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Guidance for Designated Centres

Intimacy and Sexual Relationships

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Subject	Intimacy and Sexual Relationships
Audience	Service Providers

Standards and regulations relevant to this guidance include:			
Standard	No.	Regulation	No.
<i>National Quality Standards for Residential Care Settings for Older People in Ireland</i>	8	Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013	5, 9, 11
<i>National Standards for Residential Services for Children and Adults with Disabilities</i>	1.4, 3.1	Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities) Regulations 2013	8, 11, 13

This guidance contains explanations of concepts, specific examples and templates which may assist in meeting regulations and implementing standards. There may be other requirements relevant to a particular service that are not addressed in this guidance. People providing residential services should identify the regulations, standards and best available evidence relevant to their service. This guidance is current at the time of printing. Please check www.hiqa.ie for the latest version of this guidance.

Why is this important?

The need for intimate emotional, physical and sexual closeness is a basic human need. Every human being benefits from the sense of closeness and mutual support that comes from having a network of relationships developed through school, work, hobbies and community activities. Experience of a variety of relationships helps individuals to develop the social skills, confidence and self esteem that underpins their ability to make, sustain and break more personal relationships and to express their sexuality.

All older people and people with disabilities have the right to experience a full range of relationships, including friendships and community links, as well as personal relationships.

To achieve these rights means also having the freedom to take informed risks. Support should be provided with social activities which are planned according to individual needs, interests and personal circumstances rather than the needs of the service. Activities should be appropriate to the individual's needs, interests and lifestyle and support personal growth and development.

People should have access to accurate information and responsible guidance to enable informed choices about any activities that may involve risk. Assessments of people's needs and any support required should be part of the personal planning process and recorded and monitored as in other areas of support.

The United Nations provides that people with a learning disability have: "to the maximum degree of feasibility, the same rights as other human beings..... (and) a right to protection from exploitation, abuse and degrading treatment".

The European Convention on Human Rights states that everyone has the right "to respect for his private and family life, his home and his correspondence and that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society."

People with Dementia

People with dementia continue to need loving and safe relationships and they will vary in their individual ways of giving and receiving affection, and the ways in which the dementia affects that capacity. As a result of the disease, some people with

dementia may become demanding and insensitive to the needs of others. They may also experience changes in the expression of their sexuality.

Some people continue to desire sexual contact while others may lose interest in sexual activity. Others may display inappropriate sexual behaviours.

It is important to remember that any strange or uncharacteristic behaviour is part of the illness and not directed in a personal way. A person with dementia may no longer know what to do with sexual desire or when or where to appropriately exercise the desire. Many people with dementia lose interest in a physical relationship and may become very withdrawn. They may accept physical contact from others, but not initiate affection.

Legislation

The development of affective relationships by people who use residential services, as numerous and as deep as they want and need, is to be supported by service providers. However, because of the risk of abuse, sexual relationships with people who are under age, and certain sexual relationships with people with intellectual disabilities may be against the law.

Current relevant legislation includes the Sexual Offences Against the Person Act 1993, the Criminal Law (Sexual Offences) Act 2006 and the Criminal Justice Act 2006.

Sexual Offences Against the Person Act 1993

Section 5 of the Sexual Offences Against the Person Act 1993 criminalises sexual intercourse, attempted sexual intercourse, buggery and attempted buggery with a 'mentally impaired person', as defined in that section. It also makes it an offence for a male to commit or to attempt to commit, an act of gross indecency with another male person who is mentally impaired. Section 6 of the Act makes it an offence to solicit or importune for the purpose of the commission of an act which would constitute an offence under section 5.

The definition of mental impairment includes persons who are suffering from a permanent mental disorder and those who are suffering disorder of the mind due to a mental illness, which may be temporary. The test contained in the definition is disjunctive i.e., incapable of living an independent life *or* incapable of guarding against serious exploitation. The first test has a significant degree of objectivity but the second is more subjective and illustrates the point that the criminal law is of

necessity a less than perfect way of protecting the mentally impaired against sexual exploitation.

The Act severely limits the intimate relationships that people with intellectual disabilities can have under law. According to the Irish Family Planning Centre, the absence of a defence of consent effectively criminalises mutually consenting sexual relationships between adults with intellectual disabilities.

However, the Sexual Offences Against the Person Act 1993 is not in itself a prohibition on people with intellectual disabilities having intimate relationships. "Other sexual acts are not criminal offences under this section even if one of the parties is mentally impaired" (Inclusion Ireland) and furthermore, "Sexuality is more than just genital contact and can be experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships.

Furthermore, sexuality does not exist in a vacuum and is necessarily influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors." (IFPA).

The Act cannot be used as a reason to impede this dimension of a person's life completely.

[The Criminal Law \(Sexual Offences\) Act 2006](#)

The Criminal Law (Sexual Offences) Act 2006 makes it a criminal offence to engage or attempt to engage in a sexual act with a child under the age of 15 years. A sexual act for the purposes of the law includes sexual intercourse and buggery between people who are not married to each other and any sexual act which could constitute aggravated sexual assault.

The 2006 Act provides that the accused may argue they honestly believed the child was aged 15 years or over. The court must then consider whether or not that belief was reasonable. It is not a defence to show that the child consented to the sexual act.

Section 3 of the Criminal Law (Sex Offences) Act 2006 as amended by Section 5 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 makes it a criminal offence to engage or attempt to engage in a sexual act with a child under 17 years. The maximum sentence is five years, ten years if the accused is a person in authority. A person in authority includes any person acting in loco parentis (in place of a parent or parents) to the victim and any person responsible for the education, supervision or welfare of the victim.

The accused may argue that he or she honestly believed that the child was aged 17 years or over. The court must then consider whether or not that belief was reasonable. It is not a defence to show that the child consented to the sexual act.

The consent of the Director of Public Prosecutions is required for any prosecution of a child under the age of 17 years for this offence. A person who is convicted of this offence and is not more than two years older than the victim is not subject to the requirements of the Sex Offenders Act 2001. This means they will not have their name placed on the Sex Offenders Register.

The Criminal Justice Act 2006

The Criminal Justice Act 2006 provides for a new offence of reckless endangerment of children. This came into effect on 1 August 2006. This offence may be committed by a person who has authority or control over a child or an abuser and who intentionally or recklessly endangers a child by:

- causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse
- failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation.

Service providers should have arrangements in place to ensure that those working in their service comply with the above and any other legislation relevant to their service. They also regularly review Irish and European legislation to determine what is relevant to their service.

New legislation is currently in draft form and is called the Assisted Decision-making (Capacity) Bill 2013. Appendix 1 summarises the provisions made in this Bill.

Consent

Consent is crucial in the area of sexual activity, especially in relation to vulnerable people. The Sexual Offences Against the Person Act 1993 relates to sexual acts with people who have mental impairments. It is an offence for any person, male or female, to engage in a sexual act with someone with a learning disability if the individual did not consent or was incapable of consenting, or their consent cannot be regarded as valid, e.g. due to threats or intimidation. Someone is regarded as incapable of consenting if they are unable to:

- understand what the act is
- form a decision about whether to engage in the act, or
- communicate any such decision.

Age of consent

In Ireland the law (The Criminal Law (Sexual Offences) Act 2006) states that an individual must be 17 to consent to (or agree to) have sexual intercourse. The age of consent is the same for males and females. It is the same for homosexual and heterosexual sex.

What can service providers do?

As a provider, you have a duty to promote the best interests of service users in regard to issues of intimacy, relationships and sexuality. Providers also have a clear duty to protect service users from abuse, including sexual abuse.

As a service provider you have a duty to ensure that your service complies with legislation, that the privacy and dignity of people using your service is respected as well as their rights to freedom and bodily integrity. Service providers and their staff should not intrude into the privacy of people using their service, unless it is warranted to keep people safe.

There are a number of things that may be helpful:

1. Support the person

Support the person to make choices or express a view. Is there anyone to help or support the person to make choices or express a view? The needs and preferences of the people using the service are paramount and their rights and diversity are respected. While taking account of the legal and ethical environment in which the service is run, the service should support people in expressing their identity, fulfilling their needs and upholding their values. People living in the residential service have a right to privacy in their actions, communications and physical space, with due regard to safety. Who they spend time with and form relationships with is a matter for them, unless serious risks have been identified in particular relationships.

2. Risk assessment

Carry out individual risk assessments to clearly identify where a service user is vulnerable to sexual exploitation or may pose an unacceptable risk to others. Assessments should identify the specific supports, including education, that are necessary to enhance the service users relationships. Interventions and supports should be clearly identified within the service users personal plan.

3. Assessment of capacity

Assess capacity of the person for the purposes of sexual relationships. This is required to be specifically about the adult's abilities to understand sexual and

personal relationships, and their abilities to protect themselves from exploitation or abuse.

4. Provision of information

Provide the person with all the relevant information. This may be done directly or by facilitating access to external information, advice or counseling services. For people with intellectual disabilities, residential service providers may need to tailor the information provided on matters such as sexual education, consent, or distinguishing abusive and non-abusive relationships. Providing sex education for people with intellectual disabilities, which is individually tailored, can lead to direct improvements in their decision-making capacity in relation to sexual relationships (Dukes & McGuire, 2009).

5. Communication

Provide and explain information in a way that is easy for the person to understand (for example, by using simple language or visual aids). Explore different methods of communication if required, including non-verbal communication.

6. Make the person feel at ease

Ensure the person is at ease. Determine if there are particular times of day when the person's understanding is better and locations where they feel more at ease. Determine if circumstances are optimal for decisions to be made.

7. Reporting abuse

Services providers should have a policy on intimacy and sexual relationships, which includes procedures to be followed for reporting abuse. As a service provider, if you suspect that a child has been abused, the *Children First: National Guidance for the Protection and Welfare of Children* (2011) must be followed. If you suspect that an adult has been abused, An Garda Síochána and the relevant authorities must be informed.

8. Support staff

The nature of some work with people with disabilities may mean that some staff whose role is not primarily related to emotional development, are well placed to assist people in developing their intimate relationships. For instance, provision of intimate care or spending a lot of time together, may mean that a health or social care professional or support worker may be in a position of trust to advise a service user. It is therefore important that there are clear policies in place and training for staff to help the service users.

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The European Convention on Human Rights. European Court of Human Rights.
Council of Europe www.echr.coe.int

UN Convention on the Rights of Persons with Disabilities.
www.un.org/disabilities/convention/conventionfull.shtml

www.fightdementia.org.au

Appendix 1: **Assisted Decision-making (Capacity) Bill 2013**

Reform of the law on decision-making capacity is one of the actions required to enable the State to ratify the United Nations Convention on the Rights of Persons with Disabilities. The Bill gives effect in the State to the Hague Convention on the International Protection of Adults.

The purpose of the Assisted Decision-making Bill 2013 (The Bill) is to reform the law and to provide a modern statutory framework that supports decision-making by adults and enables them to retain the greatest amount of autonomy possible in situations where they lack or may shortly lack capacity.

The Bill changes the existing law on capacity, shifting from the current all or nothing status approach to a flexible functional one, whereby capacity is assessed on an issue- and time-specific basis. The Bill replaces the Wards of Court system with a modern statutory framework to assist persons in exercising their decision-making capacity.

The Bill provides a statutory framework enabling formal agreements to be made by persons who consider that their capacity is in question, or may shortly be in question, to appoint a trusted person to act as their decision-making assistant to assist them in making decisions or as a co-decision-maker who will make decisions jointly with them.

The Bill also provides for the making of applications to court in respect of persons whose capacity may be in question to seek a declaration as to whether those persons lack capacity and for the making of consequent orders approving co-decision-making agreements or appointing decision-making representatives.

The Bill provides for protection from liability for informal decision-makers in relation to personal welfare and healthcare decisions made on behalf of a person with impaired capacity where such decisions are necessary and where no formal decision-making arrangements are in place. It modernises the law relating to enduring powers of attorney.

The Bill also provides for the establishment of a new statutory office, the Office of the Public Guardian. The Office of the Public Guardian will supervise decision-making assistants, co-decision-makers, decision-making representatives and persons holding enduring powers of attorney.

Currently there is no timeframe to determine when this Bill will be enacted. Until such time as that happens existing legislation makes provision for the protection of those with disabilities.

The Bill as published in July 2013 does not include changes to the law in relation to sex with people with 'a mental impairment'. While this Bill provides for widespread changes in capacity and consent, section 106 of the Bill provides that no law regarding the capacity to consent to sexual relations is altered or amended by it.

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