



Current and proposed sexual consent laws in Australia

**Submission by
Queensland Advocacy for Inclusion**

to

**Senate Standing Committee on Legal and Constitutional
Affairs**

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About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (**QAI**) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the **Human Rights Advocacy Practice** (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the **Mental Health Advocacy Practice** (which supports people receiving involuntary treatment for mental illness); the **NDIS Advocacy Practice** (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); and the **Disability Advocacy Practice** (which operates the Pathways information and referral phone line for all people with disability in Queensland, and provides non-legal advocacy support to young people with disability, including in relation to education). Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

Since 1 January 2022, QAI has also been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN). QIDAN has three aims: member support, sector advocacy and systemic advocacy. Member organisations work collaboratively to raise the profile of disability advocacy while also working towards attitudinal, policy and legislative change for people with disability.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights, and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (CRPD);
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

QAI's recommendations

1. Section 216 of Queensland's Criminal Code arbitrarily regulates the sexual activity of people with an 'impairment of the mind' and disproportionately violates the human right of people with disability to sexual expression.

2. Consideration should be given to alternatives that ensure the rights of people with disability to express their sexuality are upheld, whilst protecting against the risk of sexual exploitation of people with impaired decision-making capacity.

For example, consideration could be given to including a circumstance of aggravation in the *Penalties and Sentences Act 1992* (Qld), whereby additional criminal penalties occur if an offence is committed and the lack of consent is a result of the victim's impaired decision-making capacity to provide consent to sexual activity.

The law could also be changed to uphold the rights of people with disability to engage in sexual relationships, while still criminalizing sexual activity in situations of sexual exploitation, such as when sexual relations occur between a person with disability and a support worker, or in situations where the person with disability does not have capacity to consent.

Introduction

QAI welcomes the opportunity to make a submission to the Committee's inquiry into current sexual consent laws in Australia. QAI has consistently raised concern about provisions within Queensland's Criminal Code that infringe the human rights of people with disability and which arbitrarily limit their right to sexual expression. QAI has long called for the abolition of Section 216 of the Criminal Code which criminalises sexual activity involving a person with an 'impairment of the mind', even when that person has capacity to consent to the sexual activity.

In the words of the Queensland Public Advocate, "*Where people retain capacity to consent to participating in a sexual relationship with another person, they should have their right to be recognised as an autonomous and sexual being respected and protected by the law*".¹ QAI's submission therefore seeks to contribute to the Committee's inquiry by highlighting the inequitable way in which some laws relating to sexual consent can inappropriately infringe the fundamental human rights of people with a disability.

Section 216 of the Qld Criminal Code

Under Section 216 of Queensland's Criminal Code, it is a crime to engage in sexual activity with a person who is classified as having an 'impairment of the mind'.² The Criminal Code defines a person with an 'impairment of the mind' as "a person with a disability that, a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and, b) results in i) a substantial reduction of the person's capacity for communication, social interaction or learning; and ii) the person needing support."³

QAI has numerous concerns regarding this definition and its use within the Criminal Code, including its application to laws regulating the sexual activity of people with a disability.

1. The scope of the definition is so broad that it includes people with a disability whose impairment may not impact their decision-making capacity. For example, a person may have a neurological impairment that impacts how they communicate and which may result in the person requiring support for various activities of daily living, however they may retain the capacity to make their own decisions, particularly in the presence of support. Section 216 nonetheless effectively criminalises any sexual contact with that person, even if they have the capacity to consent to and understand the nature of such activities.

Although Section 216 provides a defence if the conduct did not constitute 'sexual exploitation', this term is ambiguous and subject to varying interpretations and the provision still criminalises otherwise consensual and legal sexual activity by placing the onus of proof onto the alleged perpetrator to prove that the conduct was not an act of sexual exploitation.⁴

2. The definition does not reflect the widely accepted position that decision-making capacity, including in relation to sexual activity, is contextual. In other words, capacity is decision, time, and situation (or 'domain') specific, whereby a person's ability to make decisions and communicate them can fluctuate and change depending upon the nature of the decision required and the circumstances in which it is made. Assumptions about a person's capacity cannot and should not be

¹ 2022 Public Advocate Discussion Paper - section 216 Queensland Criminal Code 1899, p3

² *Criminal Code Act 1899* (Qld) s 216

³ *Ibid*, Section 1 - Definitions

⁴ 2022 Public Advocate Discussion Paper - section 216 Queensland Criminal Code 1899, p7

drawn simply from the presence of an impairment. All adults at law are presumed to have decision-making capacity until proven otherwise and capacity should be assessed on a decision-by-decision basis. This means that capacity must be assessed every time a person makes a decision, including decisions about engaging in sexual activity.

This position is adopted in other Queensland legal contexts, such as the Queensland Capacity Assessment Guidelines 2020 and their role alongside the *Guardianship and Administration Act 2000* (Qld). Moreover, the courts have ruled that a person with intellectual impairment *can* have the capacity to consent, thereby reinforcing the position that capacity should be assessed on an individual and case by case basis.⁵

3. The definition is not congruent with contemporary understandings of, and approaches to, supported decision-making as per Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). Through ratification of the CRPD, Australia has committed to ensuring a model of supported decision-making whereby people with disability are assisted to maintain and develop their legal capacity through the assistance of informal supporters to understand, consider and communicate their decisions rather than have this right taken away from them.⁶ Only in limited and extremely rare circumstances is the denial of this right necessary, and this must always be a measure of last resort. Indeed, the Australian Law Reform Commission (ALRC) suggests that rather than considering whether a person has capacity for a matter, focus should be placed upon the type of support that is required. The focus has therefore shifted away from making arbitrary conclusions about a person's capacity due to the presence or not of an impairment, and our laws must reflect this change accordingly. People with an 'impairment of the mind' should be supported to make decisions about their own lives, including decisions about their sexuality and their desire to engage in sexual relationships.

4. The definition is at odds with the social model of disability which considers 'impairment' to be a personal characteristic, and which conceptualises 'disability' as a social construct caused by inaccessible environments.⁷ Consequently, the social model of disability requires an 'ecological view of self-determination'.⁸ That is, a focus on the environmental factors that facilitate the exercise of legal capacity and decision-making, where the onus is placed upon 'supporters, rather than those being supported'.⁹ Whether a person can consent to engaging in sexual activity is therefore related to the way in which the person is supported to understand the nature of sexual activity and to communicate their preferences, not simply attributable to the presence of a disability.

5. Singling out people with an 'impairment of the mind' and denying their right to sexual expression is discriminatory to people with disability in the sense that they are treated less favourably than others by the law. This is contrary to various legal instruments, including Article 5 of the CRPD which requires equal recognition of people with disabilities before the law and which imposes a requirement upon States Parties to prevent and eliminate discrimination. People with

⁵ *R v Mrzljak* at [16] 'The absence of consent is not an element of an offence under s 216 Criminal Code and it is rightly uncontroversial that an intellectually impaired person as defined can have the cognitive capacity to consent and can give consent within the meaning of "consent" in s 348.'

⁶ Convention on the Rights of Persons with Disabilities, Article 12(3)

⁷ Kayess, R. & Sands, T. (2020) *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation*. Sydney: UNSW Social Policy Research Centre

⁸ Watson, J. (2016) *Assumptions of Decision-Making Capacity: The Role Supporter Attitudes Play in the Realization of Article 12 for People with Severe or Profound Intellectual Disability*, *Laws*, 2016, 5 ,6; p 3

⁹ *Ibid*

disability also have the right to marriage, family, parenthood and relationships on an equal basis with others, as per Article 23 of the CRPD.

Denying certain people with disability their right to sexual expression simply due to the presence of an 'impairment' also exemplifies antiquated attitudes towards people with disability and perpetuates harmful stereotypes that conceptualise people with disability as 'victims' or asexual, unable to enjoy autonomy over their bodies and unable to exercise self-determination and personal control over their own lives. Such attitudes are extremely destructive and have no place within today's society. The disability rights movement has worked tirelessly over recent decades to dispel such attitudes. Governments must therefore take the opportunity to reconsider the assumptions, values and beliefs underlying our laws and policies and consider the extent to which they reflect a human rights framework. QAI submits that these provisions of the Criminal Code are grounded in ableist attitudes, reflect archaic assumptions about the capabilities of people with disability and have no place within contemporary Queensland or Commonwealth legislation.

As some academics have put it, "*laws that are constructed to deny sexual agency of people with disabilities...may do more harm than good in the stigma they perpetuate by denying the sexual agency of these groups.*"¹⁰

6. The definition of 'impairment of the mind' and its application to laws regulating sexual activity could be considered in contravention of various sections of the *Human Rights Act (2019)* Qld, in particular, section 25 which states that a person has the right not to have their privacy, family, home, or correspondence unlawfully or arbitrarily interfered with.¹¹ This argument is particularly compelling when the person can be supported to exercise their legal capacity and can consent to engaging in sexual activity, meaning that these provisions are neither reasonable, proportionate nor justifiable.

7. QAI acknowledges that the purpose of Section 216 is to ensure vulnerable people with disability are protected against abuse and exploitation. However, despite the benevolent intentions behind these provisions, sexual assault laws already ensure that non-consensual based sexual activity is a criminal offence. Indeed, sexual assault cases rest upon the prosecution proving that the victim did not provide consent. Additional provisions, such as Section 216 or other provisions which prohibit a person with an impairment of the mind from attending a place used for the purposes of prostitution, are unnecessarily paternalistic and arguably redundant as non-consensual based sexual activity is already an offence under the law.

Consideration should be given to alternatives that ensure the rights of people with disability to express their sexuality are upheld, whilst protecting against the risk of sexual exploitation of people with impaired decision-making capacity. For example, consideration could be given to including a circumstance of aggravation in the *Penalties and Sentences Act 1992* (Qld), whereby additional criminal penalties occur if an offence is committed, and the lack of consent is a result of the victim's impaired decision-making capacity to provide consent to sexual activity. A person's impaired capacity can already be considered with regards to the severity of punishment, and the appropriateness and proportionality of imprisonment.¹²

¹⁰ Anna Arstein-Kerslake, Eilionoir Flynn, 'Legislating Consent: Creating an Empowering Definition of Consent to Sex That Is Inclusive of People With Cognitive Disabilities' (2015) *Social and Legal Studies*, Vol. 25(2), 4.

¹¹ *Human Rights Act 2019* (Qld), section 25

¹² *R v Hansen* [2018] QCA 153

Less arbitrary alternatives are possible and are apparent in other jurisdictions across Australia. The law could be changed to uphold the rights of people with disability to engage in sexual relationships when they have the capacity to decide to do so, while still criminalising sexual activity in situations of sexual exploitation, such as when sexual relations occur between a person with disability and a support worker, or in situations where the person with disability does not have capacity to consent.

8. The challenges presented by this piece of legislation are evident in the case law. In the case of *R v Little*¹³, the complainant, a person with an intellectual disability, entered a relationship with the defendant, a person without a disability. The defendant was charged and convicted with two counts of rape, two counts of attempted carnal knowledge of an intellectually impaired person and two counts of indecent dealing with an intellectually impaired person.

Upon appeal, the judge considered the definition of ‘sexual exploitation’, to determine the reasonable grounds of whether the appellants conduct constituted exploitation.¹⁴ The judge stated that it required the jury to make ‘value judgments about the notoriously difficult matter of the nature of other people’s intimate relationships.’¹⁵ The judge also gave consideration to the right of the person with an intellectual disability to make decisions about her own relationship, and found that the complainant was able to ‘give informed consent to sex and had adequate understanding of sexuality and relationships’, further stating that ‘she was entitled to make her own decisions about forming intimate relationships’.¹⁶ Despite the fact that the judge considered she was capable of informed consent, consent is not considered a defence for the offence.

R v Mrzljak supports this stance, stating that the broad nature of the definition of impairment of mind can include persons with cerebral palsy who may have a ‘genius IQ’.¹⁷ The judge found that a person with a so called ‘impairment of the mind’ may still withhold or provide consent regardless of their condition.

The case law shows that Section 216 fails to appropriately balance protecting the right to consent to sexual and intimate relations, whilst still protecting people with disability from exploitation, and that the courts are struggling to interpret the legislation accordingly.

Other considerations

In addition to our concerns with Section 216 of the Qld Criminal Code, QAI would like to draw the Committee’s attention to the disproportionately high numbers of people with disability and, in particular, women and girls with disability, who experience sexual violence.¹⁸ While these statistics may be put forward as a reason to keep provisions such as Section 216, we submit that arbitrarily limiting the human rights of all people with certain disabilities in order to offer protection to some people (i.e. people who are unable to consent to sexual activity) does not adequately nor appropriately address this concern and violates key human rights principles in the process.

¹³ *R v Little* [2013] QCA 223

¹⁴ *Ibid* at [28].

¹⁵ *Ibid*

¹⁶ *Ibid*

¹⁷ *R v Mrzljak* [2004] QCA 420 at [68].

¹⁸ Royal Commission in Violence, Abuse, Neglect and Exploitation of People with Disability, Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia, Centre of Research Excellence in Disability and Health, March 2021, 14 at <https://disability.royalcommission.gov.au/publications/research-report-nature-and-extent-violence-abuse-neglect-and-exploitation-against-people-disability-australia>

Unfair or exploitative forms of behaviour that disproportionately affect particular segments of the community have the potential, if not afforded legal recognition, to reinforce existing patterns of social discrimination. Coercive and fraudulent sexual behaviour demands a well-targeted and effective legal response, and QAI has put forward some alternative suggestions. The law plays a crucial role in setting the boundaries of socially and culturally acceptable conduct, however, it must do so in a way that respects and upholds human rights and should sit alongside other forms of intervention.

For example, as the Public Advocate has stated,

“Many researchers, commentators and law reform commissions have emphasised the importance of providing accessible appropriate sex education to people with intellectual disabilities to not only support them to realise their sexual rights, but equally importantly, to help reduce the risk of sexual assault. Done well, accessible sex education contributes to reducing vulnerability as well as to reducing instances of inappropriate sexual expression.”¹⁹

Further, when examining sexual consent laws in Australia, the Committee should consider the significant discrimination experienced by people with disability when interacting with the criminal justice system. For example, a person with a disability may not be believed or recognised as a competent witness due to prejudicial attitudes that relate to the presence of an impairment.

Sexual consent laws must therefore respect the human rights of people with disability and must be accessible to, and appropriate for, all people with disability.

Conclusion

QAI advocates for a more nuanced approach that neither limits the right to consensual sexual expression nor unreasonably exposes people with intellectual or cognitive impairments to sexual exploitation. The law should be updated to reflect contemporary human rights principles while remaining responsive and alert to situations of exploitation and power imbalances that leave people with disability vulnerable to abuse.

QAI submits that specific provisions in Queensland’s Criminal Code that arbitrarily regulate the sexual activity of people with an ‘impairment of the mind’ are inappropriate and in need of reform.

QAI thanks the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.

¹⁹ 2022 Public Advocate Discussion Paper - section 216 Queensland Criminal Code 1899, p20