

# The problem of witness capacity

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# The challenge of witness capacity

Capacity is often cited as the overwhelming problem in dealing with abuse cases where the alleged victim has an intellectual disability.

# We will discuss:

Capacity and consent issues relating to investigation and prosecution of abuse cases

Capacity issues in relation to therapeutic work with survivors of sexual abuse

# People with intellectual disabilities as victims of crime

People with intellectual disabilities experience higher levels of sexual assault than the rest of the population. Studies estimate that between 50-99% of people with intellectual disability experience sexual exploitation by the time they reach adulthood.

# Incidence of sexual abuse

University of Kent (UK) research findings: 1992.

The research only considered cases where sexual abuse had been reported and investigated. 950 new cases of sexual abuse of adults with learning disabilities annually in the UK. Follow up research in 1994 revised this figure as being nearer 1400 new cases per year.

Irish (unpublished research) suggests 125 new cases of sexual abuse per year.

# Incidence of sexual abuse

THE VICTIMS (Mostly aged between 21 and 30)

73% male

27% female

60% had severe learning disabilities

40% had moderate and mild learning disabilities

There were judged to be additional problems – mostly verbal communication problems – in 70% of the cases reviewed.

Those surveyed lived in a variety of settings – in the family home, group homes and hospitals.

# Incidence of sexual abuse

## THE PERPETRATORS

97% male  
3% female

known to the victim	95%
had learning disabilities	41%
were members of victim's family	19%
were staff or volunteers	12%
were known and trusted in other capacity	17%
unknown	10%

# Perpetrators of sexual abuse

41% themselves had intellectual disability. Huge challenge for services and legal system. Cases often dealt with “in house” – rare that cases will go to Gardai. This may be exacerbating the problem – offenders never know there are real consequences on their actions.

Even people with severe intellectual disability may use targeting and grooming techniques (e.g.. Risk Assessment client)

# Vulnerability to sexual abuse

**Low self esteem**

**Powerlessness**

**Emotional deprivation**

**Social isolation**

**Dependent on carers**

**Lack of sex education**

**Susceptibility to coercion, incentives and bribery**

**Lack of adequate employment safeguards**

**Legal backdrop**

**Societal denial**

# Effects of sexual abuse

## EMOTIONAL

Depression

Low self esteem

Guilt

Anxiety

Obsessive/compulsive

Anger

## INTERPERSONAL

Isolation

Alienation

General social  
relationships

Re-victimisation

Fear of intimacy

# Effects of sexual abuse

## **BEHAVIOURAL**

**Self destructive behaviours**

**Self mutilation**

**Suicide**

**Eating disorders**

**Alcohol abuse**

**Drug abuse**

## **PHYSICAL**

**Psychosomatic pains**

**Sleep disturbances**

# Effects of sexual abuse

## COGNITIVE PERCEPTUAL

Denial

Cognitive distortions

Dissociation

Dissociative Identity Disorder

Amnesia

Nightmares

Hallucinations

## SEXUAL

Phobias/aversions

Sexual dissatisfaction

Prostitution

Promiscuity

Inability to separate sex from  
affection

# Guilt

People with intellectual disability can be disproportionately sensitised to feelings of guilt and shame, and can present as if they are to blame for the abuse, rather than the abuser. Many people choose not to disclose because of their fears people will think badly of them.

# Effects of sexual abuse

Sexual abuse is a trauma that impacts upon a person with intellectual disability just as much as it does on someone without. Because someone has a low IQ does not mean they will be protected from the long lasting effects of a sexual attack. The disability may serve to hide some of the effects of sexual trauma. It may take longer to surface. When people lack words with which to describe or process their experiences, they may act them out through self harming, attacking others or engaging in seemingly bizarre behaviour.

# The challenge of witness capacity

There is no one generally applicable definition of capacity at common law or in statute in Ireland.

There is no single statute governing capacity issues. General principles are gleaned from case law in different contexts in which capacity issues arise.

# The challenge of witness capacity

“It is generally not appropriate for decision-making capacity to be regarded in stark terms of either being present or absent. A more subtle approach which accords with a social model of disability is called for.”

# The challenge of witness capacity

“The Commission recommends that an adult should not be regarded as unable to make a decision merely because they make a decision which would ordinarily be regarded as imprudent.”

# Criminal Law

The criminal law requires that to enter into a sexual relationship each of the parties is of age and consents to the act. The Criminal Law (Sexual Offences) Act 1993 introduced a new offence which applies where a person has or attempts to have sex with a person who is "mentally impaired" unless they are married to each other. It is also an offence for a male person to commit or attempt to commit an act of gross indecency with another male.

# Criminal Law

There are concerns that the criminal law can be wrongly used for a blanket prohibition on relationships because people with intellectual disabilities where consent occurs and where no exploitation has taken place.

# Criminal Law

The UK Sexual Offences Act (2003) contains a specific functional concept of lack of capacity to consent in relation to people with limited decision-making ability articulated as an absence of sufficient understanding of the nature or reasonably foreseeable consequences of the act or an inability to communicate choice."

# Mental Capacity Act (UK)

“Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise

People must be given every support and opportunity to enable them to make a particular decision

No-one will be judged as not able to make any decisions; each decision will be assessed separately

Individuals retain the right to make what might be seen as eccentric or unwise decisions

Anything done for or on behalf of people without capacity must be in their best interests

Anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.”

# Capacity needs to be a simple concept.

*How do you assess capacity?*

Apply the appropriate test, on basis of adequate information, in the most suitable environment and at best time for individual.

There is a presumption of capacity and the onus of proof rests with the person alleging lack of capacity.

# Consent

For a person's consent to be valid, the person must be:

- (i) capable of taking that particular decision ('competent')
- (ii) acting voluntarily (not under pressure or duress from anyone)
- (iii) provided with enough information to enable them to make the decision.

# Consent

For people to have the capacity to take a particular decision, they must be able to:

- (i) comprehend and retain information material to the decision, especially as to the consequences of saying "yes" or "no"
- (ii) use and weigh this information in the decision-making process.

Capacity should be based on function, not status (i.e. having a disability, being old, being sectioned, etc.)

# Consent

Methods of assessing comprehension and ability to use information to make a choice include:

- exploring the client's ability to paraphrase what has been said (repeating and rewording explanations as necessary);
- exploring whether the client is able to compare alternatives, or to express any thoughts on possible consequences other than those which you have disclosed;
- exploring whether the client applies the information to his or her own case

# A question of equality

Research suggests people can be reluctant to investigate and report cases involving people with intellectual disability because they do not feel they can be successfully prosecuted.

Not taking a statement or recording the complaint has serious ramifications. If the assault is repeated there is no formal record of earlier incidents. Assaults cannot be tracked and may escalate without being addressed.

# A question of equality

In many cases the decision not to proceed appears to be made without any exploration of complainants' attitudes. The attitude of the complainant should be taken into account in determining whether to proceed to prosecution.

It is premature to consider whether a person has capacity to give evidence in court at the point of deciding whether or not to take a statement or charge the accused. People with intellectual disabilities are entitled to have their complaint fully investigated.

# “Leo”

Even when the case has been rejected by the DPP, the fact of giving a statement and being treated respectfully by the Gardai can be therapeutic and healing in itself.

# Myths

Three myths that research shows impact upon the process of making a statement:

1. People with intellectual disability lie
2. They are sexually promiscuous
3. They cannot be reliable witnesses

If complainant credibility is used to prioritise complaints, it is easy to see how complaints by people with intellectual disability can routinely fall to the bottom of the list.

# Gauging true level of disability

People with intellectual disability, no matter how low their support needs, will require some support and some adjustment to the interview process. It is not unusual for a person with an intellectual disability to present in a way that does not accurately reflect their support needs.

Some people with intellectual disability are very good at appearing more intelligent than they actually are. Some people are so traumatised by their experience of sexual abuse that they appear more disabled than they really are (secondary handicap).

# Witness performance

Evidence suggests that with appropriate questioning people with intellectual disability can give accurate accounts, although these are generally less complete than for adults generally.

While inappropriate questioning styles have an adverse effect on the witness performance of adults generally, the impact of inappropriate questioning styles appears to be greater in people with intellectual disability.

# Planning

The planning stage is key, and is even more crucial than when interviewing children or adults without disability. The more work you can do prior to the interview, the more chance you have of gaining a consistent and accurate account of what has happened. Cases tend to fall apart when the planning has not been thorough enough.

# Meeting minimum requirements

In some cases where it is determined a complainant has an intellectual disability, the interview team may feel that the minimum requirements for an interview will not be fulfilled and it will be necessary to consider whether this could be achieved over a period of time. This may mean helping the complainant to acquire the necessary communication skills or vocabulary or helping the interviewer to become more competent, or searching for an interpreter to fill the gaps in the interviewer's skills. The interviewer should be mindful of the need to avoid any form of coaching.

# Communication aids

The complainant may be unable to communicate sufficiently because he or she lacks the necessary vocabulary. They may, for example, use a communication aid such as the Bliss Board. They are more likely to be at the severe end of the intellectual disability spectrum.

Consideration should be given to the use of dolls as an aid to reinforce disclosure already made, and other props as communication aids (including drawing materials). Check with the support team about these things – do not risk infantilising the complainant.

# Understanding: language and time

The interview team should try to establish the degree to which the complainant understands complex sentences; it could be that he or she responds to just one key word in a sentence.

Someone's receptive skills may appear to be higher than they actually are.

It could be that past tenses and time concepts make specific times and places or the order in which things happened difficult to recall

# Intellectual Disability

Some complainants may not understand negatives such as “didn’t,” “don’t”, “nor”, wouldn’t, etc. They may respond to the other words in the sentence as if the negative simply was not there.

# Understanding about sex

A complainant's level or lack of knowledge and understanding about sex and sexual behaviour may impede some questioning. The terms he or she uses to describe parts of the body and sexual functions should be noted and used wherever possible by the interviewer.

# Team

You should identify the key people in the complainant's life and be prepared to include them in the planning for the interview.

Be aware of the role of “key workers”. They are specifically assigned to a particular resident or client and may have lots of important information about them – particularly how to communicate best with them.

# Trust

Trust is essential. This is true of all interviews, but may take longer to establish with someone with an intellectual disability. You may need to take longer in the rapport phase of the interviews.

Find out from the complainant's support team what kind of things they're interested in – t.v. shows, music, comics, comedians, etc.

# Use of interpreters/intermediaries

There is a danger that, through using intermediaries, the voice of the person with intellectual disability gets lost. Although you will need the help of an intermediary, you should remain focussed on the complainant. They should remain at the centre of the investigation.

# Suggestibility

People with intellectual disability are more open to suggestion, acquiescence and confabulation (the extent to which subjects report imaginary experiences they believe to be true) than others.

The lower someone's IQ, the more they agree with statements put to them.

Thus – leading or closed questions are particularly likely to produce errors in interviews with people with intellectual disability

# Recall

The unprompted recall of children with mild intellectual disability is reliable, but prompted recall is far less reliable than the recall of other children

Some prompting is needed for children to be able to retrieve stored information, but that prompting should be general to avoid suggesting a response

# What helps?

The main factor impacting on the accuracy and completeness of testimony is the type of question that is asked. General questions prompt the most accuracy in recall for children with intellectual disability

Using pictures to support questioning seems to assist the recall of children with intellectual disability – pictures diminish the need to hold parts of questions in short-term memory

# What helps?

Keeping it short. The accounts of people with intellectual disability are shorter and more likely to agree with a leading question than those from the general population.

# What helps?

People with intellectual disability give the most accurate answers to open, free recall questions:

“What happened?”

For these questions, people with intellectual disability provide accounts with similar accuracy rates to those of the general population. Although people with intellectual disability provide less information overall, they appear to include the most important details.

# What helps?

Closed questions tend to elicit more information concerning details that might not be mentioned with more open questions, although this information is less accurate. Open questions (“What did he look like?”) elicit less incorrect information than closed questions (“What colour was his hair?”). Although responses to more closed questions provide more complete accounts.

# What helps?

For more open questions the task is to tell the interviewer what the witness can remember. For more specific closed questions the task changes to one of providing the interviewer with what he or she wants the witness to remember. As witnesses with intellectual disability spontaneously recall fewer details concerning events, it is unsurprising that they provide less accurate answers to specific questions and tend to confabulate (e.g. tend to replace gaps in memory with distorted or fabricated memory).

# What doesn't help?

As questions become more specific, responses become less accurate:

From

“describe him”

to

“describe his clothes”

to

“describe his shirt”

to

“was his shirt red?”

# What doesn't help?

## Complex syntax

“At any time before or after she cried did the key worker come in or out of the house?”

## Negatives

“Did the man not tell you to be quiet?”

## Double negatives

“Did John not say that he would not go to the shop with you?”

# What doesn't help?

Multi-part questions, involving two or more parts that have different answers

“At eleven o'clock you were in the living room? Was John in the kitchen?”

Children and adults with intellectual disability frequently give “don't know” responses to these kind of questions. So do the general population, but it is more pronounced with intellectual disability.

# What doesn't help?

Closed questions

Suggestive manner / leading questions

“She was carrying a newspaper when she came into your room, yes?”

Questions focussing on names, numbers, times and dates.

# Suggestibility

Suggestibility may occur in response to leading questions. People with intellectual disability appear to be more suggestible to leading questions than the general population. However, it is worth noting that even in response to specific false leading questions, people with intellectual disability can provide a high level of accurate answers (e.g. 84% correct compared to 50% chance level).

# Acquiescence

People with intellectual disability are more likely to acquiesce (i.e. say “yes” to questions), particularly in response to questions:

- requiring a yes/no response
- that are repeated
- that are not understood

This is because of cognitive limitation and social desirability effects.

# Establishing ground rules

especially important with people with intellectual disability to stress it is o.k. to say “I don’t know” and “I don’t remember.”

be careful in exploring complainant’s ability to distinguish between truth and lies – person might think in very concrete ways and not understand “as if” propositions. This does not mean they cannot distinguish between fact and fiction

# Free narrative account

general, open ended questions

do not be afraid of pauses. Some people take longer to tell their story.

Some adults with intellectual disabilities may feel safer telling their story through another medium, such as saying it into a telephone or drawing it as they talk

# Open ended questions

remind complainant again that they are allowed to not know or not remember things

avoid double negatives, multi-part questions, complex sentences

# Specific yet non-leading questions

gently help the complainant to understand some details are more relevant than others

# Focussed questions

because of the susceptibility of people with intellectual disability to confabulation and/or to answering “yes” to “yes/no” questions, this stage is particularly difficult  
risk of leading questions that would be inadmissible in court

# Closing the interview

complainant will need much reassurance

they may feel very guilty about what they have said

return to some of the areas discussed in the Rapport phase

# Therapeutic support

It is often wrongly thought that people with intellectual disability cannot make use of psychotherapy or counselling. They can. Good Practice Guidelines apply to such therapy, with the onus on the therapist being to avoid coaching or rehearsing the evidence in any way. Group therapy should be avoided (nb.: people with intellectual disability often have quite a few group activities in day centres. Check the nature of these, and the risk of disclosures coming up within this kind of space).

# Capacity to use therapy

Misconceptions re people with intellectual disabilities' use of therapy

An emotional/relational process more than an intellectual one

Capacity to use therapy is there – may use to use different tools

Rhythm and pacing of sessions may be different

Use of language will have to be adapted

Long term assessment – sometimes an ongoing assessment

Role of client's support network

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