

**Submission to the Victorian Law Reform Commission  
Sexual Offences: Law and Procedure Review  
From the Office of the Public Advocate  
January 2002**

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*“Many of the story-tellers [people with intellectual disabilities ] told of unsafe sexual lives because of lack of information about sexuality and relationships, poor or non-existent sex education and vulnerability to sexual exploitation. Almost all of the story-tellers reported some form of sexual abuse. This had occurred in a variety of living situations: institutions, independent or supported living in the community or while they were living with their families.”<sup>1</sup>*

## **Introduction**

The Office of the Public Advocate (OPA) is created under section 14 of the *Guardianship and Administration Act* 1986 and exists to represent the interests of people with a disability, promoting their rights and dignity and strengthening their position in society. Through the work of its investigators, guardians and advocates and through its coordination of the Community Visitors Program and Independent Third person Program, OPA is aware of the vulnerability of people with disabilities to sexual assault. While the law must seek to effectively protect vulnerable people from such assault, it must also strive for balance to ensure that the capacity of people with disabilities to participate in sexual activities is not unnecessarily limited. This is a complex task, requiring law-makers to position laws effectively on the autonomy-protection continuum.

This submission will focus on issues related to sexual offences against people with disabilities. Case studies are used to highlight issues where these are instructive. In this submission, reference to people with disabilities is to those with a cognitive disability, rather than, say, a physical disability that does not impact on decision-making capacity.

## **Outlining the current law**

Sections 50, 51 and 52 of the *Crimes Act* 1958 deal with sexual offences against persons with impaired mental functioning. The law seeks to protect those with impaired mental functioning from sexual assault and indecent acts at the hands of those who are in positions of power over them, essentially health professionals and workers in residential facilities. Usually, for criminal offences, both the act itself and the intention to commit the act must be present in a crime. However, with offences against people with impaired mental functioning, only the act itself is required. This is reflected in the fact that the consent of a person with impaired mental functioning cannot currently be used as a defence by the accused.

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<sup>1</sup> Johnson, K, Hillier, L.et al, 2001, *People with intellectual disabilities. Living Safer Sexual Lives*, Melbourne: Australian Research Centre in Sex, Health and Society, p. 2

## **Redefining “impaired mental functioning”**

The definition of “impaired” in section 50 of the *Crimes Act* includes “impaired because of mental illness, intellectual disability, dementia or brain injury”. In turn, “intellectual disability” is defined by reference to the *Intellectually Disabled Persons’ Services Act* 1986 (IDPSA). It is important to note that the IDPSA is currently being reviewed by the Department of Human Services, a process which may well lead to a generic piece of disability legislation, rather than one focused on a specific type of disability, such as intellectual disability.

The existing definition may lead to an approach which requires a person to be classified as having a primary disability. This is inconsistent with preferred methods which focus an individual need rather than disability type.

The definition should reflect a more inclusive view of mental impairment, namely a lack of cognitive capacity or impaired cognitive ability, rather than attempting to list particular types of impairments. This is important as, for example, some impairments are clustered around intellectual disability but may not constitute an intellectual disability within the meaning of the IDPSA.

However, OPA does not support the inclusion of persons with a “severe personality disorder” within the definition of impaired mental functioning. This is primarily as it is difficult to determine how it would be defined and, most importantly, is seen as adopting a protective approach which is too far reaching. It is noted that the *Diagnostic and Statistical Manual of Mental Disorders*<sup>2</sup> does not define ‘severe personality disorder’, rather identifying specific types of disorder such as histrionic personality disorder, antisocial personality disorder and borderline personality disorder. It is therefore suggested that it is preferable to focus on the concept of capacity as affected by a mental illness rather than a broader notion of, and variant on, mental disorder.

## **Redefining “residential facility”**

It is the view of OPA that sections 50 and 52 of the *Crimes Act* 1958, in their focus on ‘residential facility’ reflect a view of service provision to, and infrastructure for, people with disabilities that is outmoded and inconsistent with contemporary practice. Particularly in the last decade and a half, as a consequence of de-institutionalisation and a move to a more expanded mixed economy of care<sup>3</sup>, many people with intellectual disabilities, for example, live in premises operated by service providers that are not “wholly or substantially for the purposes of providing residential services to intellectually disabled people.” or which are in the community. This is evident in the numbers of people with intellectual disabilities who live in pension-only

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<sup>2</sup> American Psychiatric Association, 1994, *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Washington: American Psychiatric Association

<sup>3</sup> The term ‘mixed economy of care’ is used to denote the involvement of the public, private, community and non-government sectors in the provision of services and facilities for people with disabilities. This has arisen in part as a consequence of the reduced role of government in service delivery, the use of market mechanisms, such as competitive tendering, to determine who is to provide services and the diversification of functions and roles in many organizations.

supported residential services (SRS)<sup>4</sup> or in facilities run by large non-government organizations that would not see themselves as fitting within the existing definition of residential facility. The percentage of residents with a psychiatric disability (including a dual disability) who live in supported residential services has also been reported as significantly increasing between 1987 and 1998 as a percentage of the total numbers of residents in such facilities<sup>5</sup>. An SRS is not “an approved mental health service” under the *Mental Health Act* 1986. These types of residents are, therefore, currently not protected by the provisions of the *Crimes Act*.

#### ***Case Study***

*A young woman with cerebral palsy and an intellectual disability lived in a facility operated by a large non-government organisation. Historically, this organisation was not established to accommodate people with intellectual disabilities, nor was this its current primary purpose. Sexual activity occurred between the young woman and a staff member employed through a staffing agency. The issue of consent was confused. The young woman developed a severe urinary tract infection and at that time the incident/relationship became known to the organisation. The organisation dismissed the staff member but maintained that the provisions of the Crimes Act were not relevant due, in part, to the definition of “residential facility” in the legislation.*

#### ***Case Study***

*John has an acquired brain injury and lives in a supported residential service (SRS) in the community. He developed a relationship with a staff member of the SRS and the staff member became pregnant. John has moved out of the SRS while the staff member continues to work at the SRS.*

### **Expanding the range of service providers captured by the legislation**

OPA is aware that there are many persons providing professional services to those with impaired mental functioning who are outside the medical or therapeutic field as specified in section 51 of the *Crimes Act*. These include those who provide professional education and recreation services, attendant care support, outreach and employment services and adult training support services. These professional relationships should also be captured by the legislation, at section 51. Once again, this reflects a change in the way the needs of persons with disabilities are conceptualised. No longer are medical interventions seen as primary, essential and determinative. Expectations exist that people with disabilities will, as far as possible, lead their lives as full citizens, intersecting, for example, with employment and training/ education domains.

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<sup>4</sup> Green, D, 2001, *Advice to the Department of Human Services on Supported Residential Services*, Melbourne, p. 14

<sup>5</sup> *Ibid*, p. 12

In addition, OPA submits that such professional services should not be required to be related to the complainant's impairment<sup>6</sup> as stated by Judge Mullaly in *R v Patterson*.<sup>7</sup> A person with impaired mental functioning may be receiving services from say, a medical practitioner, which are not specifically connected to their impairment but nevertheless the offence established by the statute in section 51 should still apply where sexual penetration or an indecent act occurs. This realistically reflects the power differential between the parties.

### **The defence of consent**

OPA is strongly of the view that the vulnerability of those with impaired mental functioning in the context of sexual offences should continue to be supported by law. This means that consent should not be available to a defendant as a defence (or modified in some way as a form of qualified defence) against engaging in sexual activity with a person with impaired mental functioning. It is OPA's experience that courts may often struggle with consent issues in relation to people with disabilities. In this context, it is appropriate to advocate a more protective approach and to openly acknowledge it as such.

### **Court processes and the laws governing evidence**

The Victorian *Evidence Act 1958* facilitates pre-recorded evidence-in-chief where the complainant is a person with impaired mental functioning. However the fact that cross-examination and re-examination require that person to be available for questioning, as part of the court hearing, diminishes the benefits that are apparent as a consequence of the pre-recording of evidence. These benefits include facilitating the involvement of people with disabilities in the criminal justice system, as complainants, by minimising the stress and alienation which they may experience in the giving of evidence. In addition, a complainant will not have to repeat his or her evidence to various professionals and the account of an alleged incident is captured as contemporaneously as possible to its occurrence.

Substantial research evidence now exists of the difficulties experienced by people with disabilities in their interaction with the criminal justice system<sup>8</sup>. The extension of VATE processes to cross-examination and re-examination, will assist in enhancing the rights of people with disabilities to seek redress.

In addition, consideration should be given to whether a judge in a sexual offence trial should have a discretion to be more inquisitorial in his or her approach in order to effectively elicit relevant evidence, recognising the difficulties identified above for people with disabilities.

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<sup>6</sup> It is understood that the Judge's ruling requires the prosecutor to prove, in part, that the services were related to the complainant's impairment.

<sup>7</sup> *R V Patterson*, Victoria, County Court, Mullaly J, 29 March 1999

<sup>8</sup> See, for example, New South Wales Law Reform Commission, 1996, *Report 80- People with an Intellectual Disability and the Criminal Justice System*, Sydney and Queensland Advocacy Incorporated and Melissa Forbes (Minter Ellison), 2001, *Justice for All. People with an Intellectual Disability and the Criminal Justice System*, Brisbane, to name a couple.

*Case study*

*Sally is in her early twenties and has a moderate intellectual disability. She lives by herself in the community with the assistance of some advocacy and support services. She also has an OPA guardian with plenary powers. Sally is the friend of a man whom she likes very much. He considerably alleviates her loneliness and general fears of isolation. They have a sexual relationship but at times Sally says that she does not like what he does to her and she is scared. On occasions her friend brings other men to Sally's house for sex. Sally says she feels OK having sex with these men. Police exploration of possible offences in this matter does not proceed in part due to Sally's 'potential unreliability in the witness box', specifically how she would respond under the pressure of cross-examination.*

For further comment on any of the issues raised in this submission, contact Julian Gardner or Louise Glanville at the Office of the Public Advocate on 9603 9500.

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