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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 interest decisions. However, sex & marriage are 'excluded decisions' which cannot be made on another's behalf in their best interest.

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Why it matters

Love, sex & relationships directly link to positive health and 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 contract decision. For capacity to have contact, the person needs to know who, when, where, duration & positives / negatives, including criminal convictions

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Questions to consider

How do we support intimate relationships
Are we OK talking about sex & sexuality?

See www.scie.org.uk/lgbtqi/

Do we have resources?

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?

www.39essex.com/mental-capacity-guidance-note-brief-guide-carrying-capacity-assessments/

See www.cqc.org.uk

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Information

For capacity to consent to sex, case law says, starting with the individuals circumstances, a person needs to know:

- 1: The mechanics of sex act
2. The risks of sexually
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



**7 Minute Briefing
Capacity Sex and Marriage 2020**

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

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

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

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