

**Protection or paternalism? A critical evaluation of  
Australian legislation relating to sexual acts  
involving persons with intellectual disability**

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I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution.

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## Abstract

As a result of the development and recognition of human rights and of the principle of normalisation, in recent decades sweeping changes have occurred in the living conditions of many people with intellectual disability. The United Nations Declaration on the Rights of Mentally Retarded Persons (1971) contains statements to the effect that, as far as possible, the lives of disabled persons should resemble those of their non-disabled peers, and this presumably extends to sexual expression. However, the words “as far as possible” imply that in some circumstances, limitations on a right may be justifiable. One such circumstance is where a competing right exists, for example, the right to sexual expression has to be balanced against a right to protection. Under some conditions, the provision of protective measures may fall to the criminal justice system, which may be used to afford protection to persons with intellectual disability. Australian jurisdictions have used three different approaches in current legislation: to set a minimum standard of sexual knowledge that must be present before the person is deemed capable of consent to sexual activities; to prohibit sexual relations with persons holding power or authority over the person; and to proscribe all sexual exploitation. This thesis contains proposals for reforms to each category of legislative provisions. First, it is suggested that the standard of knowledge required to support consent should more closely resemble the knowledge required for informed consent to medical procedures. Second, restrictions on sexual activity with persons with intellectual disability based

on employment status should be relaxed where the role of the staff member does not confer power to coerce people with intellectual disability. Third, with regard to the prosecution of offences against incapable persons with mental impairment, it is proposed that the charge should be sex without consent. On the other hand, it is argued that prosecution under criminal law is inappropriate where a vulnerable but capable person is deemed to have been exploited. The thesis contains a number of further recommendations for the reform of anomalies which exist between the general law of sexual offences and those committed specifically against persons with mental impairment. It is suggested that marriage be abolished as a defence to sexual acts with an incapable person and that offences against persons with mental impairment carry equivalent penalties to general sexual offences. On the basis of literature reviewed in this thesis, two additional proposals have been made. First, that education in the sexual rights of persons with intellectual impairment should be given to carers so that they do not unduly inhibit the development of sexual relationships by that person. The second proposal is that reform should be accompanied by the provision of repeated, appropriate, detailed and specific sex education of all persons with intellectual impairment and that this education should be based on needs identified in the aforementioned research. The tentative outcome of proposals contained in this thesis is that persons capable of consent would enjoy enhanced freedom to exercise their right to sexual expression, and those incapable of consent would be afforded more certain protection.

<b>Table of Contents</b>	
<b>Chapter 1: Introduction</b>	<b>1</b>
<i>Normalisation theory</i>	2
<i>Human rights</i>	4
<i>A note on the interface between psychology and law</i>	7
<b>Chapter 2: Context and background</b>	<b>13</b>
<i>The difficulties of defining intellectual disability</i>	14
<i>Incidence</i>	16
<i>Description of the relevant laws</i>	17
<b>Chapter 3: A history of intellectual disability, sexuality, and the developing law</b>	<b>30</b>
<i>The eugenic era</i>	38
<i>Post WWII: Human rights, normalization and deinstitutionalization</i>	48
<b>Chapter 4: The concept of sexual exploitation in legislation relating to persons with intellectual disability</b>	<b>58</b>
<b><i>Part I: A Population in Need of Protection?</i></b>	<b>62</b>
<i>Part II: Prohibition of Sexual Exploitation by Any Person</i>	70
<i>Part III: Banning Relationships with Persons in Authority</i>	80
<i>Part IV: Is Protection Without Discrimination Feasible?</i>	89
<i>Part V: Relationships that might function as legislative models</i>	90
<i>Part VI: Conclusions and Recommendations</i>	95
<b>Chapter 5: To what extent can consent be uninformed? The validity of consent to sexual acts by persons with intellectual disability</b>	<b>102</b>
<i>Defining consent</i>	109
<i>What knowledge should be required before consent may be given?</i>	121
<i>The cause of incapacity</i>	133
<i>Conclusion</i>	138
<b>Chapter 6: Can consent be uninformed? Suggested reform of sexual offences against persons with intellectual disability</b>	<b>141</b>
<i>Current law on capacity to consent to sexual acts</i>	143
<i>What are "significant relevant factors"?</i>	150
<i>Balancing protection against sexual autonomy</i>	151
<i>What position should the law take?</i>	153
<b>Chapter 7: Sexuality, the incapable person and the law: Some issues</b>	<b>160</b>
<i>How serious is having sex with an incapable person?</i>	167
<i>The marriage defence</i>	176
<i>Continuing discrimination</i>	181
<b>Chapter 8: Reform proposal</b>	<b>186</b>
<i>Current law and issues that arise from it</i>	187
<i>Further issues</i>	195
<i>Available sentences</i>	198
<i>A Model Law</i>	198
<i>Conclusions</i>	201
<b>Chapter 9: Conclusion</b>	<b>203</b>
<i>What changes should be made to sexual assault law?</i>	207
<b>References</b>	<b>210</b>

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