



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Individual Advocacy for vulnerable People with Disability

14 October 2019

Your ref: #4947954

Dear Mr Jackson

Please accept these comments on Mistake in response to your letter of 20 September 2019.

Yours sincerely,

Michelle O'Flynn, Director

Ph: (07) 3844 4200 or 1300 130 582 Fax: (07) 3844 4220 Email: qai@qai.org.au Website: www.qai.org.au

2nd Floor, South Central, 43 Peel Street, STH BRISBANE QLD 4101

QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About QAI

Queensland Advocacy Incorporated (QAI) is a member-driven, non-profit advocacy organization for people with disability. Our mission is to promote, protect and defend, through advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland.

Our Human Rights and Mental Health legal services offer advice and representation on guardianship, administration and mental health matters. Our Justice Support and NDIS advocacy programs provide non-legal advice and support to people with disability in the criminal justice system and the NDIS. This individual advocacy informs our campaigns at state and federal levels for changes in attitudes, laws and policies and assists us to understand the challenges, needs and concerns of people with disability.

QAI's constitution holds that every person is unique and valuable and that diversity is intrinsic to community. People with disability comprise the majority of our board and their lived experience of disability is our foundation and guide.



Introduction

Australia is a signatory to the *Convention on the Rights of Persons with Disabilities*, (the 'CRPD') and the Preamble of the CRPD states that "women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation".¹ With particular reference to this QLRC inquiry, we note that what is true for women and girls generally is doubly true for women and girls with disabilities.

So the now widely-acknowledged truths that -

- sexual violence is more common than other forms of assault, but under-reported
- when reported, are prosecuted less frequently than other assaults
- when prosecuted, less frequently result in conviction, and which
- often have damaging long-term impacts on victims,

are profoundly true for women and girls with cognitive and other kinds of impairment. Even when their stories are believed they are likely to miss out on the opportunity to tell them because the court may not recognise them as competent witnesses.

Men and boys who have disabilities are victims of sexual assault too. This inquiry must take special account of their experiences and the ways in which Queensland laws around sexual assault deliver justice to them, and provide them and victims in the future with the confidence to come forward, knowing that they will be believed and heard and delivered justice too.

At the same time, we acknowledge that people with disabilities are overrepresented as suspects, defendants and offenders in sexual assault matters, just as suspects, defendants and offenders with disabilities are overrepresented right across the criminal justice system.² Cognitive and other impairments are particularly relevant to considering whether a defendant has made an error of judgement when assessing a complainant's verbal and non-verbal communication around non-consent.

We will go into greater detail around these issues once the QLRC has released its issues paper. Here, QAI is satisfied to lay out some general human rights principles that are relevant to the rights and interests of people with disabilities, and which we hope you will inform the development of the issues paper.

¹ CRPD Preamble '(q)'

² 10% of Queensland prisoners had intellectual disability according to a Queensland Corrective Services *Disability Survey*, 2002.



Relevant general principles of the [CRPD](#)

The following general principles establish the rights of persons with disabilities to equal treatment, autonomy and inclusion in all aspects of life.

- ‘People with disabilities face barriers in their participation as equal members of society and violations of their human rights’.³
- [Persons with disabilities experience] ‘multiple or aggravated forms of discrimination on the basis of race, colour, sex or other status’.⁴
- The CRPD promotes
 - ‘full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and .. respect for their inherent dignity’.⁵
 - ‘individual autonomy including the freedom to make one’s own choices, and independence of persons’⁶
 - ‘Full and effective participation and inclusion in society’⁷
- ‘Children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with ‘disability and age-appropriate assistance to realize that right’.⁸
- ‘States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects’.⁹
- People with disabilities have a right to respect for
 - ‘physical and mental integrity on an equal basis with others’,¹⁰ and freedom from,

³ CRPD Preamble ‘at (k)

⁴ CRPD, ‘Preamble’ at (p).

⁵ CRPD Art #1

⁶ CRPD Art #3.

⁷ Ibid.

⁸ Article #7 (3).

⁹ CRPD Art #16 (1).

¹⁰ CRPD Art #17.



- 'stereotypes, prejudices and harmful practices.. including those based on sex and age, in all areas of life'.¹¹
- 'States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on **how to avoid, recognize and report instances of exploitation, violence and abuse.**'¹²
- 'States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted'.¹³

QAI notes that CRPD Art #12 is particularly relevant to this inquiry. It states that persons with disabilities have a right -

- 'to equal recognition before the law'.
- 'to enjoy legal capacity on an equal basis with others in all aspects of life'.¹⁴

¹¹ Art #8 (1) (b).

¹² CRPD Art #16 (2)

¹³ CRPD Art #16 (5) .

¹⁴ CRPD Art #12.



Comments Specific to the TORs

1. 'Under section 348(1), consent means 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent'.

The phrase 'person with the cognitive capacity to give consent' is a contentious one in the Queensland Criminal Code ('CCQ') and warrants a QLRC inquiry of its own. The CCQ already includes a sexual assault provision (s 216) that was designed to protect some people with disabilities, defined as 'person/s with impairment of the mind'.¹⁵¹⁶ The definition of 'person with impairment of the mind' encompasses many people with disability who have no cognitive impairment at all,¹⁷ and many who, despite the presence of cognitive or other disabilities, have the capacity to make the decision to engage in a consensual sexual relationship,¹⁸ but consent is not an element in this offence.

Rather than the general presumption that impairment equals inability to consent, we note that capacity is time, domain and decision specific and fluctuates over time.¹⁹ A person may lack capacity for a particular decision temporarily, for a short period of time or for a long period of time. If a person lacks capacity in relation to a particular decision, they may regain and even increase their capacity in relation to that decision (as a result of, for example, abatement of passing illness, taking new medication, being assisted by new technology or acquiring new skills). This means that capacity must be assessed every time a person makes a decision, including decisions about intimate relations.

As we have already stated, QAI supports the right of all people with disability to make their own decisions, including decisions about engaging in intimate relations. Whatever definition of consent it is that the CCQ adopts, in our view it should never be one that invalidates consent on the basis of disability alone. The mere

¹⁵ Defined in the *Criminal Code* as a person with a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these, and results in a substantial reduction of the person's capacity for communication, social interaction or learning, and in the person needing support. While perhaps unintended, this definition encompasses many people with disability who, despite the presence of disability, have the capacity to make the decision to engage in a consensual sexual relationship.

¹⁶ CCQ section 1.

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

¹⁸ *R v Mrzljak* [2004] QCA 420.

¹⁹ See, eg, *Borthwick v Carruthers* (1787) 1 TR 648; *R v McNaughten* (1843) 10 Cl & Fin 200,210 (Tindal CJ); *Re Cumming* (1852) 42 ER 660, 668 (Knight Bruce L J); *Boughton v Knight* (1873) LR 3 P & D 64, 71 (Hannen J); *Cosham v Cosham* (1899) 25 VLR 418, 428-9 (Madden CJ, Holroyd and Hood JJ); *Re Hodges*; *Shorter v Hodges* (1988) 14 NSWLR 698, 706; *Re Bridges* [2001] 1 Qd R 574, 575-6 (Ambrose J); *Dalle-Molle v Manos* (2005) 88 SASR 193, 197 (Debelle J); *Lawrence v Federal Magistrate Driver* [2005] FCA 394 (15 April 2005) [12] (Moore J); *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114 (12 July 2006) [26]; *SA v Manonai* [2008] WASC 168 (15 February 2008) [2], [23] (Pullen JA); *Tobin v Ezekiel* [2011] NSWSC 81 (1 March 2011) [24] (overturned on appeal, but not on the point regarding testamentary capacity); *Frizzo v Frizzo* [2011] QSC 107 (12 May 2011) [23]-[24], affd [2011] QCA 308 (1 November 2011) [24]; *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [546]; *Pistorino v Connell* [2012] VSC 438 (25



fact that a disability or impairment exists does not warrant an automatic conclusion that the person lacks capacity to make particular decisions.

2. Operation of mistake of fact (s 24) re Ch 32 offences.

- Popular sexual mores historically have been an important vehicle for the social and economic oppression of women and girls.
- 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. The law plays a crucial role in setting the boundaries of socially and culturally acceptable conduct, however-
 - Removing honest and reasonable mistake of fact all together will in some cases lead to injustice because the principle behind it remains a valid one: i.e. some people with impairments may not interpret correctly other people's verbal and non-verbal cues.
 - It likely that people with cognitive impairment or with autism, for example, may be more likely to have such mistaken beliefs.
 - People with some kinds of impairment are much more likely to miss certain social cues that are obvious to others, because -
 - their cognitive processing is different
 - they are more likely to have been raised in sexually and socially segregated environments such as hostels, institutions or group homes
 - they are less likely to have received appropriate sexual education and habituation
 - they are more likely to have been treated as 'asexual' and 'childlike'.
- In *R v Mrzljak*,²⁰ for example, the Queensland Court of Appeal held that it was relevant to the application of s 24 that the appellant spoke little English and had a mild mental impairment; this meant that he might reasonably hold a belief about consent that would not be reasonable if held by a native English speaker of average intelligence.

²⁰ *R v Mrzljak* [2005] 1 Qd R 308



Initial Recommendations

Retain mistake of fact defence, because some people with intellectual impairment can misinterpret, for example, body language, or verbal cues if CALD, but:

- a proper evidentiary basis must exist before the court directs a jury on this defence e.g. where the woman has shown little or no outward manifestation of any lack of consent (as opposed to where there is evidence of accused's use of force/violence, and resistance by complainant).
- Provide clearer guidance in the legislation for what constitutes a "reasonable" basis for an accused to believe in consent
- Provide guidance for jury directions that explain the above.

.....

