Cognitive Capacity and the Law: The Important Link Concerning Disability Rights

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The criterion to determine the required cognitive capacity that an individual may need to make personal decisions has proven to be controversial, including the capacity to understand the risks, value and other merits or courses of action that a decision may have to both oneself and others. This is particularly true when attempting to ascertain the cognitive capacity required to enter into a sexual relationship. Legal standards in Victoria include both statutory and common law traditions, which has helped shape legal principles influencing the assessment of capacity. The Convention on the Rights of Persons with a Disability and its Optional Protocol is a recently enacted international human rights convention that attempts to protect, promote and ensure respect for the inherent dignity of all persons with a disability and their active participation in society. This shift has enabled progress for persons with a disability to be seen as accepted subjects with inalienable rights and capacity to make active decisions. However, rights as a normative principle and cognitive capacity undoubtedly differ and mechanisms to determine cognitive processing and the suitable level of capacity amongst persons with a disability have proven difficult. The United Nations Declaration of Human Rights or the relevant legislation makes no reference to capacity or assessing capacity. Forced sterilisations continue to be accepted and performed on women with disabilities who are not only at high risk of being sexually assaulted thus a violation of reproductive rights, but also lack the capacity to make decisions for themselves and to adequately ensure their rights are not being violated.

1. Introduction

1.1 The Convention on the Rights of Persons with a Disability and its Optional Protocol is a recently enacted international human rights convention that attempts to protect, promote and ensure respect for the inherent dignity of all persons with a disability and their active participation in society.[1] Article 12 specifies that State parties shall recognise that persons with a disability enjoy legal capacity on an equal basis.[2] Article 23 of the UN Convention on the Rights of Persons with Disabilities states:

> State Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others.[3]

1.2 The application of democratic and egalitarian principles of liberty and self-determination into political and legal certainties together with the devastation brought by both World Wars soon established *individual* or human rights, an ongoing development that continues to evolve through the gradual elimination of prejudices. John Stuart Mill writes that, "the greatest difficulty to be encountered does not lie in the appreciation of means towards an acknowledged end, but in the indifference of persons in general to the end itself... the free development of individuality is one of the leading essentials of well-being."[4] Individuals of a specific race, religion, age or disability no longer sit in hierarchical order of preference in law or medicine.

1.3 This shift has enabled progress for persons with a disability to be seen as accepted subjects with inalienable rights and capacity to make active decisions.[5] In the *Charter of Human Rights and Responsibilities Act 2006*[6], each person is equal before the law and is entitled to the equal protection of the law.[7] However, rights as a normative principle and cognitive capacity undoubtedly differ and mechanisms to determine cognitive processing and the suitable level of capacity amongst persons with a disability have proven to be difficult. Whilst no reference has been made to capacity or assessing capacity in international law, all persons including persons with a disability are considered equal before the law and that national legislation should recognise their equal legal capacity.[8] However, forced sterilisations continue to be accepted and performed

[1] http://www.un.org/disabilities/convention/conventionfull.shtml
[2] http://www.un.org/disabilities/convention/conventionfull.shtml; also see s4.2.2 General Recommendations for States Parties on Article 12 of the European Foundation Centre's Final Report on the *Study on the Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with a Disability*.
[3] http://www.un.org/disabilities/convention/conventionfull.shtml
[4] John Stuart Mill: On liberty, Penguin 1982
[5] Australia ratified the convention in 2008 and its optional protocol in 2009 while the United Kingdom ratified both the convention and optional protocol in 2009.
[6] *Charter of Human Rights and Responsibilities Act* 2006 (VIC)
[7] §8 (2) *Charter of Human Rights and Responsibilities Act* 2006
[8] a12 *United Nations Convention on the Right of Persons with a Disability*

on women with disabilities who are at high risk of being sexually assaulted and/or impregnated[9] and with a lack of adequate education and support, persons with a disability cannot speak about their rights being violated.

1.4 Physical, sexual and emotional abuse amongst vulnerable adults – in particular women – is a widespread problem.[10] Inappropriate beliefs concerning the sexual behaviour of persons with a disability involve notions that they are either inherently a child and therefore asexual, or a threat to society since their children have a high risk of also having a disability.[11] While debates about consent and decision making amongst persons with a disability – particularly relating to medical issues – have been studied over the years, the topic of sexuality and sexual relationships has remained neglected.

1.5 The criterion to determine the required cognitive capacity that an individual may need to make personal decisions has proven to be controversial, including the capacity to understand the risks, value and other merits or courses of action that a decision may have to both oneself and others. This is particularly true when attempting to ascertain the cognitive capacity required when entering into a sexual relationship. Legal standards in Victoria include both statutory declarations and common law processes [particularly through sexual offences against and by persons with limited cognitive capacity], which has helped shape legal principles influencing the assessment of capacity.

1.6 Non-consensual sexual offences such as rape and indecent assault have played a significant role in defining sexual behaviour and the capacity required to consent to sexual intercourse. In R v Peter Tasman Cannell, the jury asked for clarification of the legal definition of consent, McMurdo P stating[12]:

> [T]he person has to have a cognitive capacity to be able to consent. So you could have a circumstance where a person might give free and voluntary consent but if they don't have the cognitive capacity to properly consent then it wouldn't be consent within the meaning of the law. Now a classic example of that might be someone who has an intellectual disability. A person who is intellectually impaired might very well say, 'Yes, I'm prepared to engage in sexual intercourse.', but lack the cognitive capacity to understand what they are doing... Under our Criminal Code, in relation to consent, the law provides that consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent. Cognitive capacity in that context means that at the time that the offence is alleged to have occurred, the complainant had sufficient understanding to know what was occurring in order to be able to give consent to it.[13]

[9] http://www.heraldsun.com.au/news/national/family-court-lets-couple-sterilise-disabled-daughter/story-e6frf7l6-1225838469430, *Muir v. Alberta*, 1996 CanLII 7287 (AB Q.B.); also see Australia's report under Article 44 of the CRC (Fortieth Session), Consideration of Reports, concluding observations: Australia, CRC/C/15/Add.268, 20 relating to the condemnation of Australia and sterlisations of children. October 2005, paras 45, 46 (e). Forced sterlisations is a violation of reproductive rights.

[10] Catherine Butler; Amanda O'Donovan; Elizabeth Shaw. *Sex, Sexuality and Therapeutic Practice: A Manual for Therapists and Trainers*, Taylor & Francis, 2009: 76

[11] Glynis H. Murphy. 'Capacity to Consent to Sexual Relationships in Adults with Learning Disabilities', *Journal of Family Planning and Reproductive Health Care*. 2003: 29(03): 148-149

[12] *R v Peter Tasman Cannell* [2009] QCA94

[13] Ibid.

Thus the question concerning the level of cognitive capacity a person may need to enjoy a sexual relationship remains complicated and controversial.

2. Presumption of Capacity

2.1 'Intellectual disability' will be used in the same way as it is defined in the *Disability Act 2006*.[14] The *Disability Act 2006* replaced the *Intellectually Disabled Persons' Services Act 1986* and the *Disability Services Act 1991*, advancing the inclusion and participation of persons with a disability in the community.[15] It confirms that persons with a disability have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities.[16] "Prima Facie every adult has the right and capacity to decide whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to premature death."[17] Consent will be used in the same way as it is defined in the *Crimes Act 1958*, whereby consent means "free agreement" and consent is not freely agreed upon if the person is incapable of understanding the sexual nature of the act.[18]

2.2 Discrimination, social stigma and even cruel or inhumane treatment against persons with a disability have only recently changed. Legislation in the past such as the *Lunacy Act 1890* had legal control over the property or assets of a person with a disability, while the *Mental Hygiene Act 1933* allowed 'mental defectives' to be placed in private institutions.[19] The *Mental Deficiency Act 1939* defines 'mental defectiveness' as:

> Mental defectiveness means a condition of arrested or incomplete development of mind existing from birth or from an early age whether arising from inherent causes or induced by disease or injury and of such a kind as to render the person affected incapable of adjusting himself to his social environments and as to necessitate external care, supervision or control of such person.[20]

Words such as 'imbecile', 'lunatic', and 'idiot' were often used and seen as standard descriptions of intellectual disability and mental illness.[21] The *Tasmanian Mental Health Act 1928* (as amended) states that 'idiots' are, "[p]ersons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy yet so pronounced that they are incapable of managing themselves or their affairs or in the case of children of being taught to do so."[22]

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[14] §3 *Disability Act2006*
[15] Ibid., s4
[16] Ibid.,s5(1)
[17] *Re C (Refusal of Medical Treatment)* [1994]1 Fam 31 at35
[18] §36 *Crimes Act 1958*. The *Crimes (Rape) Act 1991* introduced legislative changes to the *Crimes Act1958*.
[19] *Mental Hygiene Act 1933*
[20] *Mental Deficiency Act 1939*
[21] *Tasmanian Mental Health Act 1928*, see also the *Idiots Act 1886* (UK)
[22] *Tasmanian Mental Health Act 1928*

2.3 With the worldwide eugenics trend gaining momentum during the 1930's and 1940's and the establishment of organisations like the *Eugenics Society of Victoria*, the practice of forced sterilisations against women and children was initiated and not for the purposes of protecting women and children from sexual abuse but the prevention of their reproductive capacity for the protection of society. "Persons of superior natural endowments shall have a higher, or at least not lower, birth rate than persons of inferior endowments; and to ensure that persons with gross defects of mind or body… should be discouraged or prevented from producing children."[23] The *Lunacy Act* was replaced by the *Mental Hygiene Act 1933*, whereby the Lunacy Department changed to the Department of Mental Hygiene.[24]

> "These provisions were no doubt intended to be protective in nature… The effect of these laws, however, is to deprive a woman within one of these definitions of all sexual freedom. The law contains assumptions which we do not think are warranted, namely that any intercourse with such a woman is likely to be exploitative in nature, and possibly damaging in its effects. These laws do not admit the possibility that the woman may want to enter into a sexual relationship."[25]

2.4 Following WW2 and the worldwide exposure of the structured violence against Jews and other minorities together with the Nazi regimes' severe public eugenic policies known as *Aktion T4*[26] against persons with a disability [which also included euthanasia], conditions of public and private asylums in Victoria began to change with reforms being developed during the 1950's.[27] While the change was slow and by no means safeguarding the rights of persons with a disability,[28] the *Mental Health Act 1959* was established and by 1961 the *Eugenics Society of Victoria* was closed. The *Equal Opportunity Act 1977* prohibited discrimination against women and its consequent amendment in 1982 outlawed discrimination against persons with a disability, leading to the *Mental Health Act* 1986. Descriptions of disability no longer used derogatory and insensitive terms like 'idiot' or 'lunatic', and finally the *Disability Discrimination Act 1992* and the *Victorian Charter of Human Rights and Responsibilities 2006* prohibited discrimination against persons with a disability and reduced paternalism in policy development. Changes towards persons with a disability having access to the justice system were gradually developed[29] while organisations such as Women with Disabilities Australia (WWDA) continue to lobby against the sterilisation of children.[30]

2.5 Following recommendations, the definition of consent in the *Crimes (Rape) Act 1991 (Vic)* was re-defined

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[23] Victor H. Wallace, "The Eugenics Society of Victoria" *The Eugenics Review*, January 1962, 53:4
[24] §2 (1) (a) and (b) Mental Hygiene Act 1933
[25] Final Report, *Royal Commission on Human Relationships*: Vol. 5, 221
[26] ttp://www.ushmm.org/wlc/en/article.php?ModuleId=10005200
[27] ttp://www.asap.unimelb.edu.au/pubs/articles/asa97/KEWA.htm
[28] As said by Neil Rees, "[t]he Mental Health Act 1959 contained few safeguards concerning loss of liberty and of bodily integrity, probably because this was an era of great confidence in the ability of the medical profession to treat and care for people with a mental illness." This is visible in s102 of the Mental Health Act 1959 where the superintendent or authorised medical officer can permit in medical treatment on behalf of any patient. Also see http://www.abc.net.au/news/stories/2011/03/23/3171473.htm and *Criminal Law (Mentally Impaired Accused) Act* 1996 (WA)
[29] Kelley Johnson, Ruth Andrew, Vivienne Topp, *Silent Victims: A Study of People with Intellectual Disabilities as Victims of Crime*, Office of the Public Advocate, 1988, 56
[30] *Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006*

as a 'free agreement'.[31] Prior to this change, rape was an offence combining common and statute law including the *Crimes (Sexual Offences) Act 1980*[32]. The crime of rape was at common law restricted within a definition of "carnal knowledge of a female, who was not the accused wife, without her consent."[33] It included "some form of sexual penetration, be it vaginal, oral or anal, without the victim's consent."[34] "The traditional, common law crime of rape was the slightest insertion by a man of his penis into the vagina of a woman without her consent, under circumstances where the man knew the woman was not consenting, or believed there was a possibility that she was not consenting and went ahead regardless."[35] While the *Crimes (Sexual Offences) Act 1980* made many adjustments to the crime of rape, it did not amend the requirement that sexual penetration must take place without the victim's consent including victims who did not physically resist sexual penetration.[36]

2.6 In *R v Maes*[37] at the Victorian Supreme Court in 1975, Nelson J stated that: "The word "consent" itself, and the meanings that are attributed to it in the Concise Oxford Dictionary, namely, "voluntary agreement, compliance, permission", all suggest a communication of an existing state of mind to another person. The cases relating to the vitiation of apparent consent by lack of capacity, or by misapprehension, are not inconsistent with this view, because even if communication is a part of consent, the existence of a genuinely assenting state of mind is essential. If consent involves communication, the use of the expression "active acquiescence" is not inappropriate since it involves the woman doing something to convey her consent to the man. She may do that even by the very fact that she remains physically inactive."[38] In *R v David Ram Singh*, the Victorian Court of Criminal Appeal stated that "the absence of marks on the victim's body and her failure to call out... is a remarkable feature of the case."[39] This paternalism and oftentimes gender-specific tradition failed to adequately consider individual experience and perceptions of sexual violation whilst illustrating that [the penetrative model of sexuality] can undermine a victim's credibility, particularly if the victim did not strongly resist to sexual penetration.[40]

2.7 Nevertheless, the common law offence of rape was abolished and consent is now defined as a "free agreement". s36 (e) of the *Crimes Act 1958* states that a person does not freely agree to a sexual act if, "[t]he person is incapable of understanding the sexual nature of the act."[41] This is reinforced through s37AAA of the

[31] Law Reform Commission of Victoria, Rape: Reform of Law and Procedure, Report No. 43 (1991)
[32] Other forms of penetration such as mouth or anus by the penis or penetration of the vagina or anus by an object was added to the 1980 crime of rape, however the common law tradition remained.
[33] Professor Mirko Bagaric, *Statutory extensions and modifications to the common law crime of rape have been made in all jurisdictions to varying degrees.* 1 May 2009. TLA [10.3.140]
[34] Bernadette McSherry, "Legislation to Change Social Attitudes: The Significance of Section 37(a) of the *Victorian Crimes Act 1958*", Monash University, Victoria. *Without Consent: Confronting Adult Sexual Violence* (1993, Australian Institute of Criminology) at p. 380.
[35] Law Reform Commission f Victoria, Rape and Allied Offences: Substantive Aspects, Report No. 7 (June 1987); 10. Men under the age of 14 were at common law considered to be impotent until the *Crimes (Sexual Offences) Act 1980* removed this - (s62(1)).
[36] Ibid.
[37] *Maes*, [1975] VR 541
[38] Ibid.
[39] Ibid. Also see, *R v. David Ram Singh* (No. 226 of 1990, 18 December 1990).
[40] Ibid. If a victim did not strongly resist sexual penetration, the presumption of consent could be used.
[41] *Crimes (Rape) Act 1991* (Vic); this has broadened the definition of consent with §*36 Crimes Act 1958 (Vic)*. See *R v Eastwood* [1998] VSCA 42

Crimes Act 1958 (Vic) that explains jury directions relating to matters of consent and free agreement.[42] "[T]he fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement."[43] Thus, the jury is not to regard that a person freely agreed to a sexual act just because he or she did not protest or physically resist.[44] s51-52 *Crimes Act 1958* (Vic) discusses sexual offences against persons with a cognitive impairment by providers of medical or therapeutic services and providers of special programs and workers at a facility.[45] However, it is not a sexual offence if the person with a cognitive impairment is the domestic partner or spouse of the provider of medical or therapeutic services and special programs.[46] Consent is not a defence, unless "the accused satisfies the court on the balance of probabilities that at the time at which the offence is alleged to have been committed, the accused believed on reasonable grounds that he or she was the spouse or domestic partner of the other person."[47] However, marital immunity is not applied if an offender sexually penetrates his wife without consent.[48] Cognitive impairment including mental illness must also be taken into consideration when sentencing an offender.[49] According to the *Crimes (Sexual Offences Act) 2006*, cognitive impairments include impairment because of mental illness, intellectual disability, dementia or brain injury.[50]

2.8 While the meaning of consent has been broadened from the *Crimes Act 1958 (Vic)*[51], the list remains problematic when rules governing vitiation of consent on a person with a disability are in question. Sections 36 (a) – (g) lists circumstances of actions that could amount to a lack of consent or free agreement; s36 (e) states, "[t]he person is incapable of understanding the sexual nature of the act"[52] and thus requires an extensive and complex analysis of the mental or cognitive state of the victim and whether or not he/she had adequate understanding of the sexual nature of the act such as penetration. In *R v Eastwood*, Martin Eastwood has sexual intercourse and urinated on the back of "GS", an intellectually disabled 35 year old woman with an IQ of 36.[53] The counsel stated that she is unable to respond in an appropriate manner, that she demonstrably had echolalia,[54] accepted direction and dependency, did not understand the term "sexual intercourse" and did not understand the social implications or differences between sexual intercourse and various behaviours and the consequences of sexual intercourse.[55] It was claimed on appeal that the trial judged misdirected the jury

[42] §37aaa (e)(I) *Crimes Act* 1958; also see *Crimes (Sexual Offences Act)* 2006 (Vic)
[43] Ibid. §37aaa (d)
[44] Ibid. §37aaa (e)(I) *Crimes Act* 1958. See *R v Mrzljak*[2004] QCA 420
[45] §51-52 *Crimes Act 1958*(Vic)
[46] §16 *Crimes (Sexual Offences) Act* 2006; §51 *Crimes Act 1958*.
[47] §51(5) & §52(3) *Crimes Act 1958* for other Australian States, see *Crimes Act 1900* (NSW) §66F; see also, *Criminal Code* (Tas) §126*; Criminal Code* (Qld) §216; *Criminal Code* (WA) §330; *Criminal Code* (NT) §130; *Criminal Law Consolidation Act 1935* (SA) §49(6).
[48] §62(2) *Crimes Act 1958*(Vic)
[49] §90 *Sentencing Act*1991
[50] §15(a) *Crimes (Sexual Offences) Act* 2006; §50(1) *Crimes Act 1958;* Also see §20 *Crimes (Mental Impairment and Fitness to be Tried) Act* 1997 (Vic)
[51] §36 *Crimes Act 1958*
[52] §*36 Crimes Act 1958(Vic)*
[53] *R v Eastwood* [1998] VSCA42
[54] Echolalia is the automatic repetition of words said by others.
[55] *R v Eastwood* [1998] VSCA42

as to the incapacity of the complainant to consent under s36 (e) of the *Crimes Act 1958* concerning consent and free agreement. Accordingly, the trial judge stated:

> "This question of consent involves that state of mind. It means free agreement. It is "GS's" state of mind that must be proved by the Crown at the time the alleged offences took place… the Crown says that whilst she did not resist in any way and may have even consented in some form or another, that consent was not a real or true consent because she was not mentally capable of giving her consent."[56]

2.9 He continued by explaining to the jury the following factors that need to be taken into consideration; (a) whether or not she understood that there was some difference in quality between the act of allowing a naked man to lie on her or of urinating on her back and other acts such as kissing or hugging and, (b) whether or not she was aware that she did not have to participate just because she was asked or requested to do so.[57] Dr. Davis agreed during trial that the complainant did not understand that she could refuse the sexual advances offered by other parties.[58] Accordingly, Phillips, C.J. of the Supreme Court of Victoria, Court of Appeals was unpersuaded that the applicant was in anyway disadvantaged by the principles set forth by the trial judge.[59]

2.10 It has therefore become the standard human rights practice in the Australian legal system that persons with a disability are first presumed to have capacity until evidence by experts prove otherwise; this is recognised in common law tradition as *presumption of capacity*. In the *Crimes Act 1958*, section 37AAA sets out jury directions relating to matters of consent.[60] The fact that a person did not say or do anything to indicate a free agreement to a sexual act is enough to show that the act took place without that person's free agreement and therefore the jury is not to regard that a person freely agreed to a sexual act just because he or she did not protest or physically resist.[61] *In R v Morgan (1970)*, brothers John P. Morgan and Thomas R. Morgan had sexual intercourse with a 19 year old intellectually disabled woman. Whilst the judge was satisfied that she was competent enough to give evidence, "[i]ts case was that there was no consent because the prosecutrix lacked the mental capacity to consent, and that the accused knew of that lack of capacity."

2.11 Both applicants admitted sexual intercourse but stated that the acts were consensual. The Supreme Court of Victoria quashed the case and ordered a retrial based on the misdirection by the trial judge; the unique problem about this case is that the trial judge was in effect tackling the problem of *understanding* and the cognitive capacity required to consent to sexual intercourse.[62] However, the shortcomings with his direction of the jury was the theory of "rudimentary concepts" such as the moral and social significance of virginity, the effect of intercourse on the hymen and that pregnancy may result from sexual intercourse.

[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] §37aaa (e)(I) *Crimes Act* 1958; also see *Crimes (Sexual Offences Act)* 2006 (Vic)
[61] Ibid., 37aaa (e)(I) *Crimes Act* 1958

These narrow distinctions were rejected on the basis of guidance to trial judges and the failure to presume her capacity to consent.[63] Thus intellectually disabled persons must first be considered to have the capacity to make a decision until it is proven otherwise and if it is assumed that a person with intellectual disabilities cannot make decisions or does not have the capacity to consent may lead to a miscarriage of justice.[64]

2.12 The issue with *presumption of capacity* is also visible in *R v Mrzljak* at the Supreme Court of Queensland.[65] Mr. Mrzljak, a Bosnian immigrant who could scarcely speak English, was charged with two counts of rape against a young woman who was intellectually impaired.[66] The woman gave evidence that she did not want to have sexual intercourse and had told him by saying "no" and "stop". As the appellant could not speak English, he could not understand her verbal refusal and with the absence of protest and voluntary fondling/placing his penis into her mouth together with her showing little physical impairment, he claimed that the entire act appeared to him to be consensual and that he was not aware she had an intellectual disability. Following examination by psychologists, both the victim and appellant were found to be intellectually impaired with an IQ between the 50-60 ranges and while her disability could be easily apparent to an English-speaking person, a non-English speaker may find it difficult to distinguish.[67]

2.13 Several possible positions can be taken with this case:

1. The complainant did not consent.
2. The complainant did not have the cognitive capacity to consent.
3. The appellant had unlawful carnal knowledge of an intellectually impaired person.[68]

Accordingly, intellectually impaired person in s216 *Criminal Code (QLD)* as defined under s229F *Criminal Code* has a broader definition than cognitive capacity as defined under s348 *Criminal Code*, as her evidence suggests that an intellectually impaired person can still have the cognitive capacity to consent.[69] The appeal following a guilty verdict was approved due to the misconception that the, "Jury may have thought that because the complainant was intellectually impaired within s229F, they must conclude that she necessarily lacked the cognitive capacity to give consent under s348 (1) *Criminal Code*."[70]

2.14 The next concern became criminal responsibility under s24 or s27 of the *Criminal Code*.[71] The trial judge states that s24 *Criminal Code* is of little relevance to the case as mistake of fact requires honest but also a

[62] Understanding is used in the functional approach, which is now the favoured method toward analysing cognitive capacity and the capacity to consent. See section three of this report for further details.
[63] See *R v Mobilio* [1991] 1 VR 339
[64] See *R v Mrzljak* [2004] QCA420. Further information is provided in part three of this report.
[65] Ibid., also see *Libke v R* [2007] HCA 30 and *R v Morgan* [1970]
[66] Ibid.
[67] Ibid.
[68] §216(1) *Criminal Code* [QLD]
[69] *R v Mrzljak*[2004] QCA420
[70] Ibid.
[71] §24 *Criminal Code* [QLD] not criminally responsible because of an honest and reasonable mistake, but mistaken belief; s27 *Criminal Code* [QLD] deprived of mental capacity because he is also intellectually impaired.

reasonable err in judgement, both subjectively honest and objectively reasonable.[72] It must also involve the standards of a person of sound mind and therefore interpretation of s24 can lead to absurd results; a mother with a natural infirmity and a very low IQ could avoid criminal responsibility under s24 if she left her new born baby in the bath under the assumption that the child could bathe itself.[73] Psychiatric evidence is only relevant when analysing whether a mistaken belief was honest and not whether it was reasonable.[74]

2.15 With the plethora of issues surrounding capacity assessment and the cognitive capacity required to make a choice or decision, the legality of persons with a disability to pursue a sexual relationship can comparatively be understood through sexual offences, statutory definitions of cognitive impairment, and common law decisions.[75] Sexual offences have been established in Australia to protect society and to prevent sexual abuse amongst persons with a disability or cognitive impairment. In Victoria, it is a sexual offence by providers of medical or therapeutic services to have sexual intercourse with persons with a cognitive impairment who is not his/her domestic partner or spouse[76]; this remains absolute and consent is not a defense.[77] It must also be taken into consideration when sentencing an offender with an intellectual disability or cognitive impairment.[78] According to the *Crimes (Sexual Offences Act) 2006*, cognitive impairments include impairment because of mental illness, intellectual disability, dementia or brain injury.[79]

2.16 Mental illness and the cognitive capacity is extremely complex and ambiguous due to not only the diagnostic problems of defining mental illness, but also because individuals who may be diagnosed with the same mental illness may present different behavioural attitudes and decision-making capacity; problems with preventative measures and diagnosing people with mental illness is also problematic.[80] There are many men and women who are in a sexual relationship and have mental illness, which has a negative impact on their relationship and family unit.[81] "Physical and psychological abuse of women by disturbed husbands should be thwarted by appropriate protective mental health legislation and effective health services."[82] Developmental abnormalities and anti-social behavioural disorders has lacked serious study amongst youth offenders[83] while major mental illnesses such as schizophrenia and depression are three to five times higher among Australian prisoners than those in the general population.[84] In *Owen James Davey v R*, Dr. Sullivan

[72] Thus reasonable grounds for the belief and not what a reasonable person would have believed; the trial judge used the example that an intoxicated person cannot make an unreasonable belief into a reasonableone.
[73] *R v Mrzljak*[2004] QCA420
[74] Ibid.
[75] It may be safe to assume that what is legal must therefore be appropriate.
[76] §16 *Crimes (Sexual Offences) Act* 2006; s51 Crimes Act1958.
[77] Ibid., for other Australian States, see *Crimes Act 1900* (NSW) s 66F; see also, *Criminal Code* (Tas) s 126*; Criminal Code* (Qld) s 216; *Criminal Code* (WA) s 330; *Criminal Code* (NT) s 130; *Criminal Law Consolidation Act 1935* (SA) s49(6).
[78] §90 *Sentencing Act*1991
[79] §15(a) *Crimes (Sexual Offences) Act* 2006; s50(1) *Crimes Act1958*
[80] *R v Fitchett* [2010] VSC 393
[81] Elly Robinson, Bryan Rodgers, and Peter Butterworth, *Family Relationships and Mental Illness*, Australian Family Relationships Clearinghouse, 2008.
[82] Op Cit. *Family Violence*, 146
[83] Paul Wilson and Gareth Norris. "*Relationship between Criminal Behaviour and Mental Illness in Young Adults: Conduct Disorder, Cruelty to Animals and Young Adult Serious Violence*," (2003) http://epublications.bond.edu.au/hss_pubs/30
[84] Ogloff, J., et al. 2007, *The Identification of Mental Disorders in the Criminal Justice System*, Trends and Issues in Crime and Criminal Justice no. 334, Australian Institute of Criminology, Canberra

stated that, "Schizophrenia is frequently associated with cognitive impairment, which especially affects executive functioning."[85]

2.17 Alcohol and chronic substance abuse can also result in limited cognitive capacity.[86] In the *Crimes Act 1958*, a free agreement cannot be made if the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing. Alcohol intoxication can also mitigate and/or aggravate an offence[87] and it should be noted that there is distinction between consent and submission,[88] the latter implying lack of physical resistance. The *Crimes Act 1958 (VIC)* describes the difference between submission and consent:

For the purposes of subsection (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act-

(a) without the victim's consent; and
(b) while-
(i) being aware that the victim is not consenting or might not be consenting; or
(ii) not giving any thought to whether the victim is not consenting or might not be consenting.[89]

3. Functional Approach

3.1 Adults are presumed to have the cognitive capacity to make decisions, such as signing a contract or entering into a marriage contract. While many people have the capacity to make a decision to enter into a sexual relationship, some require assistance due to limited cognitive capacity. However, with many cases involving acts of sexual abuse and exploitation against vulnerable persons with a disability – in particular women – the concept of supporting persons with limited capacity to enter a sexual relationship appears to be a complex area.[90]

[85] *R v Davey* [2010] VSCA 346
[86] *R v KU; Ex parte A-G* (QLD) [287]; also see *R v Matthew Charles Rendle* on the long-term effect of substance abuse and potential brain damage.
[87] *R v McRae* [2008] VSCA 74
[88] *R v Olugboja* (1981) ALL ER 443
[89] §38(4) of the *Crimes Act 1958 (*Vic*)*; see *Papadimitropoulos v R* (1957) 98 CLR 249; no rape had occurred as inducing causes led to actual consent, though fraudently. See also *Saunders v Williams* (1835) and *R v Mobilio (1991)* VicSC.
[90] Adrian Lowe, "Father Prostituted Disabled Girl" *The Age*, March 19: 2010 http://www.theage.com.au/victoria/father-prostituted-disabled-girl-20100318-qico.html

3.2 An arithmetical formula or clinical parameter toward a conclusive understanding of cognitive capacity and persons with a disability has in the past been understood through a diagnostic process. The diagnostic approach is based on a clear and clinical diagnosis, thus a person is judged as incapable of making a decision or providing evidence as a witness in court if they have a particular intellectual disability or mental illness.[91] While a diagnostic threshold is required to understand the individual and assist in further assessments as to his/her cognitive capacity, a "purely cognitive concept [for assessing capacity] will limit assessment to cognitive functions. Reserving competence assessment to doctors alone may push the definition in the direction of conformity with medical perceptions of a "beneficent outcome."[92]

3.3 The broad concepts of 'status' or 'outcome' standards are highly visible in the diagnostic approach, as both lack the concept of *understanding* in the assessment of capacity. The status approach separates competent and incompetent decisions according to social or medical status without consideration of the differences in behavioural and decision-making capacity amongst persons diagnosed with the same mental illness or intellectual disability, whilst the outcome approach is a method that purports competent decisions remain in conformity within a specific criterion.[93] Thus, the diagnostic approach is based on prevailing conventional values and fail to analyse whether the individual understood the nature or effect of a decision. "An assessor of capacity using the "outcome" method focuses on the final content of an individual's decision. Any decision which is inconsistent with conventional values, or with which the assessor disagrees, may be classified as incompetent."[94]

3.4 The problem of the diagnostic and outcome approach became visible in *R v Jenkins*.[95] A woman with a severe learning disability who lived in a staffed group home was found pregnant and considerable difficulty to find the perpetrator existed because she was unable to speak. Following DNA testing after it was concluded by a multi-disciplinary team and advocates that an abortion would be necessary, a support worker in the group home eventually admitted to sexual penetration. They charged David Jenkins with rape rather than sex with a mental defective [as sex with a mental defective only holds a maximum of two years imprisonment][96] and therefore required expert witnesses to assess her capacity to consent to sexual intercourse.

3.5 Following the guidance of the British Medical Association (BMA) and the Law Society on the capacity of consent, the victim could not distinguish between pictures of sexual intercourse from pictures of other activities and could not understand pregnancy. While the expert witness for the defense did not disagree with her level of comprehension on sexual intercourse, he claimed that her behaviour when Jenkins was near her confirms that she wanted his presence or that she was not afraid or concerned by him when he came near her

[91] Please note that amendments leading to the *Evidence Act 2008* (VIC) require assessment of competence for witnesses with cognitive impairments under the presumption of capacity; see s13. This will be discussed further in the chapter.
[92] Ben Collier, Chris Coyne, Karen Sullivan. Mental Capacity: Powers of Attorney and Advance Health Directives, The Federation Press, 2005, 62
[93] Ibid., 62-63
[94] *Mental Incapacity*, Law reform commission (UK), para 3.4 p33
[95] Glynis Murphy. "Justice Denied" *Ment Health Care* (2000:3) 256-257

following the first sexual encounter.[97] The defense stated that the reports by the expert witness for the prosecution is inadmissible because the BMA and the Law Society's definition were both wrong.[98] Although forensic evidence determined the culprit, Judge Coltart agreed with the defense council on the incorrect definition by BMA and the Law Society, refused to allow the prosecution to charge the culprit under section 7[99] and David Jenkins was not criminalised for any offence.

3.6 In the United Kingdom, previous legislation in the UK used a diagnostic principle for capacity to consent to sexual intercourse.[100]

> A man who is suffering from [severe mental handicap] . . . cannot in law give any consent which, by virtue of subsection (1) of this section, would prevent a homosexual act from being an offence, but a person shall not be convicted, on account of the incapacity of such a man to consent, of an offence consisting of such an act if he proves that he did not know and had no reason to suspect that man to be suffering from [severe mental handicap].[101]

While the UK had long favoured the diagnostic approach,[102] the diagnostic approach has been challenged over recent years with the introduction of the functional approach. In order to delineate cognitive capacity in Australian law, an analysis of understanding the action itself and also the consequences of that action is required. This is termed as the functional approach to cognitive assessment of capacity. A functional approach requires capacity to understand the nature and effects of a decision, as "understanding is a cognitive conception of capacity."[103] *R v Jenkins* failed to assess her capacity to understand and instead accepted the subjective interpretation of the assessor as to her consent to sexual intercourse.

3.7 Nevertheless, awareness that an intellectually impaired person may not necessarily lack cognitive capacity has grown to be the standard legal and clinical model.[104] Victoria has preferred the functional approach to determine whether an individual understands broad concepts, thus assuming capacity rather than assuming incapacity based on specific diagnostic criteria or conventional medical paternalism. A person only lacks capacity when they fail to understand factual questions or provide comprehensible answers and where that capacity cannot be overcome.[105]

"So, a functional approach is strongly favoured, where the question at issue is whether the patient is able, at the time, to understand the nature and effects of his or her decision. Capacity is attributed when this is the

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[96] §7 *Sexual Offences Act 1967*: Sex with a mental defective only has a maximum of a two-year sentence.
[97] Thus, the assessor classified her competence using the outcome approach; judging her as competent because of his subjective interpretation rather than actual and visible causes.
[98] Op. Cit., Justice Denied – see *R v Howard,* as it is the case that the BMA and Law Society used to define consent.
[99] §7 *Sexual Offences Act* 1967
[100] 1956 and 1967 Acts and the *Mental Health Act 1959*
[101] §60 *Sexual Offences Act* 1967
[102] 1956 and 1967 Acts and the *Mental Health Act 1959*
[103] Op.cit., Mental Capacity, 63
[104] *R v Mobilio, R v Eastwood* – see part two
[105] Christopher Corns, Steven Tudor. *Criminal Investigation and Procedure: The Law in Victoria,* Thomson Reuters Australia, 324

case, and constitutes one of the factors required for valid consent. As understanding, this is an essentially cognitive conception of capacity."[106]

3.8 A functional approach is determined not only by a person's capacity to make a decision but by also having the reasonable capacity to communicate and understand the choice. The inability to make a decision is therefore not only about understanding relevant information provided in an explanation and given in an appropriate manner [such as through pictures] but by also retaining and communicating the information as part of the process of making a decision. *Sexual Offences Act 2003 (UK)* has thus established more unambiguous wording originating in the 1956 and 1967 Acts and the *Mental Health Act 1959* respectively, defining consent through functional capacity that requires assessment of an individual with a disability in order to substantiate whether consent to sexual intercourse had been made.[107] *Impeding choice* provides more scope and requires further cognitive assessment to determine whether choice had been obstructed. The functional rather than the diagnostic approach attempts to examine each case using an issue-specific model.[108]

> "[B]eing able to understand the nature and effects of a decision could mean either actual understanding or the capability of understanding, but that the former criterion could lead to an attribution of incompetence on the basis of failure to understand as a result of being given insufficient information... the law must therefore hold that competence lies in the ability to understand."[109]

3.9 While some various functional capacity assessments have been scrutinised for unreliability,[110] such evaluations can be a consistent method to determine cognitive capacity and function as an improved alternative from a diagnostic approach that categorises distinctive medical features. However, without a specific statutory requirements regarding capacity assessment approaches in Victoria, fears of the potential misuse of the diagnostic criteria when sentencing criminals remain apparent, as visible with the recent addition in the *Diagnostic and Statistical Manual of Mental Disorders* of a new mental disorder called Paraphilic Coercive Disorder [rape fantasies], which may be used as a diagnostic defense for serious sexual assault.[111]

3.10 While the functional approach remains a common law tradition, it is slowly but surely becoming legislatively visible.[112] An example of recent legislative exposures to the model of combing both functional

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[106] Op. Cit., Mental Capacity, 63
[107] *Sexual Offences Act 2003* (UK)
[108] *Vulnerable Adults and the Law*, Law Reform Commission of Ireland, 27: An issue-specific model means that a person's capacity to make a decision on one issue, such as signing a contract, will not be looked at when making a decision on another issue, such as pursing a sexual relationship.
[109] Op. Cit., Mental Capacity, 63
[110] Michael L. Brookshire, Frank Slesnick, John O. Ward, George A. Barrett. *Functional Assessments: The Plaintiff and Defense Attorney's Guide to Understanding Economic Damages.* Lawyers & Judges Publishing Company, 2007: 71. These functional capacity assessment methodologies are mainly rehabilitation for persons who are injured.
[111] Adrian Lowe, "Father Prostituted Disabled Girl" The Age, March 19: 2010 http://www.theage.com.au/victoria/father-prostituted-disabled-girl-20100318-qico.html
[112] Developments to legislate capacity assessments are progressively being codified. In Canada, a team within he Ministry of the Attorney General and the Ministry of Health attempted to develop within the *Substitute Decisions Act 1992 (Ont)* guidelines for capacity assessors.

and diagnostic approaches can be found in the *(Mental Health List) Bill 2009*, a procedural framework that amalgamates existing court procedures[113] with defendants that have mental illness or cognitive impairments.[114] The correctional framework or 'therapeutic jurisprudence' offers rehabilitation for offenders, taking a functional approach and combining it with a diagnostic criterion and needs eligibility.

The diagnostic criterion[115] includes:

1. A mental illness;
2. An intellectual disability (as defined in s3 of the Disability Act 2006);
3. An acquired brain injury;
4. Autism spectrum disorder;
5. A neurological impairment, including, but not limited to dementia.

The functional criterion must provide evidence that the accused has reduced capacity in self care, self-management, social interaction and communication while the needs criteria is a condition that the offender may receive benefit from the framework of therapeutic jurisprudence.[116] There are many limitations to this list of requirements, in particular relating to an accused professing innocence at which point clinical assessments can no longer be advocated. The *Disability Act 2006* also provides details of standardised measurements of intelligence for the purposes of assessing adaptive behaviour and intellectual functioning.[117]

3.11 Nevertheless, models used by health professionals when assessing cognitive capacity have been claimed to be insufficient when analysing *understanding*.[118] Experienced health care professionals can often disagree with the conclusion of an assessment, visible in *R v Fitchett* when determining mental illness not amounting to insanity.[119] Donna Fitchett killed her nine and eleven year old sons and apart from being diagnosed with post-natal depression, hashimoto's thyroiditis and menopausal hormonal imbalances, Donna did not show symptoms that warranted specialist psychiatric care.[120] Several hours after she killed her children, her husband returned home and whilst attempting to resuscitate the children, Donna moved into the kitchen and cut herself with a knife [the wounds were not fatal]. Under s8 of the *Mental Health Act 1986,* she was involuntarily admitted to Thomas Embling Hospital for major depressive disorder.[121]

[113] §83a *Sentencing Act 1991* and *Magistrates Court Act 1989* (Principle Act)
[114] *Mental Health List Bill* 2009
[115] §4T *Mental Health List Bill* 2009
[116] Ibid.
[117] §3 *Disability Act 2000*; however it also states that nothing in subsection (3) requires the Secretary to use a standardised measurement in the assessment of intellectual disability.
[118] Op. Cit. Mental Capacity, 103
[119] *R v Fitchett* [2010] VSC 393; also see *R v Tsiaras* (1996) 1 VR 398 and *R v Mooney* (1978) 2 Crim LJ 351
[120] Ibid.
[121] Ibid.

3.12 Three expert witnesses provided several different opinions of her mental state at the time of the murder. Accordingly, Professor Paul Mullen stated that Donna had been suffering from a major depressive disorder that affected her ability to understand whether or not her actions were wrong.[122] Dr. Daniel Sullivan claimed she understood the wrongfulness of her actions [as a reasonable person would], yet believed that killing her children would allow them to go to a better place. Finally, Dr. Yvonne Skinner claimed that she had only mild-moderate depression at the time of the murder and that her subsequent decline to major depressive disorder came as a reaction to the killings.[123] This case also presents the difficulty of assessing the severity of mental illness as it took a number of years before it became apparent that she had serious mental health issues that not only incapacitated her ability to be in a relationship or marriage but also ultimately led to the murder of her two children.[124]

3.13 In *R v Mooney*,[125] the chief justice stated:

> "The mental condition of an offender may be taken into account when passing sentence, but whether the evidence establishes legal insanity or mental illness stopping short of legal insanity, the question to be answered is whether the interests of society permit or the interests of the offender require that the sentence to be passed be reduced from what would otherwise be appropriate rather than whether the offender's responsibility for the offence should be regarded as having been reduced."

4. Existing Policies and Future Procedures

4.1 The presumption that all persons with an intellectual disability or cognitive impairment have the capacity for physical, social, emotional and intellectual development must be acknowledged before progress and support to enhance their sexual and emotional needs can be made. In order to exercise choice, those with a learning disability require assistance to understand what sexual relationships, pregnancy, rape and sexually transmitted diseases are; studies in the United Kingdom have shown that only 55% of adults with learning disabilities have had sex education as opposed to 98% of young people.[126] With limited sexual knowledge or education on the differences between consent and non-consent, persons with an intellectual disability are thus more vulnerable to deception and can often be cheated to pursue sexual relationships. "Adults with learning disabilities also showed limited understanding of consenting and non-consenting situations and often considered a consenting situation as 'wrong', while non-consenting situations were sometimes not

[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] *R v Mooney* (1978) 2 Crim LJ 351
[126] Glynis Murphy. "Capacity to Consent to Sexual Relationships in Adults with Learning Disabilities" *Journal of Family Planning and Reproductive Health Care,* 2003: 29(3): 148-149

recognised as abusive."[127] The Department of Human Services in Victoria has provided guidelines to support disability service providers with interpreting the *Disability Act 2006* and clearly state that explanations to persons with a disability must be in the language and form of communication that they are likely to understand, both orally and in writing.[128]

4.2 An appointed guardian cannot exercise their authority by giving consent or refusing to give consent to a sexual relationship, however institutional or personal prejudices may create obstacles for persons with a disability from pursuing a sexual relationship or sexual desires.[129] For instance, section 4.6 of DHS' *Residential Services Practice Manual 2009* prevent department staff to directly support clients when they desire access to sex workers.[130] The Office of the Public Advocate are currently drafting practice guidelines on facilitating support for advocates/guardians who may in turn support the needs of those expressing sexual interest and who have a cognitive impairment.[131] This will help advocates preserve lifestyle decisions for people with a cognitive impairment when sexual expressions arise while at the same time thinking of their best interests by protecting them from neglect, abuse or exploitation. The Victoria Police Manual also provides that "[an independent third person must be present at the interview of any intellectually or mentally impaired person"[132] in order to support victims with a cognitive impairment or intellectual disability to make complaints, particularly about sexual abuse.

4.3 Whilst legislative changes in the UK have introduced the functional approach to assessing capacity, the *Mental Capacity Act 2007* (UK) appoints independent mental capacity advocates in order to provide support and evaluate "P" to ascertain alternative courses of action.[133] Advocates can give support that will enable a person to make choices and inform them of their rights. The Act, however, explicitly excludes decisions on consenting to have sexual relations[134] and the unambiguous prohibition may result in persons with an intellectual disability from gaining the necessary support to pursue a sexual relationship or even a marriage contract. Nevertheless, the issue with marriage and guardianship recently came to the fore when a young Pakistani girl [SA] who had both physical and an intellectual disability was turning 18 years old.[135] Prior to reaching adulthood, her guardian requested for protective measures to be placed on SA due to the possibility of an arranged marriage in Pakistan.

4.4 Forensic psychologist Dr. Parsons assessed SA and stated that SA had the cognitive capacity to

[127] Ibid.
[128] *Disability Act 2006: A Guide For Service Providers*, Department of Human Services, Victoria Government Publication.
[129] §28 *Guardianship and Administration Act* 1986
[130] *Residential Services Practice Manual*, Victorian Government Department of Human Services, Melbourne 2009
[131] Office of the Public Advocate, S*exuality: Facilitating the expression of sexual expression for people with a cognitive impairment with advocate/guardians* – please note that this has not yet been approved and therefore documentation detailing methods and/or strategies for advocates to deal with sexual relationships vis-à-vis those with cognitive disabilities cannot be confirmed until officially published.
[132] §112-3, s6.2.1 *Victorian Police Manual*
[133] §35 *Mental Health Act 2007*
[134] Ibid., s27 (1)(b)
[135] Re SA [2006] EWHC 2942 (Fam)

understand the concept of marriage and of the nature of a sexual relationship, including the effects and implications, but that she fails to understand the potential legal difficulties regarding immigration.[136] Her ability to only speak using UK sign language will therefore make it difficult for her to assess whether the potential marriage contract in Pakistan will be as she has stated to Dr. Parsons.

> "SA could not give informed consent unless all her special needs are taken into account and she fully comprehends what is being proposed to her."[137]

As her parents have made no objection to her remaining a ward of court beyond her eighteenth birthday, the court has exercised 'protective jurisdiction' and ordered strict compliance to ensure that SA is not subjected to an arranged marriage without suitable consent.[138]

4.5 It has been concluded that common law in Australia confirms that cognitive capacity requires understanding of the nature and consequences of an act. A sexual relationship agreement is comparable to the law of contract[139] and thus the cognitive capacity required to understand the choice and consequences of an agreement (relationship/marriage),[140] consent and termination of an agreement as well as understanding the consequences of sexual activity such as pregnancy and the possibility of sexually transmitted diseases. Studies of cognitive abilities and brain functioning is more detailed and easily understood compared to decisional capacities both in health and law.[141] Methods of testing are therefore required to substantiate cognitive capacity; however health professional differ in views about how to ascertain what level of capacity is required for the ability to *understand* and thus models differentiate when assessing an individual. "[B]eing able to understand the nature and effects of a decision could mean either actual understanding or the capability of understanding, but that the former criterion could lead to an attribution of incompetence on the basis of failure to understand as a result of being given insufficient information."[142]

4.6 It has been claimed that inconsistencies between assessment methods and results are due to the subjective impression of incapacity together with the actual assessment of cognitive capacity. "The "subjective" opinions of health professionals as to whether an individual lacks capacity have been compared to the results of standarised assessments using specific tests (for example, Cognitive Capacity Screening Exam).[143] The results of this study suggest a lack of concordance between subjective and objective ratings of

[136] SA understood marriage and a sexual relationship but requested that both her and her potential husband return to the UK, otherwise she does not want to go to Pakistan to be married.
[137] Re SA [2006] EWHC 2942 (Fam)
[138] Ibid.
[139] §36 *Relationships Act 2008*
[140] §23(b) iii *Marriage Act 1961*
[141] Op. Cit., Mental Capacity, 108
[142] Op. Cit., Mental Capacity, 63 - see I kennedy and A Grubb, *Medical Law: Text with Materials* (Butterworths, London, 1994) 107.
[143] Other assessment tools include the *Mini-Mental Status Examination*: "The cognitive status as measure by the Mini-Mental Status Examination (MMSE) is a better predictor of decisional capacity then variables such as education, verbal abilities and ability to perform activities of daily life." Op. Cit., Mental Capacity, 112. Also the *MacArthur Competence Assessment Tool*; treatment or the assessment of sexual knowledge that tests whether reasoning skills regarding the comprehension of not only choices, but the benefits and consequences of their choices.

capacity."[144] This confirms that health-professionals' subjective view or impression can have a vast impact on the conclusion of an assessment. The requirement of a systematic assessment tool and further clinical research on empirical methods of assessing cognitive capacity is necessary.

4.7 Whilst the process of improving legal and community attitudes towards persons with a disability has substantially changed over the last century, topics such as sexual relationships amongst persons with limited capacity have remained neglected and they continue to be social stigmatised. A study in the UK found that there was a high level of indignity against persons with a disability pursing a sexual relationship.[145] Published in the British Journal of Learning Disabilities, the study showed that out of the 188 care staff and nurses interviewed, most agree that it is not appropriate for people with learning disabilities to pursue a relationship.[146]

> The role of care staff is invaluable in the day to day living of many people with learning disabilities. Consequently, care staff can often have substantial influence, although this may not always serve the best interest of the individual. Previous studies have shown significant levels of stigma towards people with learning disabilities, both from other members of the community and from carers. This is especially the case in relation to the sexuality of people with learning disabilities.[147]

5. Conclusion

5.1 Adults with intellectual disabilities are particularly vulnerable to abuse and studies have shown that significant differences exist between understanding sexuality, sexual intercourse and other concepts such as marriage compared to those without disabilities; the results concluded that education about sexuality is imperative for persons with a disability.[148] The appointment of proxy decision-makers or guardians are used to support persons incapable of making decisions for themselves, assisting with financial, health and lifestyle decisions. Competency assessments in Australian law have been left to health-care professionals and common law decisions, yet the methods used to conduct assessments have not been properly defined.[149] There have been suggestions that assessing capacity is more than simple cognitive functioning and can not only include the capacity to receive, comprehend and integrate relevant information and apply the information to one's own situation by evaluating risk and benefits, but by also communicating ones choice and to persevere with

[144] Op. Cit., Mental Capacity, 106-107
[145] Alan Grieve and Shona McLaren, William Lindsay and Ewan Culling, "Staff Attitudes Towards the Sexuality of People with Learning Disabilities: A Comparison of Different Professional Groups and Residential Facilities." *British Journal of Learning Disabilities*. (37: 2008)76-84
[146] Ibid.
[147] Ibid.
148 A.C. O'Callaghan1, G.H. Murphy. "Sexual Relationships in Adults with Intellectual Disabilities: Understanding the Law" *Journal of Intellectual Disability Research* (51:3) 197–206, March 2007
[149] Op. Cit., Mental Capacity, 94

the choice until the decision is acted upon.[150] People who have physical disabilities therefore have the potential to lack autonomy just as much as those with intellectual disabilities or cognitive impairments.[151]

5.2 There remains no distinctive opposition or support for sexual relationships amongst persons with a cognitive impairment in Australian law. With the progress of human rights law, the unfavourable position of the diagnostic approach to assessing cognitive capacity, and the development of sex education models for those with learning disabilities and for carers/guardians in supporting sexual relationships, the gradual move forward is apparent. With the ambiguous position of current assessment models measuring cognitive capacity and the lack of strategic research specifically with assessing decisional capacity, there are currently no specific statutory requirements. Common law has provided better scope and challenged the diagnostic approach for the functional approach, requiring that individuals are assessed according to whether or not they understood a certain act including the application, nature and consequences.

6. List of Former and Current Legislation

Commonwealth

Family Law Act 1975
Privacy (Privacy Sector) Amendment Act 2000

Victoria

Criminal Law and Practice Statute 1864
Lunacy Statute 1867
Lunacy Amendment Act 1888
Lunacy Act 1903
Lunacy Acts Amendment Act 1914
Lunacy Act 1928
The Mental Hygiene Act 1933
Mental Hygiene Authority Act 1950
The Mental Hygiene Act 1958
Health Act 1958
Instruments Act 1958
Crimes Act 1958

[150] Op. Cit., Mental Capacity, 64
[151] Op. Cit., Mental Capacity, 64

Mental Health Act 1959

Health Commission Act 1977

Mental Health Act 1986

Guardianship and Administration Act 1986

Guardianship and Administration Board Act 1986

Intellectually Disabled Persons Services Act 1986

Intellectually Disabled Persons' Services Act 1986

Mental Health Act 1986

Medical Treatment Act 1988

Disability Services Act 1991

Crimes (Rape) Act 1991 (Vic)

Medical Treatment (Agents) Bill 1992

Crimes (Mental Impairment and unfitness to be tried) Act 1997

Crimes (Sentencing Procedure) Act 1999

Crimes (Sexual Offences) Act 2006

Disability Act 2006

Charter of Human Rights and Responsibilities Act 2006

7. Keywords

Cognitive Impairment – Impairment because of mental illness, intellectual disability, dementia or brain injury. s16 *Crimes (Sexual Offences) Act* 2006

Consent – "Free agreement". s36 *Crimes Act* 1958

Indecent Assault: Non-penetrative and indecent sexual conduct. s39 *Crimes Act* 1958

Rape: Penetrative sexual act. s38 *Crimes Act* 1958

Actus Reus – "Guilty Act" or an absence of consent; the external element of a crime, proven beyond reasonable doubt.

Mens Rea – "Guilty Mind" or knowing or reckless that the victim did not consent; common-law criminal liability. *s38 (2) Crimes Act 1958*

Parens Patria – "Parent of the Nation" or the Court/State to intervene against negligent parenting or guardianship.

Prima Facie – "At First Sight" or self-evident fact.

Res ipsa loquitur – "Thing speaks for itself" or that a duty exists for a person to act reasonably.