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The concept of sexual exploitation in legislation relating to persons with intellectual disability

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Abstract

The focus of this paper is on the use of the concept of sexual exploitation in legislation concerning sexual expression by persons with mental impairment, with particular emphasis on persons with intellectual disability. Two main statutory approaches have been adopted in Australian jurisdictions. The first is prohibition of sexual acts between a person with intellectual disability and others who, by virtue of their employment, are in a position of ascendancy over that person. The second is the prohibition of sexually exploitative acts by any person towards a person with an intellectual disability. The major aim in this article is to critically examine these approaches and evaluate them according to the standards of being non-discriminatory, minimally restrictive of rights, and enforceable. It is argued that comprehensively cataloguing sexually exploitative acts is untenable, with the result that prohibition of all sexual exploitation is unenforceable. The alternative, namely legislation that prohibits sexual relations with any person employed to render any kind of service to the intellectually disabled person, would further restrict an already limited number of potential sexual partners. We suggest that a more useful approach would be to prohibit sexual activity in one-on-one relationships whose scope is commonly understood to exclude such acts, while allowing relations between workers or caregivers and the persons to whom they do not directly render services. This mechanism would have to be narrowly defined to have the desired effect of affording protection to vulnerable persons while preserving their right to sexual expression.

The concept of exploitation is central to the law regarding sexual offences against persons with mental impairment.¹ All Australian states and territories and many overseas jurisdictions, including Canada and England, have enacted legislation that, under certain circumstances, criminalizes sexual activity with a person with impaired mental functioning, over and above offences that may be committed against members of the general population. Although details differ between jurisdictions, the common theme underlying the legislation is the protection of vulnerable persons against their being taken advantage of — that is, against sexual exploitation.

The diversity of approaches and provisions enacted in these various jurisdictions indicates the difficulty involved in balancing the right to sexual expression of persons with mental impairment, while meeting their need for protection from exploitation. Our major aim in this article is to examine what legislative protections with regard to sexual exploitation should be in place for persons with mental impairment. In the absence of legal guidance, either by statute or by precedent, as to the meaning of sexual exploitation, we have drawn on definitions and concepts from disciplines such as philosophy and psychology to underpin our discussion.

The complexity of framing legislation in this area is reflected in the fact that the categories of persons protected by legislation differ between jurisdictions. In some states, for example Tasmania, the term mental impairment covers senility, intellectual disability, mental illness and brain damage (Tasmanian Criminal Code Act of 1924 s 126). The New South Wales Crimes Act (1900 s 66F), however, pertains only to persons with intellectual disability, defined as persons who have appreciably below average general intellectual function and who require supervision or social habilitation in connection with the activities of daily life.

In this paper we will focus solely on sexual acts where the apparent willingness of the person with mental impairment may have been exploited. In addition, we focus on the law as it relates to persons with intellectual disability, rather than on the broader class of persons with other forms of mental impairment. One of the characteristics of intellectual disability is that it is stable and lifelong, and persons with intellectual disability may have a continuing inability to consent to sex. In contrast, other conditions of mental impairment are frequently temporary, so that a person suffering a psychotic episode, for example, may temporarily lack the capacity to consent to sex, but will very likely

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¹ Although the Victorian Law Reform Commission (2004) rejects use of the term “mental impairment” in favour of “cognitive impairment” which they see as less stigmatising, we have chosen to retain mental impairment because it is the term used in Australian legislation. In addition, over time, any initially inoffensive term chosen to denote disability gains pejorative status; attitudinal change rather than a change of terminology is required to alter this (Jaeger & Bowman, 2005).

regain it when the episode ends. Persons whose degree of intellectual disability is such that it is questionable whether they have ever possessed the capacity to consent to sex are perhaps the most challenging class of individuals to be catered for by legislation, because intellectual disability carries with it characteristics that are not present in other forms of mental impairment, and which may increase vulnerability to exploitation. These characteristics are briefly reviewed below.

Part I: A Population in Need of Protection?

Effects of Intellectual Disability

Socialised to acquiesce. People with intellectual disability are less free to make choices about their lives than other people. When children, their lives are more highly supervised and controlled than their same aged peers (Clarke, Olympia, Jensen, Heathfield, & Jenson, 2004). When adults, they have fewer employment options, fewer places of residence from which to choose (Rourke, Grey, Fuller, & McClean, 2004), fewer recreational opportunities, and so on, than other people. Although ethical caregivers will promote decision-making opportunities at all stages of life, people with intellectual disability are, of necessity, much more likely to have decisions made for them than are other people (Rourke et al., 2004). As a result, individuals with intellectual disability become accustomed to following instructions without question. Some people with intellectual disability have a great desire to please and they become particularly adept at discerning what response is wanted by another person. These factors, separately or in combination, lead to an increased risk that, in sexual matters, persons with intellectual disability may be more compliant with instructions from others than would be their same-aged peers.

Limited decision making ability. A related issue is that people with intellectual disability exhibit limited ability to make a considered choice. This is almost certainly because their limited intellectual abilities result in their having difficulty envisaging consequences, goals, and alternative courses of action and the advantages and disadvantages of these (Jenkinson & Nelms, 1994). It may also be that their inexperience in decision-making contributes to their difficulties in making considered choices. Jenkinson and Nelms investigated decision-making style by presenting their participants with a series of vignettes, five of which represented major decisions with long-term consequences, and five of which were minor decisions. Twenty-five adults with intellectual disability and 14 non-disabled adult university students participated. Results showed that, in comparison with the students, participants with intellectual disability tended either to try to avoid making a decision at all, or rushed into one alternative without considering its advantages and disadvantages. Significantly, rushing into one alternative was more common with vignettes that depicted some kind of threat to the person and which required assertive action for a successful resolution. It is interesting that participants displayed stress, even though the choices did not

truly affect their lives. It seems reasonable to infer that when authentic decisions are faced, the reactions and strategies found in this study would, if anything, be amplified.

Easily manipulated. People with intellectual disability may lack the ability to resist a tempting offer. One tactic for gaining the consent of a person with intellectual disability is to offer them a reward for having sex (Thompson, 2001). The offer of a desired object such as a toy, as occurred in the case of *R v Beattie* (1981), or a packet of cigarettes, money, or a soft drink may be successful in obtaining sex with people with intellectual disability because the person with intellectual disability may not see the transaction as an unequal exchange. Such an offer may be enticing because they may have no other means of obtaining the desired object.

Persons with intellectual disability can also be easily manipulated because they may lack the ability to identify situations of risk. Therefore, they are more likely than other adults to engage in dangerous behaviours, such as entering a stranger's car. Once in such a situation, they are less able to extricate themselves from the unwanted encounter (Kempton & Gochros, in Furey, 1994).

Issues of Dependency

A person with intellectual disability is dependent on others in a variety of ways. Because of this, they are vulnerable to sexual exploitation especially when approached by a person who renders them services. If they resist an advance, they risk the withdrawal of those services — services which may be essential to their health and wellbeing. They also risk retaliation in more subtle ways, for example by being made to wait unnecessarily for services to be performed. They may be unable to complain about such treatment, either because of they are unaware of complaint channels or because they lack the necessary verbal ability (Rosser, 1990).

Issues Stemming from Limited Knowledge

Lack of knowledge about sex. Completion of sex education courses is less frequent in people with intellectual disability than in the general population. An English study (O'Callaghan & Murphy, 2002) found that just over 50% of adults with intellectual disability reported that they had received sex education, compared to 98% of non-disabled English 16-year-olds. Similarly, an Australian study (McCabe, 1999) revealed that only about half the adult participants with intellectual disability reported they had received sex education. Williams (1991) suggested that the lower rate of sex education in the population of persons with intellectual disability may reflect the attitudes of caregivers who either think that sex education is irrelevant for the person in their care, or wish to keep the person "innocent". The aversion of carers to the involvement of people with intellectual disability in a discussion of sexual matters is reflected in the difficulty

O'Callaghan and Murphy and McCabe had in obtaining participants for their studies.

In relation to overall sexual knowledge, McCabe (1999) found that people with mild intellectual disability had less experience of, and less knowledge about, sex than people with physical disability, who in turn had less experience and knowledge than non-disabled individuals. This finding was consistent with that of O'Callaghan and Murphy (2002), who found that, in comparison with 16-year-olds, adults with intellectual disability had significantly less knowledge of sex and its consequences. In the O'Callaghan and Murphy study, some items were mnemonically demanding, or required the ability to interpret line drawings and to articulate answers, and some items and scoring were value laden. Nevertheless, these recent results are consistent with older research (see, for example, Gillies & McEwen, 1981). The apparent lack of knowledge about sex, even among those who have attended sex education classes, might be because delivery of factual information does not necessarily lead to understanding and retention of it (McCabe, 1999). Of course this latter point is true of all persons, not only those with intellectual disabilities. McCabe also suggested that persons with intellectual disability do not discuss what they have learnt in sex education classes with family or friends, so that material is not expanded upon or internalised. Most participants with disability revealed that their sole sources of information regarding sexuality were sex education classes and the media. In contrast, persons without disability also gained information from family and friends. McCabe suggested that because sexuality was not discussed openly with persons with disability, they experienced negative feelings about the topic as a whole, and especially about their own sexuality.

Thompson (2001) presented qualitative evidence gleaned from interviews conducted as part of a counselling service for sexually active men with intellectual disability. Thompson's analysis suggests that only the most able men had even a basic knowledge about women's bodies. The men whom Thompson interviewed generally had only one goal: their own orgasm. In addition, the men were insensitive to their male or female partner's emotional and physical feelings, and very often did not realise that pregnancy or disease transmission were possible outcomes of intercourse. Overall, sex was conducted with little communication except that of resistance. Although the proportion of the sample that had received sex education was not mentioned by Thompson, these findings may be a reflection of a lack of sex education, an interpretation consistent with the low rate of participation reported above. A second explanation is that, when sex education is provided to this population, the focus is on the mechanical aspects of sex rather than on emotional experiences. Alternatively, Thompson suggested that the men's insensitivity may have been gender-related rather than an artefact of their intellectual function, as there is evidence that women with intellectual disability are skilled at interpreting verbal and non-verbal cues during sex (McCarthy, 1999).

Further, accurate assessment of how much persons with intellectual disability do know about sex is difficult, since persons with intellectual disability may display knowledge that is more apparent than real. That is, when questioned, they may echo what they have been taught, giving an impression of much greater understanding than is really the case. This problem is, of course, present in any attempt to assess genuine understanding by any person; however, the distinction between real and apparent knowledge sometimes demonstrated by persons with intellectual disability has been judicially acknowledged in *The Queen v Richardson* (1990) when King CJ commented, "It is quite possible, of course, that a mentally deficient person will use words indicating an apparent understanding which does not really exist."

Little knowledge of rights and of the law. People with intellectual disability may not understand that they can refuse an unwanted sexual encounter. Johnson, Andrew, and Topp (1988) cited these words of a young woman with intellectual disability: "The taxi driver touched me [sexually]. I didn't know if I could say no or not." Similarly, expert evidence was presented in *R v Eastwood* (1998) that the complainant did not know that she could refuse intercourse if it was offered or requested by another person.

Moreover, the level of knowledge of the law relating to sexual matters among adult persons with intellectual disability is much lower than that of 16- and 17-year-olds (O'Callaghan & Murphy, 2002). The fact that behaviours such as genital exposure and masturbation, or even taboo behaviours such as sexually approaching a child, are sometimes publicly performed by persons with intellectual disability has been interpreted as evidence that these individuals do not know such behaviours are illegal (Cambridge & Mellan, 2000).

Finally, persons with intellectual disability may have difficulty distinguishing when consent to sexual activities has, or has not, been given. When shown line drawings depicting a range of sexual encounters, people with intellectual disability had difficulty discriminating between consensual and non-consensual acts (O'Callaghan & Murphy, 2002). For example, it was common for participants to say that what were clearly consensual acts should be reported to staff, parents or police. This group did not appear to derive as much assistance as did a sample of teenagers from cues such as facial expression and postures. It is possible that difficulties with comprehension were symptomatic of difficulties interpreting the drawings. However, the addition of narratives to the presentation of line drawings produced no change in the performance of the group with intellectual disability. For every vignette, the group with intellectual disabilities performed at a lower level than did the teenagers when asked for factual information, such as what was happening. Their interpretations of the situations, such as imagining how each of the depicted persons felt, were also less plausible. The results indicated that even if the person with intellectual disability knows that sex without consent is illegal, they have difficulty judging whether or not consent has been given.

These results may, however, reflect difficulty viewing the scenes and narratives objectively. If a person with intellectual disability has been taught that it is wrong to engage in sexual contact and that they should report any such incident, they may label all sexual depictions as wrong. In other words, they may have evaluated the vignettes against their own moral values (or those of their caregivers) rather than against legal standards. If empirical support could be obtained for such an interpretation, it would emphasise the necessity of including instructions differentiating moral and legal standards in sex education programs specifically designed for persons with intellectual disability.

Summary

A combination of the effects of intellectual disability, both on cognition and on lifestyle, issues of dependency, and a lack of knowledge of sexual matters, of rights and of the law, leads to greater vulnerability to sexual exploitation in persons with intellectual disability than is generally the case in the rest of the population. This list of contributory elements is best viewed as inclusive rather than exclusive, and is not exhaustive, nor are all aspects necessarily present in any particular person. It seems overwhelmingly clear, however, that the question of whether this population is in need of special protection in law must be answered in the affirmative.

Part II: Prohibition of Sexual Exploitation by Any Person

It appears likely that the increased vulnerability of persons with intellectual disability to sexual exploitation was one reason for the enactment of legal provisions aimed at preventing this occurrence. One of the principles of a liberal society is freedom of individual choice (Rawls, 1999), and most individuals are legally capable of making choices. If a capable person willingly consents to engage in what many would regard as their own exploitation, they are free to do so, at least within some limits. It is when doubt exists as to the person's mental functioning that the law sees fit to intervene even within those limits. Under these circumstances, the law does not approve of exploitation, even if the person is willing to engage in it, and legislation has been set in place to protect persons who are unable to adequately guard their own interests in sexual transactions. The difficulty lies in framing provisions which afford the required protection, but do not unnecessarily restrict sexual choice.

On the face of it, the most straightforward approach is to assess capacity to consent to sex. Some authors have attempted to establish criteria by which capacity to consent might be assessed (see, for example, Kennedy & Niederbuhl, 2000; O'Callaghan & Murphy, 2002). The task has proved a difficult one. The Victorian Law Reform Commission (2005) rejected a number of submissions that relied on establishment of capacity to consent, indicating that this requirement would increase the difficulty of prosecuting offenders who sexually exploit persons with mental impairment. If, for example, expert testimony

was entered that conflicted as to the complainant's capacity to consent, conviction of an accused person who claimed they believed the complainant consented would be highly unlikely. Additional difficulties are that the nature of consent is by no means established in law (Leader-Elliott & Naffine, 2000), and agreement has not been reached on the prerequisites for capacity to consent, for example, what underlying knowledge is necessary for consent to be real. The Royal Australian and New Zealand College of Psychiatrists, in its submission to the Law Reform Commission of Victoria (1988, p.19), stated:

Consent to sexual intercourse must contain a full understanding of the consequences of pregnancy and child rearing and the ability to understand the effect of impaired mental functioning on the development of a child resulting from such intercourse.

However, in most States, the knowledge required for legal consent to a sexual act is only that the person understands the nature of that act.²

Another approach would be to assess whether a person is able, in a general sense, to give consent. However, an individual might be legally capable of decision-making in one area of life but not in another (Somerville, 1994), and thus this approach also does not yield a satisfactory solution. One method of avoiding questions of consent and of capacity to consent, which involve assessment of mental states and the competence of the *person*, is to frame legislation that is more reliant on assessment of circumstance and context — to ask in fact whether an *act* constitutes sexual exploitation. This is the basis for one of form of legislation adopted within Australian jurisdictions.

As noted earlier, some states have criminalised sexually exploitative acts committed by any member of the general population against a person with mental impairment or intellectual disability.³ The wording of these provisions differs from state to state but is broadly similar in aim, namely to deter any person from exploiting members of a vulnerable population. A number of issues are raised by this approach. We turn now to a critical examination of this legislation.

Categorising exploitation.

The problem of definition. There is no statutory definition of exploitation, nor does judicial guidance exist as to its meaning. This is likely to be because examples of exploitation are so varied as to necessitate assessment on a case-by-case basis. The fact that exploitation has not been judicially defined indicates

² ACT Crimes Act 1900 s 67; NSW Crimes Act 1900 s 66F; NT Criminal Code s 130; Qld Criminal Code 1899 s 216; Tas Criminal Code Act 1924 s 126; Vic Crimes Act 1958 s 50; WA Criminal Code s 330. The sole exception is South Australia, where the nature and consequences of the act must be understood (Criminal Law Consolidation Act 1935 s 49).

³ NSW Crimes Act 1900 s 66F; WA Criminal Code s 330; Qld Criminal Code Act 1899 s 216.

that the term has no special legal meaning. Given the lack of legal status of the term, we have drawn on definitions taken from the disciplines of philosophy and politics. The entry under 'Exploitation' in *The Oxford Companion to Philosophy*, reads, in part:

[T]o exploit someone or something is to make use of him, her, or it for your own ends by playing on some weakness or vulnerability in the object of your exploitation. A manipulative friend, lover, or parent exploits someone's feelings of guilt or need for affection.... If we think it is wrong to exploit a person, that is only because we think that someone's vulnerability should not be used to bring his or her life or labour under another's control (Wood, 1995, ¶ 1, 3).

Reeves (2003, ¶ 1 in *The Concise Oxford Dictionary of Politics*) defines exploitation as "taking unfair advantage of persons, their characteristics, or their situations.... A particular problem is the identification of exploitative transactions within consensual exchanges." For the purposes of this article, let us expand the category of consensual exchanges to include exchanges which are not overtly non-consensual but which involve a person with an intellectual disability severe enough to instil doubt as to their capacity to consent.

On the rare occasions when the legislation pertaining to the sexual exploitation of persons with intellectual disability is invoked, one of the difficulties facing justice personnel lies in the identification of purportedly exploitative relations which are, nonetheless, apparently consensual. In reported Australian cases, judicial use of the term exploitation in a sexual context is uncommon. When it does occur it is used almost exclusively in relation to cases involving the sexual abuse of children (see, for example, *R v Howes* [2000]; *R v ADW* [1999]; *Ryan v The Queen* 1999; *R v Barnes & Purnell* [1998]; and *R v Dawson* [2000]). A literature search revealed only one Australian case, namely *R v Grech* (1999), in which both the person with intellectual disability and the alleged offender were adults, where specific mention was made of the term "sexual exploitation". This case involved a young man with intellectual disability and a staff member at his residence. With cases involving children, one feature is easily identified as exploitative — the fact that children who are unable to give legal consent have been used by the stronger party, the adult, for sexual gratification. But cases in which an adult person with intellectual disability is involved pose greater difficulties. When is it appropriate for the law to intervene and override that person's decisions about their sexual activities? When is it paternalistic to do so? How is the concept of sexual exploitation to be put to practical use in the courtroom?

Pragmatic use of the term "exploitation". Attitudes within the community vary widely as to what is legally acceptable, what is morally acceptable, what is one but not the other, and what is never acceptable. For instance, it seems likely that a small number of people view heterosexual intercourse between a married

couple for the sole purpose of procreation as the only acceptable form of sexual activity, whereas a small number of others might approve of any sexual act whatsoever. Most people's attitudes probably fall somewhere between these extremes, with the greatest number falling somewhere toward the "middle of the road". A similar distribution can be found in relation to a large number of variables. It seems reasonable to assume that community attitudes to what constitutes sexual exploitation is one of these variables. Because of this, precise definition of exploitation based on community norms is difficult. Indeed, submissions to law reform commissions working on sexuality and disability legislation have reflected just such a range of attitudes (see, for example, Law Reform Commission of Ireland, 1990; Law Reform Commission of Victoria, 1988).

It can be seen that categorisation of a behaviour as exploitative is necessarily based on personal opinion. This may be one reason so few cases are prosecuted under the current legislation. However, a further difficulty in employing this terminology is that anyone can feel they have been sexually exploited, a point which is discussed in the following section.

We are all vulnerable to sexual exploitation. Traditionally, exploitation has been viewed as occurring prior to the act, for example, through the use of deception or coercion to gain consent. Recently, however, the philosopher Klepper (1993) offered the opinion that this view neglected exploitative acts that occurred during or after consensual sex. Two examples he cited were: ignoring one's partner's needs and pleasure; and revealing intimate details of the act to a third party. It is reasonable to assume that consent would not be given to either of these behaviours, which treat the person as a sexual object. There is a tacit understanding that each person will treat the other as an end in themselves. We expect that our partner will attempt to please us as we do them. Likewise, Klepper argues, our societal norm is that we do not talk about intimate encounters and therefore we do not expect details of our sexual actions to be revealed to other persons. Behaviours that violate socially accepted standards such as these may be exploitative.

The value of Klepper's analysis lies in its exposure of the extent to which exploitation is possible when we trust another person to act in accordance with social and cultural expectations. It demonstrates the ease with which individuals without any particular vulnerability may be exploited. Such general vulnerability may be compounded by the presence of intellectual disability. This may disadvantage its possessor in interactions with people who do not have that disability, or do not have it to the same degree. The South Australian Criminal Law Consolidation Act (1935, s 142) contains a section that addresses dishonest exploitation of a position of advantage. It applies to "the advantage that a person who has no disability or is not so severely disabled has over a person who is subject to a mental or physical disability." If a person with intellectual disability is indeed at a disadvantage in all interchanges, one conclusion seems to be that any sexual act with such a person constitutes exploitation.

Is all sex necessarily exploitative? The view that all sexual acts that involve persons with intellectual disability are exploitative seems to be the basis of a submission published by the Law Reform Commission of Ireland (1990, p. 17):

In typical circumstances the girl is spotted and induced into sexual intercourse or other acts by a male who has no interest in her personally and who has no intention of offering her any attempt at a long term relationship or marriage. The essence of the wrong done is that, unlike a normal girl, the handicapped one cannot see clearly the intentions of the predatory male, is too weak willed to struggle against physical inclination and is not the personality equal of the male in any struggle for friendship or commitment. If a handicapped girl is exploited in these circumstances, she may have unrealistic expectations which can be fuelled by a predatory male and be subjected to hurt or exploitation greater than a mentally able person (Law Reform Commission of Ireland, 1990, p.17).

If this view is accepted, it is difficult to see how a person with intellectual disability would be able to exercise the right to sexuality at all. Moreover, there is no evidence that “handicapped” persons are subject to greater emotional hurt than other people. Bruised feelings are not confined to persons with intellectual disability, nor are they confined to “girls”. Men, whether disabled or not, also suffer emotional hurt. And it is not only women with (or without) intellectual disability who may be deceived. The position shown in the quote is based on an assumption that a female must want commitment, and that a long term relationship or marriage is her only legitimate goal. Yet the females referred to may not have the capacity to understand what marriage involves and may not be legally allowed to marry. The commentator does not acknowledge that sex may be engaged in for simple physical relief and nothing more. There appears to be a belief that the woman should struggle against physical inclination, and in any encounter is destined to be a victim. In such a view, women with intellectual disability are the equivalent of children, and their male counterparts are not even recognised. Yet it appears that the Law Reform Commission of Ireland heeded this anecdotal submission, rejecting a more liberal approach and recommending that it become an offence for *any* person to have sexual relations with a person incapable of protecting themselves against sexual exploitation. The Western Australian Criminal Code s 330 (1) contains a similar provision — in that legislation, a reference to an incapable person is to a person who is incapable of understanding the nature of the sexual act, or of protecting themselves against sexual exploitation. Any sexual act with such a person may be the subject of a charge under this legislation.

The Irish and Western Australian provisions are similar to the approach that has been taken in Queensland.⁴ There, the current statute prohibits any person from having unlawful carnal knowledge of an intellectually impaired

⁴ Qld Criminal Code Act 1899 s 216.

person. However, a defence is available if the act did not in the circumstances constitute sexual exploitation of the intellectually impaired person. It is difficult to see how, in the absence of any legal definition of sexual exploitation, it can be proved that an act is not exploitative, any more than it can be proved that it is.

Adults with intellectual disability are subject to the same sexual desires as other adults. They may wish to express those feelings, possibly with a partner, as other adults do. However, if the law is framed in a manner which allows any sexual act with such a person potentially to be seen as exploitative, then it is difficult to see how adults with intellectual disability can fulfil their sexual needs. Although making an offence of sexually exploitative behaviour affords, in principle, the most protection to those in need, this legislation is almost unenforceable. It also neglects the needs and rights of persons with intellectual disability for sexual expression.

In the next section, one alternative approach, which is in use in several Australian jurisdictions, is examined.

Part III: Banning Relationships with Persons in Authority

As previously noted, one alternative is to ban sexual acts between people with some form of mental impairment and those who hold a position of care, supervision, authority, or responsibility towards them.⁵ Perhaps the most cogent Australian example of this approach is Victorian legislation, which contains two relevant sections. Section 51 of the Crimes Act 1958 prohibits sexual penetration of a person with mental impairment by a person who provides medical or therapeutic services to them, where the person with impaired mental functioning is not their spouse or de facto spouse. The services provided must be related to the impaired mental functioning. Section 52 of the Crimes Act 1958 prohibits sexual relations between a worker at a residential facility and a resident who is not their spouse or de facto spouse. Consent is not a defence to charges under either section unless the accused believed on reasonable grounds that he or she was the spouse or de facto spouse of the person with intellectual disability.

In *R v Patterson* (1999), Mullaly J ruled that in order to secure a conviction under s 51 of the Crimes Act 1958 (Victoria), the prosecution must prove that: the complainant was a person with “impaired mental functioning”; the accused was providing medical or therapeutic services to the complainant; the services related to the complainant’s impairment; the act of sexual penetration occurred when the accused was providing services to the complainant, although not necessarily at the exact time of giving the service; the accused knew that the complainant was a person with impaired mental functioning; the accused knew that he or she was providing medical or therapeutic services to the complainant; the accused knew

⁵ This approach is taken in the following legislation: NSW Crimes Act 1900 s 66F; Vic Crimes Act 1958 ss 51 & 52; Tas Criminal Code Act 1924 s 126; NT Criminal Code s 130.

that the services related to the complainant's impairment; and the acts were conscious, voluntary and deliberate.

According to the Victorian Law Reform Commission (VLRC; 2001), emphasis on the accused's knowledge may make it difficult for this offence to be established and they recommended the offence be one of strict liability not reliant on the knowledge of the accused (VLRC, 2005). The VLRC (2001, 2005) appeared especially interested in making it easier to obtain convictions because although there is a high incidence of sexual assault against persons with mental impairment, the crime is underreported. They recommended that the existing s 52 of the Crimes Act 1958 (Victoria) be extended "to cover any person working at a facility or program that provides services to people with cognitive impairment, rather than just workers at residential facilities" (VLRC, 2005, p. 337). Section 52 would apply to paid and voluntary workers.

However, we believe that any instance of sexual assault would and should be charged under the general law of sexual offences. Such offences occur in the absence of consent. There may be an overt lack of consent, consent may be vitiated by a number of factors including deception or coercion, or the person may be incapable of consent. In these cases, the result is sexual assault and should be charged as such, regardless of whether or not the accused provides services to the complainant. On the other hand, if the person is capable of consent and their consent was not vitiated for any reason including coercion, then no crime has occurred.

We suspect that there are a number of reasons that widening the range of persons who are prohibited from sexual relationships with persons with mental impairment will not reduce the incidence of sexual assault nor increase reporting rates. First, reporting rates are currently low, so it is difficult to see how prohibiting more sexual liaisons would alter that. Second, sexual offences in general are notoriously underreported (Easteal, 1998) and sexual offence charges are defended in court more than any other type of crime (Wundersitz, 1996). The difficulties of testifying in court are amplified for persons with mental impairment (VLRC, 2005), and conviction may be more difficult to secure when the victim has a mental impairment (McSherry & Naylor, 2004), factors which discourage reporting and prosecution. Third, the VLRC (2001, 2005) states that some persons with mental impairment are unaware of complaint channels; it is difficult to see how extension of s 52 would alter that situation.

Incorporation of the proposed extension to s 52 into law would effectively prohibit sexual relations between persons with mental impairment and workers who are not in any position of ascendancy and therefore could not use their employment as a coercive device. Most people find their partners through the circumstances of their life, for example, where they live and work. Extension of s 52 would mean that anyone who held any paid or voluntary position would be prohibited from engaging in sexual relations with a person with mental

impairment. Workers not directly involved in the care of the person with mental impairment might well develop a genuine relationship with them but would be unable to legally engage in a sexual act. The effect of extension to s 52 would be to limit the sexual autonomy of persons with mental impairment who voluntarily wished to engage in a sexual relationship.

In the past, the rights of individuals in need of special care have often been curtailed on the basis of unjustified beliefs. In the context of freedom of sexual expression, it is most likely that these individuals' rights will be limited on the basis of their incapacity, a concept that should be applied in accordance with principles of human ethics and human rights. For example, while it is acceptable to limit the right to marry where an individual lacks the capacity to understand the nature of the marriage contract, it is not acceptable to assume that all mentally ill or retarded persons lack such capacity. Likewise, the right to freedom of sexual expression may be curtailed if the individual lacks the capacity to consent to sexual intercourse, but there should be a presumption against limiting this right and clear justification for doing so would need to be provided. Such limitations are often justified by recourse to the notion of harm, but care must be taken that this is not used unethically. The main difficulty lies in drawing the line between true, justified prevention of harm to the individual and unjustified paternalism (McSherry & Somerville, 1998, p. 118).

Consider if the sexual choice of non-disabled people was to be restricted because of the high incidence of rape and underreporting of it. One might imagine that anyone who suggested such a thing would face a firestorm of criticism by the public and in the national media. Rather than further limiting the sexual choice of the victim, a more useful solution to the problem of sexual abuse of persons with mental impairment would be to provide them with education about who may not have sex with them, that consent is "free and voluntary agreement" (McSherry, 1998; McSherry & Somerville, 1998) and what that means in pragmatic terms, about coercion, about the fact that they can say no, and about complaint channels. Education should also be provided to all workers to enable them to recognise the signs of sexual abuse, which have been comprehensively catalogued by Hayes (1993).

Nevertheless, there are negative effects associated with consensual sexual relationships in which one partner is in a position of ascendancy. In her examination of consensual sex in professional relationships where one party is subordinate to the other, Sanger (2004) discussed the arousing effects of power and influence and the flattering effect of capturing the attention and interest of an experienced, skilled and intelligent partner. She also examined the negative effects that can result from such relationships. First, there may be an appearance of, or indeed, real favouritism, which may have harmful effects on the colleagues of both parties and on overall morale within the organisation. Second, such

relationships may compromise professionalism. Finally, initially benign power differentials may be misused if the relationship founders. These points are relevant to the relationships under consideration here. Staff may be reluctant to enforce rules on a resident who is having an affair with their colleague or superior, and other residents may feel neglected. The reputation of the whole organisation may be tarnished if the existence of a sexual relationship between a member of staff and a resident becomes common knowledge. Even if it does not, staff members who view such a relationship as unethical are likely to be uncomfortable with this situation. And as previously discussed, the person with disability may be punished in a variety of ways by the staff member if the relationship founders.

Although the coercive power of authority quickly comes to mind, not all authoritative influence is coercive, and a blanket prohibition of sex between parties who hold positions of responsibility and those in their care does have several disadvantages. First, persons with intellectual disability often have a restricted range of potential sexual partners. There are three classes of persons with whom an attachment might be formed: people responsible for them, others with intellectual disability, and people without disability. O'Callaghan and Murphy (2002) found that with the exception of family, professionals and carers, adults with intellectual disability have a much smaller number of people in their social networks than do mainstream 16- and 17-year-olds, and of these, very few are not disabled themselves. Thus, there is only a small chance of meeting and developing a relationship with a person without disability. Prohibition of sexual relationships with a large proportion of their social circle, namely people who hold a position of responsibility, may, therefore, effectively restrict an already limited number of possible partners to others who have some form of disability.

A second disadvantage of legislating against relationships between persons with intellectual disability and those in positions of responsibility is that the persons involved might have genuine feelings for each other. In the previously mentioned case *R v Grech* (1999) the defendant was a team leader at a home run by the NSW Department of Community Services. He was charged with having a homosexual relationship with a resident over a period of several years. Evidence was presented that the defendant's marriage had broken up as a result of this relationship, and both men asserted their love for each other and their wish to continue seeing each other. It might be argued that an ethical person could resign their employment if they found themselves in such a position. However, it seems likely that even if Grech had resigned, the revelation of such a relationship would have provoked negative reactions from family members and staff (the precipitating factor in charging Grech was the resident's parents becoming aware of the relationship). One result of resignation and/or disclosure may be that fewer opportunities for contact are available to the couple and the person with mental impairment might suffer the loss of the comforting presence of a genuinely caring person. This may not seem an acceptable risk to take.

However, the *R v Grech* case was unusual. It is far more common to find references to non-consensual sexual acts committed against people with mental impairment, often by people close to them, than it is to find consensual ones (Carmody, 1990; Furey, 1994). Although statistical evidence citing abuse rates is difficult to obtain, the effect of socially legitimated authority on compliance is well recognised in the psychological literature (the classic study in this area is that of Milgram, 1963). According to the Model Criminal Code Officers Committee (1999, p.181), “Some way of distinguishing between, on the one hand, truly exploitative sexual contact between mentally impaired persons and their carers, and, on the other hand, sexual contact with a carer to which a person with some degree of mental impairment might nevertheless freely and voluntarily consent, must be found. Otherwise, the Code will arbitrarily restrict the sexual autonomy of mentally impaired persons when it comes to their carers.” McSherry and Naylor (2004, p. 244) express similar concerns: “The benefit of having specific provisions criminalising sexual acts with those with mental impairment is that they may very well lead to more convictions... The problem with such provisions is that they may go too far in preventing those with mental impairment exercising any right to sexual autonomy.”

Recommendations made in the Model Criminal Code are that offences should be created only against persons directly responsible for the care of a person with mental impairment. A limited defence ought be available, however, if the person with impairment consented, and the giving of that consent was not unduly influenced by the fact that the person was responsible for the care of the person with mental impairment (Model Criminal Code, p. 180).

It is difficult to see how it could be proved that being in a position of dependency was not unduly influential on the giving of consent. To be legal, consent must be freely given. When one party is in a position of power over the other, an element of doubt necessarily exists as to whether the consent of the subordinate to the superior’s request was completely free. Because it would be so difficult for a defendant to avail themselves of the Model Criminal Code defence, it seems likely that if such legislation were enacted, only the most optimistic carers would risk sexual contact with those they care for.

Part IV: Is Protection Without Discrimination Feasible?

The Model Criminal Code recommendation has the merit of being non-discriminatory and would be useful if a test for exploitation could be developed. Without such a test, any judgment that exploitation has occurred is necessarily open to the criticism that such an opinion reflects the values of the observer. Indeed, our earlier criticism of the submission to the Irish Law Reform Commission was based on such an argument.

In that submission, acceptance of sexual contact as an end in itself is absent. The submission supported a position which was founded on particular moral values rather than on legal principles. Other moral values may be held by other members of the community. For instance, some might argue that there is nothing inherently exploitative about casual sex and that any adult, including a person with intellectual disability, may freely choose to have a casual liaison.

If the view that all casual liaisons or certain types of sexual acts are necessarily exploitative for persons with intellectual disability were enshrined in legislation, the outcome would be discriminatory — the result would be that casual sex or those particular acts would be illegal for people with mental impairment but not for people without. Even as it stands, current law allows enormous scope for its interpretation to be coloured by the personal values of an observer. It also allows discrimination on the basis of disability. Persons with mental impairment may wish to engage in sexual acts but be prevented from doing so because of the moral values that others hold.

The problems inherent in current legislative approaches along with the dearth of case law in this area indicate the need for reform. Of course, sexual acts involving people with mental impairment are not uniquely subject to sanction. Children are also protected by law, and certain professional relationships are subject to ethical scrutiny by governing bodies. As these measures are designed to protect the more vulnerable party of a dyad, and are therefore relevant to this discussion, an examination of these relationships is the focus of the following section.

Part V: Relationships that might function as legislative models

Relations involving children. All relationships contain power imbalances. Some imbalances are so large that certain categories of sexual relations have been proscribed, the obvious example being acts involving children. Statutory laws against sexual activity with children were enacted because it is considered that a child is in such a subservient position relative to an adult that the child cannot consent in any circumstances. The power imbalance between a child and an adult is too great to allow for genuine choice on the part of the child, even if power is not overtly exercised by the adult. Typically, children are easily manipulated by an unscrupulous adult, have limited ability to see alternatives, are easily threatened, lack knowledge of their rights and of the law, and have much to lose. Their position resembles that of persons with intellectual disability. It might be argued, therefore, that the law relating to sexual acts with children provides an acceptable model for provisions regarding adults with mental disability.

Acceptance of this model would certainly confer protection, but at the expense of the right to sexual expression. All sexual acts involving persons with

intellectual disability would become illegal. Currently, supporters can be found to champion the priority of the right to protection over the right to sexuality, and vice versa. There are good arguments for both cases.

If we balance the need for protection and safety against the need for sexual expression with another person, we may find ourselves agreeing that the former should take precedence over the latter. Such a judgment is consistent with the theoretical ideas of the prominent humanist psychologist Maslow (1970), for whom safety and freedom from fear were secondary only to the most basic physiological requirements necessary to sustain life. The outcome of this line of reasoning is that the need to protect persons with intellectual disability is paramount, and the need for sexual expression is secondary.

But there are several problems with assigning priorities using such an approach. First, it is unnecessary to prioritise protection to such an extent that the possibility of any sexual expression with a partner is eliminated. These rights and needs are not mutually exclusive. It is possible to find a middle ground that respects both. Such an approach is consistent with the United Nations *Declaration on the Rights of Mentally Retarded Persons* (1971, paragraph 1), which states that "the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings". Although international law has no direct effect until it is incorporated into domestic law (Mason, 1998), which has not occurred in relation to this *Declaration*, the rights of the disabled will ideally be upheld even in the absence of legal obligation (McSherry & Somerville, 1998). In *R v Swaffield; Pavic v The Queen* (1998), Kirby J stated: "To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law of Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence."

The rights of persons with mental impairment are not equivalent to the rights of a child with the same mental age. Mental age is based on the IQ test score of the average child. When a test is first designed, a large number of children of the same age are tested and the average number of correct answers is calculated. This score is known as the norm for that age. This procedure is repeated for a range of ages. When a person is tested, the number of correct answers they give is compared to the norms. Their mental age is the age of children who give the same number of correct answers. Mental age is sometimes incorrectly used to infer that an adult with intellectual disability is in all respects the mental equivalent of a child of that age. This is not the case; such a person may have accumulated far more life experience than a child, and they are physiologically not children. In particular, they are sexually mature. Persons with intellectual disabilities are interested in sexuality, in its variants and in its consequences (McCabe, 1999). They wish to be allowed self determination and to have their decisions respected (Somerville, 1994). As a model for legislation,

therefore, laws pertaining to the involvement of children in sexual acts are unsatisfactory.

Professional ethics. At this point we would like to conduct a more searching examination of sexuality in professional relationships. Our specific interest here is in sexual relationships between a professional and their client that are either prohibited by law or which contravene professional ethics. Leaving aside relations that are entered into because of coercion, deception, irrationality, ignorance or emotional vulnerability such as that occasioned by grief, there is a morally suspect class of consensual relationships that are, at least in part, entered into as a result of the power structure of the professional relationship itself. Archard (1994) condemned such relationships as unethical. His reasoning was that “A’s giving of consent is attributable, wholly or in significant part, to the nature of the positions occupied by A and B within their relationship” (Archard, p.95). Consent would not have been given but for the existence of the professional relationship; sex between doctor and patient, therapist and client, and professor and student fall into this category. The critical feature identified by Archard of this “exploited consent” is that the professional relationship has a certain scope, and that this scope is breached by sexual intimacy. The discovery of sexual acts between professional and client, when they involve only adults, generally does not lead to criminal prosecution; the skilled party is usually only subject to sanctions administered by the governing body of his or her profession.

Archard’s analysis, although confined to professional relations, is particularly applicable to relationships between persons with mental impairment and those who care for them. These relationships are established for a specific purpose, are commonly understood to have a specific scope, and they are peculiarly open to exploitation. The distinguishing feature of these relationships is that they are not overtly non-consensual but they do contain a power imbalance — one person is in a position of dependency and the other person holds the power to influence their life to a significant degree. It may be that consent would be extremely unlikely if the professional relationship did not exist. The category excludes relationships in which no professional connection exists between two people.

[T]here is nothing in our understanding of the everyday relationship between professional and non-professional that says sexual intimacy is inappropriate, that is outside its proper scope... we must be careful not to condemn any consensual relation whose parties are not the equals of one another. If we do, we condemn too much (Archard, 1994, p. 99).

By this reading, an example of an unethical relationship is where consent is given by a student to her own teacher. It would not be unethical if she consented to a teacher because he was *a* teacher, as long as he was not *her* teacher. There is no professional relationship between the two: he cannot favour her when he

grades her work, he cannot retaliate by marking her down if things go wrong. There is nothing in the relationship that is breached by sexual contact.

We advocate a legislative approach based on this principle. Relations would be allowed between persons with mental impairment and any person who does not hold a position of authority whose scope proscribed such contact. Positions of authority that would be excluded would be all those that incorporated ascendancy over the person being cared for; and from which, by virtue of that ascendancy, any coercive pressure could be exerted. This approach minimises the number of persons expressly excluded as potential sexual partners. For the same reasons it is minimally restrictive of rights. At the same time it is enforceable, and therefore is preferable to much of the current legislation.

Part VI: Conclusions and Recommendations

One weakness of basing legislation on a concept such as sexual exploitation is that concepts can best be used only when they are properly operationalised. When precise definition is neglected or when the concept is found to be so broad as to be impossible to precisely define, it opens significant debate as to whether or not the indicated concept has been observed. Has exploitation occurred in a particular case? In these circumstances, the law becomes unenforceable.

Much of the current law attempts to address the right of persons with intellectual disability to protection from sexual exploitation, but does so in a way which may result in undue interference with their right to sexual expression. The purpose of the law is not to prevent people with intellectual disability from making errors of judgment. Such a law would be paternalistic in that it would treat adults as children. It would also be discriminatory: people who may have a reduced capacity to foresee the consequences of their actions, nevertheless, have a right to have their decisions respected unless there is a very clearly justified reason for not doing so (Somerville, 1994). The purpose of legislation is to afford protection from the peculiar vulnerabilities that accompany intellectual disability or, more broadly, mental impairment. The goal is to achieve this protective function while avoiding unnecessary restriction, discrimination and paternalism.

Very often a passive, victimized role is ascribed to people with intellectual disability — it is assumed that, if anything, they will be taken advantage of. Such notions are in evidence in submissions to law reform groups. However, it is difficult to argue that exploitation of a person with mental impairment has occurred based only on the presence of a sexual act. Even when acts occur that some would view as degrading, as, for example, in the case of *R v Eastwood* (1998), where a woman with intellectual disability was urinated upon, the same complexities arise. Some people without intellectual disability willingly engage in this practice, so a conviction based on this fact alone might be overturned. The

difficulty in proving the existence of exploitation may be one of the reasons that very few charges of sexual offences against complainants with mental impairment come before the courts.

The prohibition of sexual acts between persons in a position of responsibility and those in their care is necessary because of the potential within such relationships for the abuse of power. The analysis of such relations by Archard underlined the pervasive influence of authority on compliance. Even in the absence of intentional use of power differentials, consent may be achieved in circumstances that are suspect. The law does have the legitimate role of providing protection by preventing the undue influence of persons with a particular susceptibility.

To that end we recommend the creation of criminal offences that prohibit sexual acts between persons in a relationship, either paid or voluntary, with a person with a mental impairment where the said relationship has a clearly defined and commonly understood scope which excludes sexual acts. This proposal redistributes criminal liability. It does not disqualify people as potential sexual partners based on employment categories such as professional, residential worker or carer. Rather, it is based on the status of the relationship between the individuals involved. Persons who hold positions that are recognised as having a clearly defined scope which excludes sexual acts are only excluded from having sex with the particular person or persons with intellectual disability to whom their position applies. Under this proposal, criminal liability is extended to all persons who have been engaged, or who have volunteered, in a role that is understood to exclude sexual acts, but who would be liable under current legislation to conviction only if sexual exploitation could be proved.

A potential criticism of this recommendation is that it is discriminatory — those who hold a position that excludes sexual acts are not free to engage in casual sex with persons in their care. However, to afford such a freedom to those who hold what are in many ways positions of trust is to risk the exploitation of the persons in need of protection. Declarations of the rights of the disabled acknowledge that it may be necessary to curtail the rights of affected persons, a notion which is justified by reference to harm occurring, either to the person or to others (McSherry & Somerville, 1998). Our suggestion is in keeping with this principle.

A second point which may be seen as discriminatory is that there is no criminal liability for analogous acts that do not involve a person with mental impairment. A consensual sexual act between a professional and their adult client, patient or student is viewed as unethical but not criminal. This might be because there are sanctions for professionals who breach ethical principles. Moreover, increased gravity in offences against persons with mental impairment is consistent with existing principles of aggravation. In the eyes of the law, any offence is aggravated when committed against a member of a vulnerable

population, which includes people with disabilities (Walker & Padfield, 1996), and more severe penalties are available for such convictions. Giving criminal status to acts that would be viewed as merely unethical in other circumstances is consistent with this approach. It is difficult to see how it is possible to afford protection to persons with mental impairment unless there are some differences between legislation that applies to them and legislation that applies to the population as a whole. Adherence to general legal principles while increasing the severity of the offence and the sentence satisfies this protective requirement.

A weakness with existing legislation that bans all sexual acts between any worker at a residential facility and a resident is that relationships are prohibited with workers who do not provide services to that particular person. Examples are maintenance workers, gardeners, administrative staff and the like, who may be in a position to form genuine friendships with residents. People filling these roles are not ascendant in any significant respect over the person with mental impairment, and sexual acts do not contravene the scope of the relationship. The suggested policy minimises restrictions and is therefore consistent with the principle of maximisation of the human rights of persons with disabilities.

Thus, this approach may be employed as a basis for legislation that approximates the criteria of being non-discriminatory, minimally restrictive, clearly defined and applicable. The emphasis is on approximation: we do not claim that our recommendation is ideal. Any specialised clauses that apply only to a subsection of the population are immediately suspect as discriminatory. Yet the right to protection can only be preserved by the enactment of such special provisions. Without them, people who are particularly vulnerable can claim only the protection afforded to the whole community. We have argued that such a position is unsatisfactory. It is not kind to pretend that people with disabilities do not have special needs when in fact they do; to that end we have attempted to formulate a legislative approach that meets those needs while at the same time most fully supports the exercise of their rights.

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