ONLINE SUPPLEMENT

Key issues for clinicians to address for Section 30 assessments and reports

1 *Does the alleged victim have a mental disorder?* It is accepted for the purposes of Section 30 Sexual Offences Act 2003 that mental disorder is as defined in Section 1(2) of the Mental Health Act 1983 as 'any disorder or disability of the mind'. Consequently, this could encompass all types of mental disorders. Describing and explaining in simple terms the symptoms and signs of any mental disorder will be important to aid a jury involved in the case. (It is possible that such an offence could occur to a patient detained under the Mental Health Act itself.)

2 *Could the alleged offender know or reasonably be expected to know the alleged victim has a mental disorder?* External distinguishing features may be evident indicating an intellectual disability or head injury; the patient being in a care home would potentially alert someone to the possibility of a disorder, for example dementia; speaking with a person may provide evidence of a mental disorder, for example dementia or intellectual disability. The clinician needs to consider this question from a lay person's point of view and may need to explain and describe clinical symptoms and signs, avoiding technical medical terms or clinical jargon. Again, this is important for a jury if giving evidence.

3 *Could the alleged offender have known or reasonably be expected to have known the alleged victim was likely to be unable to refuse because of the mental disorder?* Assuming the case for a mental disorder has been adequately made out, the direct connection of the inability to refuse sexual activity because of the mental disorder needs to be explained again in simple terms from the point of view of the alleged offender. This may involve a description of how the mental disorder directly affected the decision-making process, for example, the alleged victim lacked the ability because of cognitive impairment (e.g. dementia, intellectual disability, long-term effects of head injuries) or because they were disinhibited due to hypomania/mania/psychosis.

4 *Does the victim lack capacity to choose whether to agree to the touching?* In the precise terms of Section 30 this means that the alleged victim is unable to refuse consent to sexual activity if they lack 'sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason'. This encompasses a wide range of circumstances whereby a mental disorder may rob someone of the ability to make an autonomous choice even where they have sufficient understanding of information relevant to it. 'Foreseeable consequences' includes knowing that sexual activities are different from personal care and may lead to pregnancy and to acquiring sexually transmitted diseases.[4] Explanation of how the mental disorder influences the decision-making processes needs to be elucidated again in a way that a jury can understand. The use of the test of capacity under the Mental Capacity Act 2005 could be considered to demonstrate reasoning. For example, in relation to the sexual activity, did the alleged victim (a) understand relevant information about the decision to be made; (b) retain the information in their mind; (c) use or weigh the information as part of the decision-making process; and (d) was the victim able to communicate their decision? The legal test from *X City Council*[18] could also be used to provide structure and reasoning in addressing capacity.

5 *Can the alleged victim communicate their decision to the alleged offender?* This does not just apply to the physical inability to communicate their decision (e.g. dysphasia, dysarthria), but can be because the mental disorder impinges upon a person's decision-making processes such that they cannot verbalise their decision coherently.