

1

## Background

Article 12 of the Human Rights Act guarantees the right to marry, & to have a family, including same sex couples & transsexual people. However, a person who lacks capacity to consent to marriage, cannot lawfully marry. Under the Sexual Offences Act, it is unlawful for someone knowingly to have sex or marry a person who lacks capacity to consent, or is under 16.

The Mental Capacity Act (MCA) is the legal framework for supporting people to make decisions, assessing capacity & making best interests decisions. However, sex & marriage are 'excluded decisions' which cannot be made on another's behalf in their best interests.

2

## Why it matters

Love, sex & relationships directly link to positive health & wellbeing. Health & social care staff need confidence to support people with intimacy, & to know how the law protects people who lack capacity to consent to sex or marriage. To avoid discrimination, the threshold is low for capacity to consent to sex & marriage, & not partner specific.

Safety with partner(s) is a *separate contact decision*. For capacity to have contact, the person needs to know who, when, where, duration, & positives / negatives, including criminal convictions

3

## Information

For capacity to consent to **sex**, case law says, starting with the individual's circumstances, a person needs to know:

1. The mechanics of the sex act
  2. The risk of Sexually Transmitted Infections
  3. That sex between a man and woman may give rise to pregnancy (N/A for gay sex)
  4. The *basics* of contraception
  5. That they can refuse
- NB: Coercive control can impair capacity**

4

For capacity to consent to **marriage**, a person needs capacity to consent to sex, *and* to know, in broad terms

1. About the marriage contract
2. The normal rights & responsibilities of marriage, including financial.
3. That essentially marriage is for 2 people to live together and love one another

5

For capacity to use **contraception**, a person needs to understand and weigh

1. The reason for contraception & what it does (including likelihood of pregnancy if not used)
2. Types available & how each is used
3. Advantages & disadvantages of each
4. Possible side effects of each & how they can be dealt with
5. How easily each can be changed
6. The generally accepted effectiveness of each



7

## Questions to consider

**How** do we support intimate relationships?  
Are we OK talking about sex & sexuality? See [www.scie.org.uk/lgbtqi/](http://www.scie.org.uk/lgbtqi/)

**Do we** have resources? [www.bild.org.uk/resources/relationships/dating-to-sex/](http://www.bild.org.uk/resources/relationships/dating-to-sex/)

**What** do we do if someone is engaging in unsafe sexual activity?

**Do we** know the law? <https://www.39essex.com/mental-capacity-guidance-note-brief-guide-carrying-capacity-assessments/>

See [CQC guidance here](#)

6

## What to do

- Apply the **MCA** principles
- Support safe relationships
- Identify when to assess capacity or refer for an assessment
- Seek legal advice if needed
- Raise a safeguarding alert if you suspect sexual abuse or coercive control
- Support access to domestic violence services
- Report sexual assault to the Police immediately