



# **Criminalisation of Sex with Disabled People with Cognitive Impairments in Commonwealth Countries: A Colonial Remnant that Interferes with the Human Right to Sexual Agency**

| © Anna Arstein-Kerslake, Yvette Maker, Anita Deutschmann, Siane Richardson

## **Plain English Summary**

### **1. Introduction**

Disabled people with cognitive impairments have a right to have sexual and romantic relationships. However, laws in many Commonwealth jurisdictions make sexual activity with a disabled person with cognitive impairments a crime. These laws are often described as necessary to protect disabled people from abuse. In this article, we argue that these laws are based on a misunderstanding of cognitive impairments. They do not seem to protect people from abuse and may make it difficult for them to have fulfilling sexual and romantic lives. We argue laws in many countries must change to respect the human rights of disabled people with cognitive impairments.

### **2. Summary of research approach**

We conducted a comparative analysis of sexual offences laws in 54 Commonwealth jurisdictions. These are places in Africa, Asia, the Americas, Europe and the Pacific that are under the rule of the United Kingdom or former territories of the British Empire. We analysed each law's compliance with our interpretation of two human rights of disabled people with cognitive impairments: the *right to sexual agency* and the *right to be free from abuse*. Our interpretation of the rights is based on articles 12 and 16 of the United Nations Convention on the Rights of Persons with Disabilities (the CRPD).

### **3. Summary of main findings**

We found that most of the jurisdictions have laws that criminalise sexual activity with a disabled person (often a person with a cognitive impairment). Many other jurisdictions have laws that criminalise sexual activity with a person deemed to lack cognitive capacity to consent. Laws in most Commonwealth countries seem to be inherited from British colonial rule or are very similar to current British laws.

We argue that both these forms of law are likely to breach the CRPD. This is because they do not allow disabled people to consent to sex on the same basis as other people. They are



based on discriminatory beliefs that all disabled people with cognitive impairments are unable to make decisions about sex and cannot lead happy, healthy sexual lives.

We found that laws in some jurisdictions also create separate systems for disabled people. For example, some jurisdictions employ different tests for a person's ability to consent depending on whether they are disabled. Others impose different sentencing rules if a person is convicted of a sexual offense against a disabled person. We argue that these unequal systems may jeopardise the right of disabled people with cognitive impairments to be free from abuse.

We argue that laws can be changed to better protect the human rights of disabled people with cognitive impairments. These laws should combine (or 'couple') respect for the right to legal capacity and the right to be free from abuse.

In our view, sexual offense laws will promote the rights of disabled people with cognitive impairments to enjoy sexual agency and also be free from abuse if they have three features:

- i. *Laws should be disability neutral.* This means sexual offense laws should make unwanted sexual activity against any person a crime, rather than making special or different laws that only apply to disabled people with cognitive impairments.
- ii. *Laws should provide disability-inclusive support.* This means laws must be accompanied by sexual education, training, awareness and reporting that are tailored to the needs of disabled people and the disability community. This should include support that addresses the marginalisation and social barriers that affect disabled people in relation to sex romantic relationships and life in general.
- iii. *Laws should provide disability-inclusive access to reporting mechanisms.* This means reporting mechanisms must be accessible and appropriate for people who are at risk of being abuse or have been abused.

#### **4. Main implications**

Disabled People's Organisations and others from the disability community have criticised laws that deny disabled people's sexual agency. They have argued that the right of disabled people to sexual agency must be recognised and protected on an equal basis with other people. This article identifies and analyses laws in 54 countries around the world that potentially interfere with this right, and the right to be free from abuse. It offers arguments, based in international human rights law, for discriminatory laws to be changed. It also suggests what features human rights compliant law should have. Disabled People's



Organisations, other disability advocates, human rights and law reform bodies may find the research outcomes useful for focusing and guiding advocacy and reform work.

### **About the authors**

Anna Arstein-Kerslake is an Associate Professor at Melbourne Law School at the University of Melbourne and a Professor in Research Scholarship at the Irish Centre for Human Rights at the University of Galway. Yvette Maker is a Senior Lecturer at the University of Tasmania and an Honorary Senior Fellow at Melbourne Law School. Anita Deutschmann and Siane Richardson were students in the Disability Human Rights Clinic at Melbourne Law School and now work in the legal field in Melbourne, Australia.

You can contact the authors at [Anna.Arstein@unimelb.edu.au](mailto:Anna.Arstein@unimelb.edu.au)