*Sexuality and the Disabled: Legal Issues**

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Freedom to marry and freedom to have sexual relations are fundamental human rights. Like anyone else, severely disabled people may have strong sexual needs, but Australian law, in most jurisdictions, severely restricts such a person's rights to have sexual relations. It is fair to say that both the civil and criminal law, in many respects unnecessarily discriminatory against disabled people, are both archaic and anachronistic and, worse, overly paternalistic.

It is important to remember at the outset that simply because a person has been classified or labelled as intellectually, physically or mentally disabled does not mean that he/she has lost his or her legal rights or duties. Legislation may take rights away in specific instances. Care providers or parents, out of concern for a person, may in practice prevent that persons enjoyment or fulfilment of rights but, generally speaking, whether a person can exercise the legal rights that others take for granted will depend on that person's individual capacity to understand the nature and consequences of his or her actions in a specific situation.

The freedom to have sexual relations

Marriage

Clearly a person who is intellectually disabled and has entered into a valid marriage has the right and freedom to participate in sexual relations. But the central issue here, of course, is when or whether a severely intellectually or mentally disabled person can enter into a valid marriage. The question is one of capacity.

Section 23B(1)(d)(iii) of the *Marriage Act* (Cth) provides that a marriage is void (i.e. of no legal effect) where the consent of either of the parties is not a real consent because he or she is mentally incapable of understanding the nature and effect of the marriage ceremony. It follows from this that mere awareness of going through

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* This paper was originally presented to a workshoop on Sexuality and the Disabled conducted by Family Planning Tasmania Inc. in Hobart in September 1991. In some sections of the paper the author discusses the legal position as it exists in Tasmania with specific reference to Tasmanian statutory provisions in most cases, however, the law is the same or similar in the other Australian jurisdictions. Important differences in content have been noted in the footnotes.

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a marriage ceremony is not enough; a person must also understand the nature and effect of the ceremony involved.

What is meant by the words, 'incapable of understanding the nature and effect' of the marriage ceremony? In a leading English case Lord Justice Singleton said:

> In order to ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.[1]

It seems to me this statement largely begs the question. The responsibilities normally attaching to marriage may vary enormously—if, for example, they extend to taking care of one's own person and property the test of capacity is a high one. However, the position seems to be otherwise and the test is not a stringent one. In another English case, *Durham v Durham*[2] (1885) Sir James Hannan said:

> It appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement to live together, and love one another as husband and wife, to the exclusion of all others.

In the very few reported cases in this area the courts have generally been very reluctant to find that a marriage is void on the ground of lack of capacity. As was pointed out by Caruthers J. in 1857:[3]

> But every consideration of policy and humanity admonishes us that a contract so essentially connected with the peace and happiness of individuals and families, and the well being of society, should not be annulled on this or any other ground, not clearly made out. The consequences, in many cases, would be most deplorable. The rights of property would be unsettled and the peace of families destroyed, to say nothing about the effects upon the innocent offspring. The annulment of other contracts would only affect property; but this would do that, and more—it would tell upon the happiness, character, and peace of the parties. The appalling character of these consequences is well calculated to impress the courts with the solemn duty of requiring a clear case for the application of the general principle to this delicate and important contract.

I suggest that the views of the judiciary, fortunately, have changed little in the ensuing 100 years!

It is important to reiterate that intellectual or mental disability of itself does not imply lack of understanding of the nature of the marriage ceremony. As with all other citizens, an intellectually

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1 *In the Estate of Park* [1954] P.112 at 127. This decision was applied in Australia in *Dunne v Brown* (1982) 60 F.L.R. 212 at 222-223.

2 (1885) 10 P.D 80 at 81.

3 *Cole v Cole* (1857) 5 Sneeds' Tenessee Rep. 56 at 58.

disabled person should be deemed capable of that understanding unless it is proved otherwise. In fact there is a legal presumption that when a marriage is celebrated the parties understand the nature of the ceremony and the onus of disproof will therefore be on the party disputing the validity of the marriage. This is perhaps one reason why there have been so few reported cases involving the legal validity of a marriage involving intellectually disabled persons. Another reason, identified by the Bright Committee[4] in 1981, may be

> that many people with an intellectual disability may be prevented from forming close long term relationships and from marrying by segregation, over protection and lack of normal life experiences, as well as by well-meaning families and service providers who brought undue influence to bear on the movements and friendships of such persons.

However, it must be recognised that there are people in the community whose disability is such that they will be incapable of marriage or will never have the opportunity to marry. What then is the legal position in respect of those people who engage in sexual relations?

Sexual relations outside marriage

The position in Tasmania is that if a man has sexual intercourse with a woman knowing that she is either insane or a defective he is guilty of a criminal offence. Defective in this context means 'severe subnormality' which is defined in the *Mental Health Act* 1963 (Tas) to mean 'a state of arrested or incomplete development of mind that includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation'. In Western Australia and South Australia[5] the position is similar while the other Australian States have very recently enacted legislation in an attempt to overcome the overly protective and discriminatory nature of these special statutory offences.

The result in at least three Australian States is that unless they are married[6] the severely intellectually disabled do not have sexual freedom because any sexual behaviour involving them is an offence. This is not to say that the intellectually disabled person is always criminally responsible in such a case. However willing she was, an intellectually disabled woman who engages in sexual intercourse with a man never commits an offence; but the man may, even if he is

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4 *The Law and Persons with Handicaps, Vol. 2 ,Intellectual Handicaps (The Bright Report)* South Australia, Govt. Printer.

5 Criminal Code (W.A.), s.188; *Criminal Law Consolidation Act* (S.A.), s.49.

6 S.49(8) of the *Criminal Law Consolidation Act* (SA) specifically provides that the offence is not committed if the persons are married to each other. See also *Crimes Act* (Vic.) s.51. In the other States no offence is committed because the sexual intercourse would not be 'unlawful' as required by legislation.

also intellectually disabled, and the practical result is to severely restrict the freedom of the woman as well.

It has been argued that these statutory provisions constitute a serious interference with individual liberty, are discriminatory and overly-protective; and, because of the risk of prosecution as an aider or abettor, inhibit the staff of hospitals and other residential establishments from allowing sexual relations between patients or residents of group homes which they believe could be of therapeutic value. While it may be that prosecutions for these offences are rare[7]—usually only in cases where the man has been warned that the woman has a mental disability—and that in Tasmania the offences may be difficult to prove because the Crown is required to establish that the accused man knew the woman was a defective not merely that he suspected or ought to have known[8]—nevertheless it is submitted that they should be repealed unless overwhelming justification can be found for them.

Numerous justifications have been offered for the existence of these offences. One reason for their introduction is said to be the difficulty of establishing a rape charge in these circumstances. The crime of rape requires the Crown to prove that a person had sexual intercourse with another person without that person's consent. However, the special statutory offences, such as the Tasmanian—unlawful sexual intercourse with a defective—do not require the Crown to prove lack of consent on the part of the victim. However, while in most cases involving women who are mentally or intellectually disabled it may be difficult to prove absence of consent, in fact ,the law requires that for a consent to be valid it must be an informed or rational consent. Mere acquiescence or submission are not enough. For example, s.2A of the Criminal Code (Tas) says that 'consent' means one that is 'freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which consent is given'.

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7 In Tasmania, for example, only two people have been charged with the crime of 'unlawful sexual intercourse with a defective' in the last five years. In the first, in 1986, the Crown did not proceed with the charge and the second case has still to be determined. There have, however, been prosecutions in other states. See *Beattie* (1981) 26 S.A.S.R. 481 (S.A.), *Abbott* (1983) 9 A. Crim. R. 151 (Qld) and *Lindsay* (1984) 15 A. Crim. R. 179 (W.A.).

8 In New South Wales and South Australia the Crown are similarly required to prove that the accused had knowledge of the relevant disability, whereas in Western Australia it is sufficient if the accused ought to have known the woman was mentally disabled or intellectually handicapped. In Queensland the accused will have a defence to a charge of having 'unlawful carnal knowledge of an intellectually impaired person' if he believes on reasonable grounds that the person was not so impaired.

Thus, in the context of rape, it has been held that unless the woman has sufficient knowledge or understanding to comprehend -

(1) that what is proposed to be done is the physical act of penetration by the male organ, or

(2) that the act of penetration proposed is one of sexual connection as distinct from an act of a totally different character, her consent is invalid.[9]

In many cases therefore, where the woman is severely intellectually disabled, the Crown will be able to prove that the woman did not consent and the accused could be successfully prosecuted for rape.[10] If this is so, it is extremely difficult to see how the justification for the special statutory crimes can be retained.

Another justification for the offences is said to be the protection of women from exploitation and corruption, not only from the person allegedly "taking advantage" of her but from herself, so that even if she understands the nature of the act and consents, her potential partner will presumably be deterred by possible criminal prosecution. If the justification is protection against exploitation, by abuse of a position of trust or dependence, the offences are drawn too widely since they are not limited to cases where sexual relations involve exploitation.

Victoria, New South Wales and, to a lesser extent, Queensland have recently enacted legislation along the lines suggested above. For example, in New South Wales, s.72A of the *Crimes Act*—which provided that whosoever knowing a woman or girl to be an idiot or imbecile has or attempts to have unlawful carnal knowledge of her shall be liable to penal servitude for five years—was repealed in 1990 and replaced with sections which limit criminal prosecution to situations where the offender is either in a position of authority in connection with a facility or program providing services to people with intellectual disabilities[11] or has taken advantage of the other person's vulnerability to sexual exploitation.[12] Similarly in Victoria

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9 See *Morgan* [1970] V.R. 337 at 341, *Schell* [1964] Tas. S.R. 184, *Roden* (1981) 4 A. Crim. R. 166.

10 Note however that in the common law States, namely Victoria, New South Wales and South Australia, there is an additional requirement for a successful rape prosecution. In those States the Crown is required to prove not only that the accused had sexual intercourse with a woman without her consent, in fact, but that at the time he intended to have intercourse he was either aware that the woman was not consenting or else realised that she might not be and determined to have intercourse regardless. Clearly, if the accused knows or possibly suspects that the woman lacks the capacity to consent to sexual intercourse it will not be difficult for the Crown to establish the additional requirement. See *Lambert* [1919] V.L.R. 205 at 213.

11 *Crimes Act* (N.S.W.) s.66F(2).

12 *Crimes Act* (N.S.W.) s.66F(3).

the old statutory crimes have been replaced with laws that provide adequate protection and seek to prevent exploitation and abuse by those in positions of authority or trust. In Victoria it is now only an offence to have sexual intercourse with a person with 'impaired mental function'[13] if the person committing the act is providing medical or therapeutic services to the other person or is a worker at a residential facility.[14]

Sterilisation

Sterilisation operations (usually involving hysterectomy) may be carried out on intellectually disabled children or adults for two main reasons: either as a permanent solution to the risk of pregnancy; or as a drastic form of menstrual management. The following comments by a judge of the Family Court are typical of the reasons advanced for justifying sterilisation in the former case:

> She (the 15 year old in question) is quite unable to understand the process of conception and birth and would be quite unable to bear a child. Pregnancy would be most likely to have a highly detrimental effect upon her and should she become pregnant, for her own sake, her pregnancy would be terminated ... she would be highly confused and disturbed by a pregnancy in its latter stages and the process of birth would be a frightening and catastrophic event which would seriously impair her opportunities for development.[15]

Sterilisation of the intellectually disabled raises a number of legal and social issues.[16] The following propositions represent the current legal position:

(1) A sterilisation operation performed on a person who has the capacity to given an informed[17] consent to the operation is unlawful and could give rise to a prosecution of the doctor who performed the operation for assault[18]. This issue rarely arises

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13 In s.50 of the *Crimes Act* 'impaired' means 'impaired because of mental illness, intellectual disability, dementia or brain injury'.

14 Both the term 'worker' and 'residential facility' are defined widely in s.50 of the *Crimes Act.*

15 In *Re a Teenager* (1988) 13 Fam. L.R. 85 per Cook J.

16 For a detailed discussion of the legal issues and the recent statutory reforms in the various States see: Blackwood J., *'Sterilisation of the Intellectually Disabled: The Need for Legislative Reform'* (1991) 5 AJFL 138.

17 For the purposes of assault - both civil and criminal a consent will be sufficiently informed if the person understands the general nature and purpose of the proposed treatment. See: *Chatterton v Gerson* (1981) 1 All ER 257; *Schell* (1964) Tas SR 184; *Disability Services and Guardianship Act* 1987 (N.S.W.), s.33(2)

18 Subject to the exception that a surgical operation, including sterilisation, performed in an emergency is lawful. See: *Secretary Department of health and Community Services (NT) v JWB and SWB* (1992) 66 ALJR 300 per McHugh J at 337; Tasmanian Criminal Code

as in most reported cases the woman concerned clearly lacks the capacity to consent.

(2) In relation to children the High Court, in the *Secretary Department of Health and Community Services (NT) v JWB and SWB*,19 has recently confirmed that at common law[20] a parent or guardian can consent to medical treatment of a child, including an intellectually disabled child. However the High Court, by majority, held there are some medical procedures which are beyond parental authority.21 Sterilisation is one example22. For such an operation to be lawfully carried out the approval of the Family Court must first be obtained.[23] Essentially ,the High Court gave two reasons for this decision:

(i) the significant risk of making the wrong decision, either as to a child's present or future capacity to consent ,or as to what are the best interests of a child who cannot consent; and

(ii) the consequences of a wrong decision are particularly grave. [24]

It is also clear from the majority judgment that a sterilisation operation on an intellectually disabled child is to be regarded as a 'step of last resort'. The operation would not be in the child's best interests unless alternative and less invasive procedures have failed and it is certain that no other procedure on treatment will work. Similar regard will necessarily be had to the various measures now available for menstrual management and prevention of pregnancy.[25]

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s.51(3); Guardianship and Administration (Mental Capacity) Act *1992* (SA) s.61.

19 (1992) 66 ALJR 300 (hereinafter *JWB and SWB*)

20 The position is the same in the Code jurisdictions. See: *Criminal Code* (Tas) s.51(3).

21 Above, in 19, per Mason CJ, Dawson, Toohey and Gualdron JJ at 310-311.

22 Abortion, donation of non-regenerative tissue and cosmetic surgery may be other examples.

23 In South Australia and New South Wales the position as regards sterilisation of intellectually disabled children is covered by statute. In both States the performance of the operation is unlawful unless the approval of the appropriate tribunal - in South Australia the Guardianship Board and in New South Wales the Supreme Court - is obtained.

24 Above, fn 21.

25 Despite the decision in *JWB and SWB* the position in those States where legislation is in force authorising surgical operations remains unclear. For example, in Tasmania a surgical operation is lawful if it is performed with the patient's consent and is for his or her benefit and reasonable in the circumstances (s.51(1)). Section 51(2) provides that in the case of a child 'too young to exercise a reasonable discretion' about

(3) Unless a guardian has been appointed there is no person in law capable of consenting to medical treatment for a person over the age of 18 years irrespective of that person's intellectual capacity.[26] While there is now in most states,[27] and in the territories,[28] legislation providing for the appointment of guardians with the power to consent to medical treatment, the legislation in all jurisdictions is specifically designed to prevent unnecessary sterilisations upon intellectually disabled adults.

While the legislation in each State is similar, to the extent that in each jurisdiction the operation can only be lawfully performed if the consent of the appropriate tribunal (in most cases, the Guardianship Board) is obtained there are differences in approach and application. For example, in South Australia a sterilisation operation can only be approved by the Guardianship Board if either the operations is therapeutically necessary[29] or, if not:

(i) there is no likelihood of the person acquiring at any time the capacity to consent;

(ii) the person is physically capable of procreation and either

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the particular operation, consent may be given by a parent. The Code makes no distinction between therapeutic and non-therapeutic operations, for example, between an appendectomy and a sterilisation operation. It can be argued that provided the operation, whatever its nature, is for the childs 'benefit and reasonable in the circumstances', it is lawful. The same situation could prevail in Queensland and Western Australia where a similar section is in force. See: *Queensland Criminal Code*, s.282; and generally: O'Regan R., *Surgery and Criminal Responsibility under the Queensland Criminal Code* (1990) 14 Crim L.J. 73.

26 See, for example, s.51(2) of the *Criminal Code* (Tas.) which specifically limits third party consent to children. Compare s.282 of the *Criminal Code* (Qld.), however, which does not require consent for a surgical operation to be lawful, provided other criteria are satisfied. See above, fn 25.

27 N.S.W.: *Disability Services and Guardianship Act* 1987 (N.S.W. Act); Victoria: *Guardianship and Administration Act* 1986 (Vic. Act); South Australia: *Guardianship and Administration (Mental Capacity) Act* 1992 (S.A. Act); Western Australia: *Guardianship and Administration Act* 1990 (W.A. Act) Tasmania: *Mental Health Act* 1963 and Queensland: *Intellectually Handicapped Citizens Act* 1985. Note that in Tasmania and Queensland the relevant tribunal has no power to regulate sterilisation operations. Legislation is currently before the Tasmanian Parliament to provide for a new *Guardianship and Administration Act* which will contain extensive provisions dealing with medical treatment for disabled people.

28 Northern Territory: *Adult Guardianship Act* 1988 (N.T. Act) Australian Capital Territory: *Guardianship and Management of Property Act* 1991 (A.C.T. Act).

29 S.A. Act s.60(2)(a).

(a) is likely to be sexually active and no other method of contraception could reasonably be successfully applied; or

(b) in the case of a woman, cessation of her menstrual cycle would be in her best interests and the only practicably way of dealing with the problems of menstruation.[30]

By contrast, the legislation in force in Victoria, Western Australia and the Northern Territory simply requires that the tribunal be satisfied that the proposed operation is in the person's best interests[31] before approving the operation.

It is perhaps to be regretted that the words 'best interests' are not defined and that the respective Guardianship Boards are given no guidance as to when a sterilisation operation may be considered to be in a person's best interests.[32] The problem is, however, partly resolved by an additional requirement that the Board, in exercising its discretion, must act in a way which is the 'least restrictive of a person's freedom of decision and action'. In applying this principle to sterilisation operations the Victorian Guardianship Board has said that factors such as the possibility of pregnancy, the likelihood of sexual activity and the feasibility and medical advisability of less drastic means of contraception both at the present time and the foreseeable future will be taken into account in determining whether or not to approve the operation.

30 S.A. Act s.60(2)(b). The N.S.W. Act is similarly very specific and arguably excessively protective. See ss.42(b)-(f) and 45(2).

31 Vic. Act s.42, W.A. Act s.63(1), N.T. Act, s.21(8). The legislation in the A.C.T. is similar but the Tribunal must also be satisfied that the proposed operation is otherwise lawful and that the person is not capable of consent and is not likely to become capable in the foreseeable future. (s.70(1).

32 Compare the A.C.T. Act where 'best interests' are defined to include taking into account the wishes of the person; what would happen if the operation was not carried out; alternative treatments; and the availability of better treatment in the future.