to ‘enforce’. On the other hand broad powers are more difficult for the adult to challenge, may be interpreted and exercised more freely by the guardian and may be less compliant with a human rights approach.

In general, we believe that any use of guardianship to protect an adult should be as specifically framed as possible, with a clear justification set out for any powers which may in practice restrict the person from entering into a sexual relationship.

Each case needs to be considered on an individual basis with the principles of the Act in mind, with advocacy involvement with the adult and possibly the request for the court to appoint a curator ad litem or safeguarder.

Defining ‘capacity’ to consent to sexual relationships

In determining whether a person can consent to sexual relationships, it is important to be clear about what is being assessed. There is little caselaw in Scotland, but English cases provide some guidance.

In the case of *IM v LM*⁴ the Court of Appeal held that, in the context of an assessment of capacity for the purposes of the civil law, the test was not about whether a person can consent to sex with a particular person, but whether the person is able to consent to sexual relationships in general. The Court also held that the test for capacity should not be overly demanding and place a much higher requirement of understanding on persons with capacity issues than on others.

It must also be borne in mind that the AWI Act and the United Nations Convention on the Rights of Persons with Disabilities expect that people will be given support to assist them in taking decisions. Assessment of capacity should be based on the person’s ability to take a decision with that support.

This does not mean that, if a person is assessed as being capable of consenting to sex, that guardianship cannot be used to protect them. If there is evidence of a risk of exploitation, which the person cannot protect themselves against, it may still be appropriate to seek powers under guardianship proceedings. But it is important to frame the justification for those powers around the risks presented, not a generalised assertion that the person lacks capacity to consent to sexual relationships.

Factors in considering prosecution

Ultimately, the decision as to whether a crime has been committed is a decision for the criminal courts, and a decision as to whether anyone should be prosecuted for allegedly committing a crime is a matter for the procurator fiscal. Where there is a concern that a crime is being committed, that matter should normally be reported to the police, alongside consideration of a referral under adult support and protection procedures to the local authority.

⁴ [2014] EWCA Civ 37: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/37.html>

It is not mandatory to report every instance to the police where someone with a learning disability has had sexual relations, particularly where there is no concern about exploitation or abuse or a crime having been committed.

In a letter to the Law Society and the Mental Welfare Commission, the Lord Advocate outlined a number of factors that the Crown and Procurator Fiscal Service (COPFS) would consider in deciding whether or not to prosecute. This should not be taken as prescriptive guidance on when prosecution would or would not take place, but give some idea of the approach which may be taken.

These include:

- the medical opinions of supervising staff in relation to both the accused, if appropriate, and the victim including the nature and extent of their mental disorder
- the ages of the victim and the accused-are their ages similar in reality and in mental capacity
- any relevant information from staff supervising the accused, if appropriate and the victim. This can include the background of both and information about previous relationships.
- the views of parents/legal guardians of the accused, if relevant, and the victim
- the balance of power within the relationship and whether there is an imbalance of power due to factors such as age, mental health, physical health, emotional stability, financial issues
- the nature of the relationship including whether it is abusive or supportive and whether there are any children from the relationship
- the intent of the accused
- whether prosecution would be deemed to be, or not be, in the public interest.

In terms of staff being prosecuted, similar factors about the alleged crime would be considered as well as:

- establishing the intent of the staff in supporting the relationship
- evidence of good practice by staff including proper assessment of capacity
- multi-agency discussions
- detailed recording of discussions and decisions.

Generally, we understand that there are very few prosecutions related to section 17 of the Act though there are no statistics available on this.

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