



Law Society
of Scotland

Consultation Response

Clinical pathways and guidance for healthcare professionals working to support adults who present having experienced rape or sexual assault in Scotland

February 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Mental Health and Disability and Criminal Law Committees welcome the opportunity to consider and respond to the Scottish Government consultation: clinical pathways and guidance for healthcare professionals working to support adults who present having experienced rape or sexual assault in Scotland. The committees have the following comments to put forward for consideration.

General

The consultation covers a wide range of issues. We have restricted our detailed comments at this time to section 8.2, adults with incapacity, and to issues relating to criminal law.

8.2 Adults with Incapacity

We have concerns that this section, including the flow chart, does not accurately reflect the legal position in Scotland or best practice in relation to adults with incapacity.

Adults with Incapacity (Scotland) Act 2000

Section 8.2 properly identifies the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act) as the basis of the law in Scotland. However, the main content of this section appears to be based on the law in England & Wales, for example in the use of concepts such as 'decision-making capacity'.

In particular, it is incorrect to apply a test of the best interests of the adult. That test was explicitly rejected as inappropriate for persons aged over 16.¹ In Scotland, all interventions in relation to an adult with incapacity must be made in line with the fundamental principles of the 2000 Act,² namely that:

- The intervention will benefit the adult, and the benefit cannot be reasonably achieved without that intervention
- The least restrictive option should be taken
- Consideration must be taken of
 - The present and past wishes and feelings of the adult, using any means of communication
 - The views of specified individuals, including the nearest relative, guardians, and attorneys
- The adult should be encouraged to exercise their skills in relation to their affairs and welfare

United Nations Convention on the Rights of Persons with Disabilities

Any guidance on how to approach decisions and interventions relating to adults with incapacity or disability must take into account the United Nations Convention on the Rights of Persons with Disabilities (CRPD), an international convention “to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.³ The UK has ratified both the CPRD and the optional protocol.

In addition to the wider implications of this rights-based approach and non-discrimination, Article 12 recognises the legal capacity of persons with disabilities, and the need to take measures to support the exercise of legal capacity, and Article 13 of the CRPD requires effective access to justice for persons with disabilities on an equal basis to others. Article 16 requires measures to protect persons with disabilities from exploitation, violence, and abuse. This includes promoting recovery, rehabilitation, and social reintegration of victims of abuse, and effective means of identifying, investigating and, where appropriate, prosecuting instances of exploitation, violence, and abuse.

Ensuring that adults with incapacity presenting with experience of rape or sexual assault are treated in a way that respects and protects their human rights, including ensuring that necessary forensic examinations can be undertaken to support criminal investigations, is clearly an important part of guidance to healthcare professionals.

¹ See the discussion at para 2.50, Scottish Law Commission, *Report on Incapable Adults*, (1995).

² Section 1, Adults with Incapacity (Scotland) Act 2000

³ Article 1, United Nations Convention on the Rights of Persons with Disabilities

European Convention on Human Rights

In addition to the CRPD, the UK is party to the European Convention on Human Rights (the ECHR), which is incorporated into our law through the Human Rights Act 1998. Public authorities are bound to act in accordance with the provisions of the Human Rights Act.

Similarly to the CRPD, the ECHR also requires that persons with disabilities must be protected by the criminal law in the same way as others. This has been particularly relevant in the prosecution of sexual offences, including by ensuring that there are not barriers to investigation and prosecution of offences committed against persons with disabilities.⁴

Supported decision-making and best interpretation

The two concepts of supported decision-making and best interpretation of an individual's wishes and feelings provide necessary context to how decisions on interventions should be approached in compliance with both the 2000 Act and the CRPD.

Although we recognise the concerns around allowing family members, friends or partners to act as interpreters, in practice this may conflict with the need to seek the best interpretation of the views and wishes of an individual and support them to exercise their skills in making decisions relating to their treatment.

The role of independent advocacy workers would also be a helpful point to include in the guidance, in the context of supported decision-making.

Flowchart

The flowchart on page 50 of the consultation document appears overly complex and potentially inaccurate and fails to adequately distinguish between examination and treatment.

Where a guardian or attorney has express authority to consent to medical examination (or treatment), and it is established that the adult does not have capacity to consent to the examination or treatment, that is the source in law for the doctor's authority to examine (or treat). If a flowchart is to be provided as a tool for medical professionals, then it should relate to forensic examination in the situation where such examination is necessary to establish whether criminal prosecution of a perpetrator is warranted, and if so to preserve and provide necessary evidence. The doctrine of necessity, expressly preserved in Part 5 of the 2000 Act,

⁴ See *X and Y v the Netherlands* (1986) 8 E.H.R.R. 235 where a procedural gap leading to the absence of criminal law protections against sexual assault of a young woman with mental disability was held to be a breach of Article 8 ECHR, right to respect for private and family life.

is potentially relevant if there is indeed urgency; as is the concept of assent, rather than consent – if necessary, communicated non-verbally.

The role of a guardian or attorney (including consideration of the scope of their powers), the use of certificates of incapacity, and the common law position in situations of emergency create a complicated system. The practical implications in forensic examination (as opposed to treatment), particularly in situations where examination may be urgent, require further consideration and clarification for the purposes of this guidance.

People with impairments of intellectual, mental and cognitive functioning are particularly vulnerable to sexual and other abuse. It is fundamental to concepts of justice and non-discrimination, reinforced by obligations under both human rights instruments referred to above, that they should be subject to no discriminatory obstacles in receiving the full protection of the criminal law, in practice as well as in theory. Potential offenders need to know that they are no less likely to face prosecution and conviction because they select victims with such impairments. The starting-point for section 8.2 of the consultation document must be to ensure that the foregoing requirements are fully achieved. A focus upon using an assessment of the existence of such impairments as a basis for failure to carry out essential forensic examinations, when such impairment may be the very reason for the suspected crime, is fundamentally inappropriate.

We suggest that this section of guidance should be further developed with the input of solicitors and practitioners with relevant expertise.

Criminal law

The main relevant sections of the consultation document relating to criminal law are sections 9 and 11.

However, as a general comment, we would note that under section 4, although it is correct that sexual violence predominately affects women and girls, it is important to note that the Sexual Offences (Scotland) Act 2009 is a gender-neutral Act, and that men and boys can also be victims.

9.1 Types of witnesses

In relation to expert witnesses, it is relevant to note that this category of witness must be accepted by the court to be an expert in the appropriate area, based on their CV and experience.

11 The criminal justice process

We suggest that the information on sentencing in this section could be further clarified as follows.

In the Sheriff Court, a Sheriff has the power to remit cases to the High Court where they deem sentencing of 5 years to be inadequate in the light of the facts and circumstances.

In addition, although it is correct that the maximum sentence that a Sheriff can impose is 12 months imprisonment, their sentencing powers include a huge range of community disposals/ fines etc which may be pertinent in relation to the range of sexual offending and management of offending behaviour. Only mentioning the maximum sentence may unrealistically shape expectations of the inevitable outcome of such offending as being custodial sentencing.

For further information, please contact:

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