

**ADULTS WITH A LEARNING DISABILITY - INTERPERSONAL RELATIONSHIPS AND SEXUAL DEVELOPMENT**

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## **POLICY**

- 1 The Department recognises that people with learning disabilities have the same rights as other people and would seek to provide services and practice which reflect that and would seek to maximise:
  - personal choice
  - competence
  - valued social roles
  - community presence and participation

## **BACKGROUND**

- 2 The policy does not stand alone and its implementation is dependent on wider issues. In particular, it should be seen in conjunction with the policies set out in the Bibliography and additional practice guidance (Appendix 1) and in line with the Departmental specifications and the current strategy for people with learning disabilities.
- 3 A separate section outlining the Legal Framework is attached at Appendix 2 and should be referred to as appropriate. Staff are expected to adhere to this and other policies at all times.

## **CONTEXT**

- 4 Staff should at all times respect and promote the rights and responsibilities of people with a learning disability. They should ensure that practice takes account of the following:
  - individuals must not break the law
  - individuals must not impose their personal views of sexuality on other people
  - individuals should not coerce and exploit other people
  - individuals should respect other people's views and feelings
  - individuals are able to access community-based services in order to obtain appropriate advice and treatment
  - support and education is available as appropriate to the individual's needs
  - guidance about protection from unreasonable risks which may have distressing consequences.

## **BIBLIOGRAPHY**

### **Texts**

[Code of Conduct](#) (link available only to CCC employees)

### **Operational Instructions**

[Protection of Vulnerable Adults from Abuse \(COM CARE 4.4\)](#)

[Supervision Standards \(GENERAL 8.1\)](#)

### **Departmental Manuals**

[Complaints and Representations Staff Handbook](#)

[Health and Safety Manual](#) (link available only to CCC employees)

[Human Resources Procedures: Recruitment, Training, Discipline and Capability](#) (link available only to CCC employees)

### **Help and Advice**

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# ADULTS WITH A LEARNING DISABILITY – INTERPERSONAL RELATIONSHIPS AND SEXUAL DEVELOPMENT: PRACTICE GUIDANCE FOR STAFF

## APPENDIX 1

### 1.0 INTRODUCTION

1.1 This document aims to provide an informative and supportive framework for staff working with people with a learning disability in the knowledge that this may be a difficult area for staff. Service users, parents and other informal carers need to be able to discuss with ease and feel confident about the basis upon which decisions are made. The document is in three parts:

1. policy outlining the underlying principles;
2. practice guidance;
3. legislative background.

Training and Operational Instructions will be produced to support this guidance as appropriate.

1.2 This document contains a number of references to review meetings. Since the information to be discussed at these will be of a sensitive nature it is recommended that particular attention is paid to their size and composition. The views of the service user(s) must be taken into account in this context, either expressed directly or via an advocate.

### 1.3 Learning Disability Definition

1.3.1 One definition used by the Department of Health defines learning disability as “a state of arrested or incomplete development of mind that includes significant impairment of intelligence and social functioning”. Included in this definition are people with mild, moderate, severe and profound learning disabilities. [LAC \(92\) 15 Social Care for Adults with Learning Disabilities \(Mental Handicap\)](#) suggests that most people with severe or profound learning disabilities will require “considerable help in order to live, initially in their family homes and later in appropriate residential accommodation” (DH 1992b). Those with a mild or moderate degree of learning disability are more likely than the general population “to require additional emotional, mental, health and social support”. (Taken from: ‘It Could Never Happen Here’: ARC 7 NAPSAC 1993).

1.4 For adults with a learning disability the Social Services Department

will offer the following help and support to assist them in the conduct of their personal relationships.

- a) education and support in dealing with the expression of sexuality appropriate to their needs;
- b) access to community based services in order to obtain appropriate advice and treatment in respect of health care arising from their sexual needs;
- c) sex education within an agreed and planned programme of care and education in response to identified needs;
- d) assistance in developing skills in assertiveness in order to be confident in making decisions relating to the degree and nature of their sexual activity;
- e) in exceptional circumstances protection from unreasonable risks, which may have distressing consequences;
- f) consideration of the views of carers and relatives with support and mediation provided by an independent advocate.

## 2.0 **RIGHTS AND RESPONSIBILITIES**

### 2.1 The Service User

2.1.1 Underpinning this policy is the principle that service users have a range of rights in the area of sexuality:

- a) to have and enjoy a fulfilling personal relationship;
- b) the right to express sexual need in an appropriate way if they wish to;
- c) to privacy;
- d) to be sexually active;
- e) to have sexual education, including counselling on personal relationships, sex and sexuality, HIV and other sexually transmitted diseases;
- f) to contraceptive advice and support services;
- g) to marry or cohabit;
- h) to make an informed choice about whether or not to have children;
- i) to be free from exploitation, abuse and degrading treatment;

j) to take risks and make mistakes in personal relationships.

2.1.2 Similarly, particular responsibilities can be expected from people with learning disabilities as with anyone else:

- a) not to break the law;
- b) not to impose their personal views of sexuality on other people;
- c) not to coerce and exploit other people;
- d) to respect other people's views and feelings.

## 2.2 Members of Staff

2.2.1 The rights of staff in this context derive from their contract of employment and their rights as individuals. Although the Department is committed to helping service users with a disability to participate as fully as possible in society, staff's own rights rely on the Department giving them the opportunity to express what they would and would not be prepared to do to help service users with the expression of their sexuality. Staff will receive relevant training and guidance both as part of their induction and at appropriate times thereafter.

2.2.2 Additionally, staff should be given the opportunity to discuss concerns about the interpretation of the sexuality policy during supervision with their manager. Departmental Operational Instructions, which are of practical assistance in the discharge of their duty of care with reference to the expression of sexuality by service users with a learning disability, will be made available. When appropriate, advice and expertise will be sought from colleagues in other agencies.

## 2.3 The Role of Relatives and Carers

2.3.1 It is important both to acknowledge the role of relatives of service users with a learning disability in this context and to acknowledge the role of staff concerning potentially conflicting views over the expression of sexuality between a service user and his/her parent(s).

2.3.2 Parental concern about the expression of sexuality by their son or daughter who has a learning disability is to be expected and must be respected. It must be viewed in the knowledge that parents usually retain an involvement in the lives of their adult children and that is heightened when the child has a disability. Parental ability to offer ongoing advice and support to a disabled child must be acknowledged.

2.3.3 In seeking to promote the expressed wishes of the service user, staff will need to acknowledge that parents will also have views. In the first instance, the service user should be asked if they would like to talk to their parent(s), with staff support if appropriate. If the service user

chooses not to do this, an alternative option is for staff to inform the parent(s), should the service user request it. If the service user does not wish their parents to be consulted, this must be documented, and planned work with the service user should start /continue. Independent advocate support may be necessary in some circumstances.

- 2.3.4 In some circumstances, there may be a conflict between a service user and their parent(s) regarding the expressions of the former's sexuality. If this occurs, then an independent advocate should be provided to assist in overcoming the conflict.

### **3.0 HEALTH ASPECTS OF SEXUALITY**

#### **3.1 Access to Mainstream Services**

- 3.1.1 Service users should be helped to attend appropriate health services in accordance with their wishes and needs. Ideally, this should be carried out from home (i.e. with the help of carers), but if this is not feasible, health care staff or day services staff may become involved.

#### **3.2 Sharing Information**

- 3.2.1 As with any other confidential material, information relating to the sexuality of service users should only be shared with others if it helps the service user to receive the care and support they require.
- 3.2.2 Whilst issues relating to health and sexuality are normally dealt with in confidence this is not always possible with those associated with service users with a learning disability.
- 3.2.3 The commonest reason for this is that service users with learning disabilities usually require assistance in accessing health care.
- 3.2.4 In exceptional cases, it may be necessary for legal advice to be obtained to ensure that the service user with a learning disability receives health care appropriate to their needs. The care manager would normally initiate this process.
- 3.2.5 Extreme care must be taken in disclosing confidential information when a service user with learning disabilities has HIV/AIDS. Advice from a specialist worker should be sought and consideration given to seeking legal advice.

#### **3.3**

##### **Menstruation and the Menopause**

- 3.3.1 What menstruation is and how to deal with it on a practical level should be included in all sex education programmes for both sexes ideally, this should happen before the start of periods but occasionally reminders will be necessary. Parents, carers and schools should be

involved in this process. Staff should be aware of various cultural differences surrounding menstruation, and support and advise service users accordingly.

- 3.3.2 Menstrual hygiene should be taught (ideally by health staff), and correct information given. All options for sanitary wear should be considered, and the woman herself encouraged to make choices. Staff must assist with changing pads if required in accordance with the principles of personal care. Wherever possible, a female member of staff should help with this task. Under no circumstances should a staff member insert tampons. As in 3.1.1. service users should be assisted with attending a doctor if there are problems with menstruation. It is important to be careful not to attribute all challenging behaviour to menstrual cycles/pain/PMT or menopause.

### 3.4 The Menopause

- 3.4.1 The effects of the menopause on women vary widely. This is also one of the times when staff may find it necessary to explain the changes that are taking place.
- 3.4.2 It is all too easy to overlook these symptoms particularly if a client's ability to communicate is limited or their every day behaviour masks some of these changes (e.g. a client who is liable to mood swings may have her irritability attributed to her "usual causes" rather than her menopause). Even women who have not been sexually active are subject to the same symptoms. Following the menopause, osteoporosis (thinning of the bones) occurs to a variable extent in all women. This can make women vulnerable to fractures later in life. Any woman who is observed to experience these problems during her middle years should be offered medical help. Staff should be aware of the possible effects of the menopause on their clients and be ready to refer them to their GP, or other relevant health professionals, or suggest this course of action to service users or their families.

### 3.5 Unplanned Pregnancy

- 3.5.1 Termination of pregnancy for service users with a learning disability is available as for all women, subject to existing abortion law.
- 3.5.2 Should an unplanned pregnancy occur, the service user (and, if appropriate, their partner) should receive counselling from an appropriate specialised source on the options available.
- 3.5.3 The role of staff in this context is to ensure that all relevant information is available to the service user. Information and support should be sought from health professionals.
- 3.5.4 Of crucial importance in this context is a judgement about whether or not the female service user is capable of consenting to the termination of pregnancy if this is her preferred course of action. This is a decision to be made by a medical practitioner. For women with a

learning disability the medical practitioner will have, in all probability, access to additional information from those who know the service user well, along with legal advice.

- 3.5.5 Consideration may be given to the views of the male partner and parent(s) as appropriate but in respect of unplanned pregnancy, their views have no standing in law.

### 3.6 Contraception

- 3.6.1 Contraception advice and support should be available to all service users with a learning disability who require it. It is self-evident but important to emphasise that contraceptive advice and services relate to the needs of the individual service user and are not solely a means of allaying staff or parental concerns. Information about side effects or risks should be explained simply.

- 3.6.2 Information about contraception is primarily available from two sources. It should form part of an ongoing sex education programme and be available in response to individual circumstances.

- 3.6.3 It is important to note that contraception when prescribed under medical direction can only be given with the service user's consent. For the service user with a learning disability this raises the issue of their ability to give consent. This is a judgement that must be made by the doctor in charge of the treatment proposed. If the service user with a disability does not have the ability to consent, the issue is much more complex. However, responsibility for the decision, whether or not the treatment takes place, is a medical one and the doctor will base his/her decision on whether the proposed treatment is in the best interests of the service user with a learning disability.

### 3.7 Sterilisation

- 3.7.1 Sterilisation has implications other than as purely a means of contraception. Parental demand for sterilisation may be insistent and it is important to acknowledge the beliefs and feeling which prompt this reaction.

- 3.7.2 However, for the service user, the possibility of sterilisation must be viewed in the context of other known methods of contraception (see 4.5.4).

- 3.7.3 It is likely that in practice a recommendation for sterilisation of a service user with a learning disability as a means of preventing unwanted pregnancy would be subject to the judicial process.

- 3.7.4 The role of staff in this context is difficult and has three elements:

- a) to continue to demonstrate care and concern for the service user;

- b) to ensure that all the relevant information is available to key decision makers;
- c) to ensure that the views of the service user are represented in the judicial process if it is enacted.

## 4.0 THE EXPRESSION OF SEXUALITY

### 4.1 General Statement

- 4.1.1 The expression of sexuality is positive, healthy and important. Service users should be helped to pursue this part of their lives with dignity, through advice, guidance and information on sexual issues in a way that does not expose them to risk and provides them with knowledge about their bodies.

### 4.2 Sexual Intercourse

- 4.2.1 Sexual intercourse is considered to be a private activity between consenting adults. If this is the intention of the service users it is the responsibility of the staff to ensure that both parties do consent and are capable of doing so. The issue of informed consent is important for two reasons. As well as the criminal law as it applies to all women, there are a number of offences specific to people with a learning disability. In these circumstances a professional judgement must be made about the ability of service users with a learning disability to give their informed consent.

### 4.3 Homosexuality

- 4.3.1 The response to homosexual behaviour should be consistent with the Social Services commitment to equal opportunities.

### 4.4 Masturbation

- 4.4.1 Because masturbation is a personal activity, privacy should be afforded and encouraged. If masturbation becomes public or interferes with everyday living, practical advice should be given to the service user about where and when this is an appropriate activity. If the service user is unable to understand, guidance and support should be sought from Health professionals. Staff should be aware that, in some circumstances, excessive masturbation could be caused by a lack of alternative opportunities, or a reaction to stress.

4.4.2 It may be appropriate to include advice on masturbation to service users as part of a general education programme on sexual health and hygiene issues. This should involve the advice and expertise of trained nursing staff or other health professionals.

#### 4.5 People with Profound and Multiple Disability

4.5.1 Service users with a high level of dependency may often be severely restricted in expressing their feelings and forming relationships with others. It is important that services provide a wide variety of sensory experiences and opportunities to interact with peers.

4.5.2 Alternative opportunities to experience closeness, excitement and enhancement of sensory awareness should be sought in order to improve the general quality of life for people with profound and multiple disability. People with multiple disabilities may experience the world around them much more directly through their senses and bodily sensations. Specific skills, responsibility and sensitivity are required to meet their needs. Service users' gender identity should be considered in the organisation of personal care tasks. For example, in most circumstances, it is preferable that male staff assist men and female staff assist women.

### 5.0 **THE ISSUES OF CONSENT**

#### 5.1 Legal Framework

5.1.1 A detailed and helpful analysis of this is contained in Appendix 2. A practical interpretation of this from the publication "It Could Never Happen Here" is included in the main body of the text with the permission of the Association for Residential Care and the National Association for the Prevention of Sexual Abuse in Care.

#### 5.2 Importance of Consent

5.2.1 Consent is the crucial issue in determining whether a particular act, relationship or situation is abusive of the person concerned. It is always necessary to determine whether the person could consent and whether he or she did consent. When determining issues of consent Brown and Turk (1992) suggest that consideration should be given to the four possible situations outlined below.

#### 5.3 Consent Withheld

5.3.1 If the service user withholds consent to sexual activity then, as with the rest of the adult population, the laws of rape and sexual abuse protect him or her.

## 5.4 Inability to Consent

5.4.1 The service user may be unable to give consent because the severity or nature of their learning disability significantly undermines their understanding of the basic elements of sexual behaviour. If this is so they cannot be said to be giving a meaningful consent to it. Brown and Turk (1992) suggest that if a person is unable to think about or “through” sexual behaviour in any of the following ways they are not in a position to consent to sexual activity per se.

- making sense of what has been done to them and construing the sequence of behaviour as a sexual act;
- appreciating an inappropriateness of behaviour, for example, a woman with learning disabilities might not be told that sexual acts between fathers and daughters are not normal;
- appreciating the value accorded to a sexual act, for example, that having sex for a cigarette is not a fair deal;
- anticipating the possible consequences of sexual acts, such as pregnancy or sexually transmitted disease.

## 5.5 Power and Unequal Situations

Even if a service user can make judgements about sexual activity there may be particular situations where consent cannot be freely or meaningfully given. Such situations are essentially those where power and inequality are involved and include:

- the presence of a parental or familiar relationship between the person involved: this may of course involve in some circumstances the offence of incest;
- the presence of a custodial or care taking relationship between the persons involved;
- the use of a weapon, threat or injury, or the use of force by the first person;
- the presence of a power imbalance between them, which precludes consent by the weaker person.

## 5.6 Staff as Powerful People

5.6.1 Staff in a residential home or a resource centre have status and authority and service users are in a position of dependence. Even within a culture which values people with learning disabilities and encourages self-advocacy and independence the relationship is unequal and this must be accepted and understood by staff and volunteers. Consequently, it is clear that all sexual activities between staff and residents would be unlawful. Additionally, abuse such as

teasing and harassment of service users must not occur and in certain circumstances may also be construed as unlawful. In these circumstances the Department would take disciplinary action against an employee.

## 6.0 **SEX EDUCATION**

### 6.1 Visual Sexual Material

- 6.1.1 An interest in soft pornographic magazines and videos may be seen as a normal part of maturing and exploring sexuality.
- 6.1.2 The approach of staff in this context should be sensitive and non-judgemental. However, staff should emphasise and ensure that such material is used by service users discretely and privately in their own homes, and must not be left about. It may also be appropriate to tell the service user that such material may not present a true picture of sexuality. Staff should not introduce such materials to service users.

### 6.2 A Programme of Sex Education

- 6.2.1 As part of the local authority's obligation to provide service users with a learning disability with information about personal and social relationships, we should be offering sex education to meet service users needs if it is not available from elsewhere. Often this will be carried out together with colleagues who have training and expertise in this area and always as a response to needs identified via assessment of service users. The Training section of either Social Services or Health should agree the use of sex education materials, unless they are materials recognised by other professional organisations such as MENCAP or the Autistic Society.
- 6.2.2 Sex education should be offered within an agreed and planned programme of education. A range of issues should be covered, for example, hygiene, contraception, parenthood, safer sex/HIV, and respect for other's feelings and the need for a responsible attitude. For service users with a learning disability it is particularly important to stress the right to say no, and to alert them to the consequences of exploiting others or being exploited themselves.
- 6.2.3 To be able to offer advice and education, staff require suitable materials and an appropriate level of skills, training, supervision and support. Advice must be given in a manner, which is sensitive and meaningful to individual service users. It must be culturally appropriate and in understandable language.

### 6.3 Marriage/Cohabitation

- 6.3.1 Couples may express a desire to marry/cohabit. These couples should be able to discuss the implications of such relationships in

terms of the legal, emotional and psychological aspects with an experienced member of staff or an advocate, preferably of the clients own choosing and independent of the service. Advice on marriage and relationships is not the responsibility of Health or Social Services alone. Other agencies including Relate, Family Planning Association, religious bodies etc. may be preferred by service users and carers and may be more experienced in this area.

- 6.3.2 Statutory authorities may work to support both people with a learning disability and their children. In law, however, the duty will always be to treat the child's needs as the highest priority. This creates anxiety for staff and it is important to make a balanced assessment between the rights of the person with learning disability and the possible outcome in relation to the child. People with learning disabilities do have the right to become parents but with this right comes serious responsibilities. Counselling service users who wish to be parents may be necessary and involves the exploration of their expectations. This counselling should allow couples to make an informed choice about having children.

## **Text**

- 1.0 National Health Service and Community Care Act 1990 – Complaints and Representation
- 2.0 LAC (92) 15 Social Care for Adults with Learning Disabilities (Mental Handicap).
- 3.0 'It Could Never Happen Here': ARC and NAPSAC 1993.
- 4.0 Sex and the Law: A brief guide for staff working with people with learning difficulties. Family Planning Association 1991.

# ADULTS WITH A LEARNING DISABILITY - INTERPERSONAL RELATIONSHIPS AND SEXUAL DEVELOPMENT: PRACTICE GUIDANCE FOR STAFF

## APPENDIX 2

### LEGISLATIVE FRAMEWORK: SUMMARY OF THE LAW

**NOTE:** This section provides a brief outline of the law to support the Policy and Practice Guidance sections. It should not be seen as the definitive answer to all cases but provides a general overview. In complex cases expert advice should be sought through management.

#### 1.0 INTRODUCTION

1.1 In general people with learning disability are treated the same as other people in law. This section summarises the law which relates to specific issues arising in the context of the sexual behaviour of people with learning disability. It is based on 'Sex and the Law' published by the Family Planning Association Education Unit (4<sup>th</sup> Edition dated 1996) and staff should consult this document for further guidance. Copies of the book are available from the F.P.A. Education and Training Department (publications) Tel 0171 837 5432.

1.2 People with learning disabilities who are competent have the right to make their own decisions. A person may make their own medical treatment decisions from the age of 16 and even younger in certain circumstances. Once a person is 18, as an adult, parents, doctors and other professionals have no legal right to make decisions on their behalf unless granted specific powers to do so.

#### 2.0 AGE OF CONSENT

2.1 The same age limits apply to a person with learning disability as to anyone else, both in terms of entering into a sexual relationship and in the context of marriage. A 16 year old woman may enter into a sexual relationship with a member of the opposite sex: a man may enter into a homosexual relationship in private at 18; 16 year olds male or female may marry with parental consent and 18 year olds without it.

2.2 The Sexual Offences Act 1956 gives the same protection to an under 16 year old girl who has a learning disability as it does to any other girl.

## 2.3 Contraceptive Advice to Under 16 Year Olds

A doctor may provide medical advice including contraceptive advice and treatment to a person aged less than 16 years, if they have sufficient understanding and intelligence to enable them to understand what is being proposed, without having to inform his/her parents. This also applies to a person with a learning disability. However, the 1986 DHSS Guidelines state that the “doctor should always seek to persuade the young person to tell the parents or guardian, or let him inform them that advice or treatment is being given. It should be most unusual for a doctor or other professional to provide advice or treatment in relation to contraception to a young person under 16 without parental knowledge or consent”.

## 2.4 Abortion and Sterilisation

2.4.1 No abortion or sterilisation operation can be performed on a person aged 16 or over without his/her consent. Consent is not defined in law, but the individual does need to receive a certain amount of information before it is given, this being consistent with current medical practice.

2.4.2 The position of the law is highly complex with people who are incapable of giving consent due to a learning disability, but it might be possible in the case of medical necessity that abortion or sterilisation could be carried out, despite the incapacity to consent. There is no requirement that the opinion of the Court be obtained to clarify the position in respect of each individual, but a use of the Court could represent good practice in providing “an independent objective and authoritative view on the lawfulness of the procedure in the particular circumstances of the case”.

## 3.0 **MARRIAGE AND DIVORCE**

3.1 There is no law specifically restricting the right of people with a learning disability to marry. A person with a learning disability who is 18 or over may marry without parental consent, so long as the Registrar or Minister is satisfied that he or she understands the nature of the proposed undertaking. In practice, the Registrar or Minister could ask a professional person to provide a statement to this effect. A person aged 16-17, with a learning disability, would have to ask the permission of their parents, as in the case of a non-disabled person.

3.2 Mental disorder which makes a person unfit for marriage is a ground for annulment, but this will be difficult to obtain if the partner knew of the disorder at the time of the marriage. The law relating to divorce treats people with a learning disability the same as others.

## 4.0 SEXUAL INTERCOURSE

4.1 This is defined by law as vaginal or anal penetration of a woman by a man; it may or may not include ejaculation.

4.2 As well as offences under the Sexual Offences Act 1995 and Criminal Justice and Public Order Act 1994, which apply to all women, eg rape – there are a number of offences specific to people with learning disabilities. It is an offence for:

- a) A man to have unlawful sexual intercourse with a woman who has a severe learning disability (Section 7) as it is stated that she is unable to give consent;
- b) anyone to procure such a woman to have unlawful sexual intercourse with any man or men (Section 9);
- c) anyone to take such a woman away from the care of her parent with the purpose that she shall have unlawful sexual intercourse with a man (Section 21).

In each case “unlawful” means outside marriage.

4.3 **Note:** In all these offences, a person will not be guilty if he or she can show that they did not know and had no reason to suspect the woman to have a severe learning disability. This will often be the basis of a decision not to prosecute in such a case.

4.4 In Summary:

- a) Two people, both with a severe learning disability, may legally have sexual intercourse, if it can be argued that the man cannot recognise the degree of impairment of his partner.
- b) A man with a severe disability may legally have sexual intercourse with any woman because the law only refers to females with a severe learning disability. The woman/man however, could be charged with indecent assault if there is evidence of exploitation.
- c) A woman with a severe learning disability may legally have sexual intercourse with any man, if it could be argued that he did not know and had no reason to suspect that she had a severe learning disability. This might particularly apply to a man with a mild learning disability.

## 5.0 HOMOSEXUALITY

5.1 Homosexual acts in private (ie no more than two people taking part or being present between consenting men aged 18 or over) is legal under the Sexual Offences Act 1967 and Criminal Justice and Public Order Act 1994. If either of the men has a severe learning disability

he cannot, in law, consent to the act.

5.2 However, a similar “get out” clause exists as for sexual intercourse with the effect that:

- a) two men with a severe learning disability may legally have a homosexual relationship if neither partner could be expected to recognise the degree of impairment of his partner;
- b) a man with a severe learning disability may have a homosexual relationship if it could be argued that he did not know, and had no reason to suspect, that his partner had a severe learning disability. Again, this might apply to a man with a mild learning disability.

Both a) and b) in theory give considerable freedom to an adult man with a learning disability to have a sexual relationship with another man. Unless there is evidence of exploitation, prosecution will be unlikely.

5.3 The Sexual Offences Act 1956 made all acts of gross indecency on men and buggery illegal; however, the Criminal Justice and Public Order Act 1994 has made some amendments where this takes place in private between two consenting adults.

5.4 Although there is no law specifically for homosexual acts between women there could be a charge of indecent assault if evidence of exploitation existed (Section 1.11).

5.5 A man may now be the victim of rape, which is committed where a man had anal intercourse with another man without consent. (Criminal Justice and Public Order Act 1994).

5.6 Gay couples kissing and cuddling in public may still be guilty of an offence under Section 5 of the Public Order Act 1936. (*Materson v Holden* 1986).

5.7 Section 28 of the Local Government Act 1988 prohibits expenditure, except for the purpose of treating or preventing disease, for the promotion of homosexuality. This does not appear to prevent some general sex education on a need-to-know basis.

## 6.0 **MASTURBATION**

6.1 Assisting a person with a learning disability to masturbate could possibly constitute an indecent assault under the Sexual Offences Act 1956 (Section 1.11) and is a difficult issue both legally and ethically. Consequently any teaching should be provided by using relatively abstract methods (books etc) and within the context of a personal hygiene and sexuality training programme.

6.2 If the person being helped to masturbate has a severe learning

disability he or she cannot legally give valid consent, regardless of his or her actual capacity. However, if the motive is judged to be decent, then all the requirements of the offence would appear not to be fulfilled, although this has never conclusively been decided. A review meeting at which agreement has been reached on a course of action involving a member of staff in assisting a person with a severe learning disability to masturbate should ensure that the motive will be regarded as a decent one.

6.3 Prosecution will be unlikely in any event, unless there is evidence of exploitation.

## 7.0 **SEXUAL RELATIONSHIPS WITH STAFF**

7.1 Under Section 128 of the Mental Health Act 1959, it is an offence for a male member of staff or manager of a hospital or mental nursing home to have unlawful sexual intercourse with a woman “who is for the time being receiving treatment for mental disorder or is an out patient at the hospital or home”. It is also an offence for a guardian to have unlawful sexual intercourse with a person in his custody/care (Mental Health Act 1948) or in Part 111 accommodation (National Assistance Act 1948). The Sexual Offences Act 1967 also makes it an offence for a male member of staff to commit acts of gross indecency on male patients. All prosecutions require the Director of Public Prosecution’s consent.

7.2 No equivalent law exists for female members of staff or managers. Sexual relationships between female members of staff and patients could be construed as ill treatment (a separate offence under Section 127 of the Mental Health Act 1983). A woman member of staff could also be charged with indecent assault.

## 8.0 **INDECENT ASSAULT**

8.1 Under the Sexual Offences Act 1956, indecent assault can be committed on either a man or a woman (Section 14 and 15), the maximum sentence for both being ten years imprisonment. There are three requirements for the offence to be committed:

- a) an assault – this means that the victim must have something done to him/her or that she apprehends (fears) that something will be done in the near future by a man or woman;
- b) the assault must be indecent;
- c) there is an intention to indecently assault.

8.2 If an act has taken place with the consent of the potential victim, ordinarily no offence will have been committed. However, a person with a severe learning disability cannot validly give consent. The

exception is that if the person committing the act did not know and had no reason to suspect that the other person had a severe learning disability, he or she cannot be guilty of that incapacity to consent.

8.3 Taking account of other relevant legislation, the situations relating to people with a learning disability where the law on indecent assault may apply are:

- a) where two women are involved in a sexual relationship and there is some evidence of exploitation of one by the other;
- b) where a member of staff is inappropriately helping (eg outside the context of a personal and social relationship programme or in the prurient or selfish lewd interests of the member of staff) a person with a learning disability;
- c) where a woman (who may be a member of staff) is having a sexual relationship with a man with a learning disability.

9.0 **EXPOSURE**

9.1 Staff should provide people with learning disabilities with support and information about appropriate behaviour, and what is, and is not, socially acceptable. This is important in the context of the common law offence of 'Exposure', as assumptions can be made about nudity being an offence, and people with learning disabilities are vulnerable to being perceived as behaving inappropriately, or illegally.

The Sexual Offences Act 2003 replaced the offence of 'Indecent Exposure' with the offence of 'Exposure'. Prior to the passing of the Sexual Offences Act 2003, three offences of 'Indecent Exposure' existed :

- a) "to commit an act outraging public decency in public and in such a way that more than one person sees, or is at least able to see, the act";
- b) under the Vagrancy Act 1824 to "wilfully openly, lewdly and obscenely expose one's person (ie penis) with intent to insult";
- c) Infringement of local bylaws which would need to be checked through in conjunction with the Council's Legal Services

The Sexual Offences Act 2003 changed the law relating to these offences as follows:

- a) the threshold for committing an offence of 'outraging public decency in public.....' is now significantly higher. Nudity without seriously aggravating circumstances is not an offence

- b) the offence of 'wilfully, openly, lewdly and obscenely expose one's person (ie penis) with intent to insult' has been repealed
- c) most local bye-laws about nudity are vulnerable to challenges under the Human Rights Act 1998

The offence of 'Exposure' also requires proof that the person committing the offence 'intends to cause alarm or distress'

## 10.0 SECTION 27 OF THE SEXUAL OFFENCES ACT 1956

10.1 This applies to all staff and makes it an offence for the "owner, occupier, or anyone who has, or acts in, the management or control of any premises, to induce or knowingly suffer a woman who is defective (ie has a severe learning disability) to resort to, or be on those premises for the purpose of, having unlawful sexual intercourse with men or a particular man". This is undoubtedly a very wide offence and staff need to bear four points in mind:

- a) a case would first need to be reported;
- b) a discretion exists as to whether or not to prosecute;
- c) It is possible that "knowingly suffer" might be interpreted as cause or encouragement. Therefore staff would have to both know what is happening and actively encourage it in order to commit an offence;
- d) the section is primarily concerned with discouraging prostitution.

10.2 If the couple are married, the sexual intercourse is not "unlawful" and so the staff do not commit any offence under Section 27.

## 11.0 CONCLUSION

11.1 This section provides a brief summary of the law. In considering the implications of the law for individual people with a learning disability further reference should be made to the publication referred to in Section 1.0.

11.2 The law relating to the sexual behaviour of people with a learning disability is complex. Senior staff will make decisions about its application to particular situations.

11.3 This summary provides a valuable guide to specific issues relating to the sexual behaviour of people with a learning disability. As such it provides relevant background information for all staff.