

**Practical issues with sex, rights and relationships** (Working within the law to support sexual expression and intimacy for people with brain injuries, with some practical scenarios)

---

PROFESSOR CLAIRE DE THAN, academic,  
Law Commissioner, author

SHADA/THE OUTSIDERS/OU SEXUALITY  
ALLIANCE etcetcetc...



## To bear in mind...

---

- ‘Most people faced with the decision whether or not to have sex do not embark on a process of weighing up complex, abstract or hypothetical information.... **There is a danger that the imposition of a higher standard for capacity may discriminate against people with a mental impairment.**’ Baker J, TZ, [55]
- ‘the notional **decision-making process attributed to the protected person with regard to consent to sexual relations should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity.**’ Which is ‘largely visceral rather than cerebral, owing more to instinct and emotion than to analysis’ [80]. IM v LM, CoA
- Fun, pleasure, intimacy, warmth, relationships...



# Human rights

---

- Art 8 ECHR right to respect for private life, family life etc includes quality of life, personal and sexual autonomy (decision-making), confidentiality/privacy, dignity, forming and maintaining personal relationships ; Pretty v UK; ADT v UK and Dudgeon v UK; X v UK; Botta v Italy
- Arts 9, 10 and 11 expression-rights including very important right to information, education and possibly support; Handyside v UK
- Sex education as human right: CH



# Some of the many myths...

---

- ‘procuring’ and arranging sex workers for people with disabilities
- Capacity when alone!
- Banning all sexual expression for those who lack capacity: there is always something that somebody conscious is entitled to do
- The ‘mental disorder’ offences and supporting sexual expression for clients/patients: judges don’t always help, but massive misreporting and misunderstanding
- of recent cases



# A summary

---

- Fun, pleasure, intimacy, warmth, relationships, leisure activities... are human rights
- Everyone has right to sexual expression, relationships of their choosing, and fun
- Everyone has the right to receive information and education to support their decision-making about all of these; decision-making should be supported, not substituted, whenever possible
- Restrictions need very strong reasons and must be proportionate to their aims (eg protecting children)
- People who need support in accessing their rights may be entitled to it
- Even people who lack capacity have the same human rights as everyone else
- Judges get the law wrong sometimes, and appeals are costly; be careful what you ask for; many cases have gone to court, I'm advising on many, test can be made clear but is often misunderstood



# Bubblewrapping...

---

- Safeguarding: a national obsession, a duty, or a human rights violation?
- The general belief: a duty to protect vulnerable people from risk
- The reality: known, real and immediate risk to the life or safety of that person
- But people with capacity are allowed to decide for themselves how much risk they want to run in their lives: *Ivison v UK*
- The result: breaking one law by trying to uphold another. Adults don't need protecting from their human rights
- The Sexuality Guidance and Standards help explain what the law does and does not allow, with accessible and realistic case studies as examples



# Claire's toolkit

---

- Adult? Non-carer? Communicate? Consents? Capacity? Private? OK! Any of those missing? Possible crime! Top tips: non-carer involvement; watch for power imbalance; keep communication records; best practice re capacity; the danger of legal 'dominoes'
- Remember the purpose behind the law, and ask 'is there any harm?'
- Policy: 'None of the measures in the Act are [sic] intended to interfere with the right to a full and active life, including a sexual life, of people with a mental disorder who have the capacity to consent.'
- Avoid bubble wrapping: rights are central to safeguarding, people with capacity have right to choose own risks
- But needs Guidance and reform of the 'mental disorder' offences- campaign! And read CC Inform article- law less scary than most people think...



# HOW THE OU SEXALL GUIDANCE HELPS: ENABLING RIGHTS

---

- right to protection and the autonomy-based rights need to be weighed up against each other, to prevent bubblewrapping
- Some people need support or help for sexual expression
- If motivated people work together and apply the Guidance consistently, small changes could make a world of difference towards ensuring that everyone has an equal opportunity to enjoy their human right to fun.
- And here it is (new edition imminent):  
[http://www.open.ac.uk/health-and-social-care/research/sexuality-alliance/sites/www.open.ac.uk.health-and-social-care.research.sexuality-alliance/files/files/Guidance-40pp\\_03-17\\_email.pdf](http://www.open.ac.uk/health-and-social-care/research/sexuality-alliance/sites/www.open.ac.uk.health-and-social-care.research.sexuality-alliance/files/files/Guidance-40pp_03-17_email.pdf)
- <https://www.open.edu/openlearn/health-sports-psychology/young-peoples-health/lets-talk-about-sex-intimacy-and-relationships> stage 2 of the project!! Interactives, listicles, videos, new booklet for young people and their carers/parents etc...





# ABOUT ME

---

- [@clairedethan](#) (twitter)
- [clairedethan@mac.com](mailto:clairedethan@mac.com) (FB)



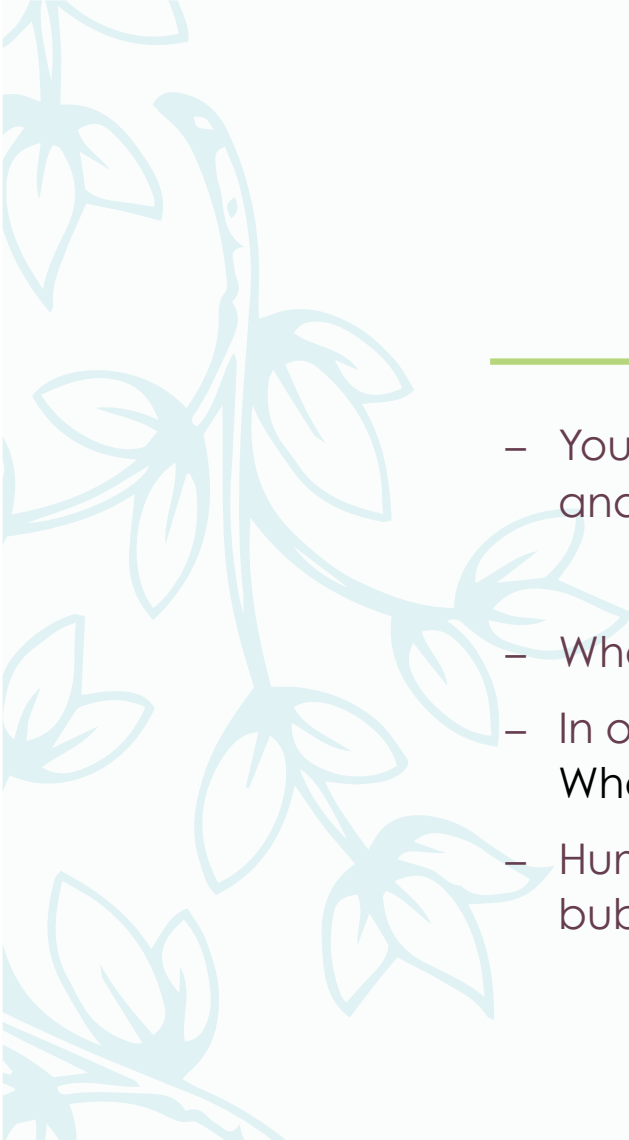
## EXAMPLES TO PONDER (each has a pressure-point or two...)

---

- J and K are residents of a care home, and both have dementia. You think they may have a sexual relationship, but they seem happy

What do you WANT to do? What MUST you do? What should you definitely NOT do?

Human rights angle; criminal law angle; safeguarding vs bubblewrapping

- 
- 
- Young woman, brain injury, overtly touting for men on social media and disclosing her personal and contact details
  - What are her rights and what are your duties?
  - In other words, What do you WANT to do? What MUST you do? What should you definitely NOT do?
  - Human rights angle; criminal law angle; safeguarding vs bubblewrapping




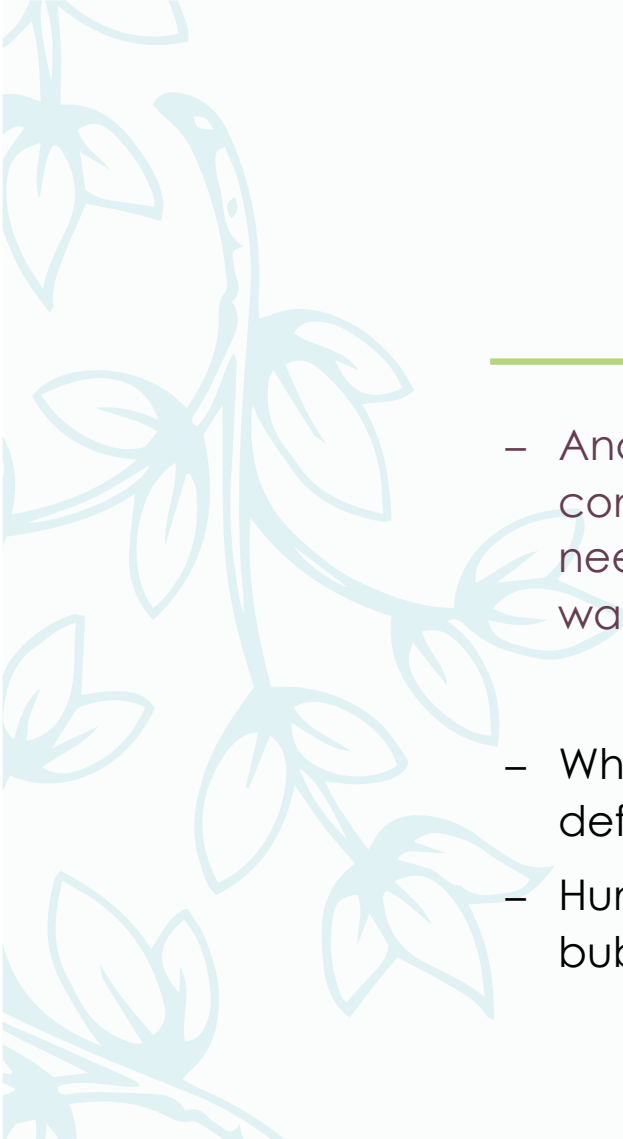
---


– S does not have mental capacity in relation to sex, but wants sexual expression, intimacy, a relationship.


– What do you WANT to do? What MUST you do? What should you definitely NOT do?

– Human rights angle; criminal law angle; safeguarding vs bubblewrapping

- 
- 
- JOAN
  - Brain injury, impaired judgment, poor insight re risks
  - Lives with partner, Steve
  - Police called out after incidents at home; Steve told that he was the one who would be arrested because Joan is vulnerable adult
  - Case Manager repeatedly asks Joan if she wants to stay with Steve: 'yes'
  - What are Joan's rights and how should they be balanced against risks?
  - I.E., What do you WANT to do? What MUST you do? What should you definitely NOT do?
  - Human rights angle; criminal law angle; safeguarding vs bubblewrapping

- 
- 
- Andy’s care home refuses to talk about his sexual needs. He has complex disabilities and his Case Manager has suggested that he needs sexual expression, but the suggestions are ignored. Andy wants to see a sex worker.
  - What do you WANT to do? What MUST you do? What should you definitely NOT do?
  - Human rights angle; criminal law angle; safeguarding vs bubblewrapping

- 
- 
- Tim, 14, showing an interest in sexual expression but unable to masturbate due to complex physical disabilities. Also cognitive impairment.
  - What should his carers do? Does anyone have a duty to raise the issue with Tim's parents?
  - What do you WANT to do? What MUST you do? What should you definitely NOT do?



Any scenarios of your own which you want to discuss? Or questions?

---