

8 December 2022

Committee Secretary  
Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Submitted via My Parliament website

**Re: Universal access to reproductive healthcare**

Thank you for the opportunity to comment on the inquiry into universal access to reproductive healthcare.

As the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.<sup>1</sup>

The terms of reference for this inquiry refer to barriers in 'universal access to sexual and reproductive health information, treatment and services that offer options to women to empower choice and control in decision-making about their bodies'. The terms of reference also make specific reference to including the experiences of people with a disability.

I would like to raise with the inquiry that in the Queensland context, there is a broad issue that interacts with the reproductive rights of people with disability, including women, and the criminal law. Section 216 of the Queensland *Criminal Code* effectively criminalises any sexual activity involving a person with an 'impairment of the mind' (a defence to the charge exists if it can be shown that no exploitation was involved). The term 'impairment of the mind' has been interpreted to have such a broad application that it includes not only people who have impaired decision-making ability, but some people with disabilities that have no impact on their decision-making ability. In January 2022, I released a paper discussing this issue titled 'A discussion of section 216 of the Queensland *Criminal Code*' (attached). In this paper, I concluded that a review of section 216 in Queensland is necessary.

The fact that sexual activity is effectively criminalised has meant that some service providers and disability support workers have been reluctant to provide sex education to clients with intellectual disability and other conditions that may affect decision-making ability. Service providers have been concerned that such actions could be interpreted as encouraging or aiding the commission of an offence. Denying access to knowledge clearly affects sexual and reproductive health literacy in a negative way.

I ask the committee to note that there still exist certain legal barriers that can inhibit the ability of women with disability to access sexual and reproductive services, and that law reform here is warranted.

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<sup>1</sup> *Guardianship and Administration Act 2000* (Qld) s209.

Thank you for the opportunity to provide feedback regarding the inquiry into the universal access to reproductive healthcare. If you require clarification of any of the issues raised in this correspondence, please contact my office on 07 3738 9513.

Yours sincerely

John Chesterman (Dr)  
**Public Advocate**

Enc

## **A discussion of section 216 of the Queensland *Criminal Code***

A call to review the criminalisation of sexual relationships involving people with 'an impairment of the mind'

**January 2022**

## Acknowledgement of Country

The Public Advocate and staff acknowledge the traditional custodians of the lands across the State of Queensland and pay our respects to the Elders past, present, and emerging. We value the culture, traditions and contributions that Aboriginal and Torres Strait Islander people have made to our communities, and recognise our collective responsibility as government, communities and individuals to ensure equality, recognition and advancement of Aboriginal and Torres Strait Islander Queenslanders in every aspect of our society.

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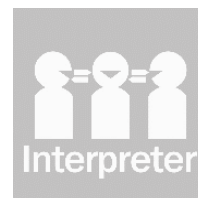
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A discussion of section 216 of the Queensland Criminal Code: A call to review the criminalisation of sexual relationships for people with disability.

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# Acknowledgements

I would like to acknowledge the people who have been involved in advancing the discussion of this topic over many years.

This project was initiated by my predecessors, Jodie Griffiths-Cook and Mary Burgess, as well as former staff member Elise Ho. Their research and advocacy efforts laid the groundwork for this paper.

I also acknowledge the University of Queensland Pro Bono Centre for their assistance in researching the inconsistency between the current Queensland *Criminal Code* provisions and other legislation and international instruments. Further, I want to acknowledge the work of Naomi Loader, QUT law student, who undertook the initial research on the history of the Queensland legislation and comparable laws of other states and territories during her student placement with the office.

Finally, I want to acknowledge the work of Yuu Matsuyama and Jo Sampford, Senior Legal Officers with the Office of the Public Advocate, who reviewed the previous research material and prepared this final paper for publication.

I trust this report will be considered a useful contribution to the policy debate about the rights of people with disability to live autonomous and independent lives to the greatest extent possible, including to enjoy consensual sexual relationships. It is my sincere hope that this paper will assist to achieve positive change to the criminal law in Queensland that appropriately protects and promotes the rights of Queenslanders with impaired decision-making ability.

John Chesterman (Dr)  
**Public Advocate**

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# Summary

The way in which the rights of people with disability, including those with impaired decision-making ability, are protected and recognised in law have progressed significantly in recent years. Given the number of laws that exist, it is inevitable that some are not reviewed as frequently as they could be, even if they may be impeding on people's rights.

This paper explores Section 216 of the *Criminal Code 1899 (Qld)*, which effectively criminalises any sexual activity involving a person with an 'impairment of the mind'. 'Impairment of the mind' has been interpreted to have such a broad application in the *Criminal Code* that it includes not only people who have impaired decision-making ability, but those with disabilities that have no impact on decision-making ability.

Section 216 is explored in a number of different contexts including;

- contemporary perspectives of society regarding the concept of disability;
- application of the section in the Queensland criminal justice system;
- approaches employed across other jurisdictions regarding the rights of people with disability to engage in sexual relationships; and
- the compatibility of the provision with current international, Australian, and Queensland legal frameworks.

Based on the findings of this paper, a review of section 216 does appear to be necessary, and potentially overdue. This review needs to consider what legal frameworks and principles exist in various jurisdictions, as well as issues including what level of protection people with disability may require and the lived experience of people with disability. It also needs to incorporate the views of other people who have knowledge and understanding of such situations.

Public discussion and debate about this matter will be informed by strong and compelling opinions, experiences, and views. Therefore, a much wider consultation is required to consider all views from the range of stakeholders who wish to contribute.

The Public Advocate recommends that there be a **referral of section 216 to the Queensland Law Reform Commission for review**. The Public Advocate will continue to promote this issue and participate in future discussions and developments in this area to ensure the rights of adults with impaired decision-making ability are promoted and protected.



# Introduction

## The Public Advocate

The Public Advocate is established under chapter 9 of the *Guardianship and Administration Act 2000* (Qld) to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity through systemic advocacy.

Section 209 of the *Guardianship and Administration Act* states that the functions of the Public Advocate are:

- '(a) promoting and protecting the rights of adults with impaired capacity (the adults) for a matter;
- (b) promoting the protection of the adults from neglect, exploitation, or abuse;
- (c) encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
- (d) promoting the provision of services and facilities for the adults;
- (e) monitoring and reviewing the delivery of services and facilities to the adults.'

## People with impaired decision-making capacity

The Public Advocate undertakes systemic advocacy to benefit Queensland adults with impaired decision-making capacity.



### Impaired decision-making capacity

'Having capacity' means a person can understand the nature and effect of decisions about a matter, can freely and voluntarily make decisions about it, and can communicate their decisions in some way.<sup>1</sup> If a person is unable to do one or more of these things, they may have impaired decision-making capacity.

There are several conditions that may affect a person's decision-making capacity. These include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse. While not all people with these conditions will experience impaired decision-making capacity, many will at some point in their lives. For some, impaired decision-making capacity may be episodic or temporary, requiring intensive supports at specific times, while others may require lifelong support with decision-making and communicating their choices and decisions.

People with impaired decision-making capacity are a broad and diverse group. They can be from all age groups, cultures, and demographics.

## The criminal justice system and people with disability

When the criminal justice system is assessed in relation to people with disability, it is commonly in the context of matters such as the overrepresentation of people with disability as both defendants and victims of crime, the accessibility of the justice system, or the suitability of correctional facilities. It is often concluded that the justice system does not offer adequate protections to people with disability.

What is less frequently considered is how the criminal justice system, in its protective capacity, may adversely affect the rights of people with disability. It is equally important to acknowledge that aspects of the criminal justice system place restrictions on the rights of people with disability that do not apply to people without disability, creating a situation of inequity.

<sup>1</sup> *Guardianship and Administration Act 2000* (Qld) sch 4.





One aspect of the Queensland law that may be incongruent with equal rights, autonomy, and participation for people with disability is section 216 of the Queensland *Criminal Code Act 1899*.

Under section 216, it is a crime to engage in sexual activity with a person who has an 'impairment of the mind'. This section effectively criminalises any sexual contact with that person, even if they have the capacity to consent to and understand the nature of such activities. 'Impairment of the mind' has been interpreted to have such a broad application in the *Criminal Code* that it includes not only people who have impaired decision-making ability, but those with disabilities that have no impact on decision-making ability.

The current law means it is possible for a consensual relationship involving a person with disability or impairment to be made the subject of criminal charges and court proceedings, with a requirement that the defendant prove a lack of sexual exploitation. This will necessarily involve the person with disability in the criminal justice system as a victim and witness, which brings with it many other issues of access to justice. Whilst a defence may ultimately be proved, this will come at a cost to all parties involved.

The impact of these provisions on the relationships and sexuality of people with impaired decision-making ability will become more significant as our population ages and brings with it a greater prevalence of illnesses such as dementia. The current law also criminalises sexual intimacy between two people who may have been together for a lifetime, in the event that one or both of them begins to exhibit impairment in their cognitive functioning, even if this does not affect their ability to consent to sexual activity. Where people retain capacity to consent to participating in a sexual relationship with another person, they should have their right to be recognised as an autonomous and sexual being respected and protected by the law.

## Terminology

This discussion paper primarily uses the terms 'impairment of the mind' and 'mental impairment', because these are the expressions used in the *Criminal Code*. The legislation defines a 'person with an impairment of the mind' as 'a person with a disability that is attributable to an intellectual, psychiatric, cognitive, or neurological impairment or a combination of these'.<sup>2</sup> Thus, it can include intellectual, cognitive, and developmental disabilities, mental illness, dementia and acquired brain injuries, be they severe or mild, permanent, or episodic. There is significant variation between and within these different conditions, and people with these conditions have diverse needs, experiences, and unique contributions to make. By using these terms from the legislation, this paper does not mean to suggest that people with these conditions are the same.

The statutory definition also requires that the person's disability results in 'a substantial reduction of the person's capacity for communication, social interaction or learning; and the person needing support'. All adults, including adults with disability, are presumed to have capacity to make decisions about matters that affect them. Receiving a diagnosis of a mental impairment or condition is not determinative of a person's capacity to make decisions, including for personal matters such as relationships and sexual activities. A key issue raised in this discussion paper is concern regarding the correlation in the legislation between the existence of an impairment and the inability to consent to intimate acts and relationships, and that the legislation does not contemplate or provide for a situation where a person with a mental impairment may consent to the activity.

The terms 'people with disability' and people with 'intellectual disability' are also used in this paper when referring to official documents (such as the UN Convention on the Rights of Persons with Disabilities<sup>3</sup>), policies, research, or general commentary about the rights of people with disability or studies that involve people with a specific disability. People with cognitive impairments are an important cohort of people with disability, however when the broader term is used in this paper, it is

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<sup>2</sup> *Criminal Code Act 1899* (Qld), s 1.

<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008)

not suggested that people with disability generally have cognitive impairments or impaired decision-making ability.

# 1. The context for reform

The task for the law in this area has been described as one of balancing two competing interests or policy goals: that of protecting people with impaired mental functioning from sexual exploitation, while giving maximum recognition to their sexual rights.<sup>4</sup>

Although sexuality is an integral part of everyone's lives, people with impaired decision-making ability may find sexual expression inaccessible because of social and cultural barriers. These include; family reactions to relationships, managerial concerns and staff anxiety, restrictive rules and limited opportunities, and a lack of privacy.<sup>5</sup>

On the other hand, people with intellectual disabilities experience much higher rates of sexual abuse compared to the general population. Whilst obtaining accurate data is difficult, a 2015 Australian study suggested that people with intellectual disabilities were 12 times more likely to experience sexual abuse than their non-disabled peers.<sup>6</sup>

The 'ideal', it has been said, 'is to achieve a balance between these competing rights', with different reforms seen to involve trade-offs between costs and benefits of casting the net too wide or too narrow:

If a high standard of knowledge is demanded in order that the person with mental impairment is deemed capable of consent to sexual expression, the number of individuals who are able to achieve capacity will be diminished. The advantage of this position is that more persons will then be afforded whatever protection the law can provide. The cost associated with this approach is that it restricts freedom of sexual expression. Yet if the right to sexual expression is prioritised, the protection that can be given to vulnerable people is undermined. The challenge is to set a legislated standard so that those persons who require protection are given it, and those who are capable are allowed the freedom to express their sexuality by avoiding unnecessarily paternalistic interference from the law.<sup>7</sup>

The task of striking an appropriate balance is complicated by the considerable diversity of people with mental impairment in terms of the extent of their impairment, living circumstances and sexual interest and knowledge.<sup>8</sup>

The task is further complicated by the high incidence and low reporting and prosecution rates of sexual abuse involving people with mental impairments. Disability advocates and commentators argue that the sexual choices of people with disability ought not to be restricted merely because sexual abuse is under-reported.<sup>9</sup> It is anticipated that there would be significant community unrest if a similar solution was proposed for non-disabled women who face parallel challenges of low reporting and prosecution rates for rape and general sexual offences.<sup>10</sup>

In the late 1990s it was noted that in view of the problems with limiting the right to sexual autonomy, most jurisdictions appeared to be moving away from generic criminal law provisions and toward

<sup>4</sup> Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning Report No 15 (1988)* cited in B McSherry, 'Sexual assault against individuals with mental impairment: Are criminal laws adequate?' *Psychiatry, Psychology and Law* (1998) vol 5, no 1, p. 114; Victorian Law Reform Commission (2003) *Sexual Offences Interim Report*, p 114.

<sup>5</sup> E Healy, BE McGuire, DS Evans and SN Carley, 'Sexuality and personal relationships for people with an intellectual disability. Part 1: service user perspectives' *Journal of Intellectual Disability Research* (2009) vol 53, no 11, pp. 905-912.

<sup>6</sup> M Nixon (2015) *Intellectual disability, criminal offending and victimisation*, PhD thesis, Monash University, School of Psychiatry, p 179.

<sup>7</sup> C Graydon (2007) *Protection or paternalism? A critical evaluation of Australian legislation relating to sexual acts involving persons with intellectual disability*, PhD Thesis, Murdoch University, pp 6-7.

<sup>8</sup> Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning Report No 15 (1988)* cited in B McSherry, 'Sexual assault against individuals with mental impairment: Are criminal laws adequate?' *Psychiatry, Psychology and Law* (1998) vol 5, no 1, p 114.

<sup>9</sup> See, for example, C Graydon (2007) *Protection or paternalism? A critical evaluation of Australian legislation relating to sexual acts involving persons with intellectual disability*, PhD Thesis, Murdoch University, p 84

<sup>10</sup> C Graydon (2007) *Protection or paternalism? A critical evaluation of Australian legislation relating to sexual acts involving persons with intellectual disability*, PhD Thesis, Murdoch University, p 84.



refining them<sup>11</sup> (the different approaches of each jurisdiction are discussed in part 3 and the specific offence provisions of each is summarised in Appendices B and C). The Model Criminal Code Officers Committee, tasked with developing a set of criminal law provisions that could be adopted by Australian states and territories, considered that 'a general blanket prohibition does not properly allow for the sexual rights of persons with impaired mental functioning'.<sup>12</sup> The Committee further noted the Victorian Law Reform Commission's observations that there was 'too great a risk that an offence of that type would unduly restrict expression of the sexual rights of people'. The Victorian Law Reform Commission preferred to confine the offence provision to specific situations in which individuals with mental impairments 'are particularly dependent, and therefore particularly vulnerable', targeting those responsible for their care and welfare.<sup>13</sup> Similarly, the Model Criminal Code, finalised in 2009, recommended specific offences prohibiting sexual contact between persons with impaired mental functioning and persons responsible for their care (including providing medical, nursing, therapeutic or educative services).<sup>14</sup>

## 2. Section 216 of the Queensland Criminal Code

### 2.1 The provision

The principal offence provisions of section 216<sup>15</sup> states:

#### **216 – Abuse of Persons with an Impairment of the Mind**

- (1) Any person who has or attempts to have unlawful carnal knowledge with or of a person with an impairment of the mind is, subject to subsection (3) (a) and (b), guilty of a crime, and is liable to imprisonment for 14 years.
- (2) Any person who—
- (a) unlawfully and indecently deals with a person with an impairment of the mind; or
  - (b) unlawfully procures a person with an impairment of the mind to commit an indecent act; or
  - (c) unlawfully permits himself or herself to be indecently dealt with by a person with an impairment of the mind; or
  - (d) wilfully and unlawfully exposes a person with an impairment of the mind to an indecent act by the offender or any other person; or
  - (e) without legitimate reason, wilfully exposes a person with an impairment of the mind to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or
  - (f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a person with an impairment of the mind;
- is, subject to subsections (3) (c) and (3A), guilty of a crime, and is liable to imprisonment for 10 years.

<sup>11</sup> B McSherry, 'Sexual assault against individuals with mental impairment: Are criminal laws adequate?' *Psychiatry, Psychology and Law* (1998) vol 5, no 1, p 112

<sup>12</sup> Model Criminal Code Officers Committee, *Model Criminal Code – Chapter 5: Sexual offences against the person: discussion paper*, Standing Committee of Attorneys-General, November 1996, pp 145-146.

<sup>13</sup> Model Criminal Code Officers Committee, *Model Criminal Code – Chapter 5: Sexual offences against the person: discussion paper*, Standing Committee of Attorneys-General, November 1996, pp 145-146.

<sup>14</sup> Parliamentary Counsel's Committee, *Model Criminal Code*, 1<sup>st</sup> edition, (28 May 2009), ss 5.2.28 – 5.2.33, pp 81-82. < <https://www.pcc.gov.au/uniform/crimepercent20percent28composite-2007percent29-website.pdf>>

<sup>15</sup> A short history of Section 216 is included as Appendix A to this report

Section 216(1) makes it an offence for any person to have sexual intercourse with a person 'with an impairment of the mind' while section 216(2) covers other sexual acts such as indecently<sup>16</sup> dealing with the person, procuring the person to commit an indecent act, exposing the person to an indecent act or indecent matter, and taking indecent images of the person.

Section 216(3) and (3A) create circumstances of aggravation in relation to the offending, such as when the offender is the guardian or parent or grandparent of the person with an impairment of the mind.

Section 217 also criminalises the procurement of sexual intercourse with a person with 'an impairment of the mind'.<sup>17</sup> 'Procure' in this context is defined as 'knowingly entice or recruit for the purposes of sexual exploitation'.<sup>18</sup>

### Application/Persons protected

Section 216 (along with section 217) has a wide potential application. The definition of 'person with an impairment of the mind' is broadly defined:<sup>19</sup>

'person with an impairment of the mind' means a person with a disability that—

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) results in—
  - (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and
  - (ii) the person needing support.

While perhaps unintended, this definition has the potential to include many people with disability who, despite their disability, still have the capacity to decide to engage in a consensual sexual relationship. The Queensland Court of Appeal has expressed concern that the definition is so broad that it potentially includes people who do not have 'any diminution in the capacity to acquire knowledge', and simply requires some level of neurological impairment that affects the power to communicate.<sup>20</sup> For example, the definition is so wide as to 'include a cerebral palsy sufferer of genius IQ'.<sup>21</sup> This case, and other court decisions considering and applying section 216, are considered below (under part 2.3).

<sup>16</sup> What 'indecent' means in the *Criminal Code* is to be construed by its ordinary and popular meaning. It is to be judged on the context of the situation (*R v Dunn* [1973] 2 NZLR 481) and is something that offends against currently accepted standards of decency (*A-G v Huber* (1971) 2 SASR 142).

<sup>17</sup> *Criminal Code Act 1899* (Qld) s 217(1).

<sup>18</sup> *Criminal Code Act 1899* (Qld) s 217(2).

<sup>19</sup> *Ibid* s 1.

<sup>20</sup> *R v Mrzljak* [2004] QCA 420 at [68].

<sup>21</sup> *Ibid*.

## Aggravated offences

Higher penalties are applicable for guardians, carers, and family members:<sup>22</sup>

- (3) If the person with an impairment of the mind is not the lineal descendent of the offender but the offender is the guardian of that person or, for the time being, has that person under the offender's care, the offender is guilty of a crime, and is liable-
  - (a) In the case of the offence of having unlawful carnal knowledge – to imprisonment for life; or
  - (b) In the case of an attempt to have unlawful carnal knowledge – to imprisonment for life; or
  - (c) In the case of an offence defined in subsection (2) – to imprisonment for 14 years.
- (3A) In the case of an offence defined in subsection (2), if the person with an impairment of the mind is, to the knowledge of the offender, the offender's lineal descendant, the offender is guilty of a crime, and is liable to imprisonment for 14 years.

## Defences

In addition to the general criminal law defences, such as mistake of fact<sup>23</sup> and insanity,<sup>24</sup> section 216 provides two specific defences:

- (4) It is a defence to a charge of an offence defined in this section to prove-
  - (a) that the accused person believed on reasonable grounds that the person was not a person with an impairment of the mind; or
  - (b) that the doing of the act or the making of the omission which, in either case, constitutes the offence did not in the circumstances constitute sexual exploitation of the person with an impairment of the mind.

Although section 216 provides a specific defence if the conduct did not constitute 'sexual exploitation'<sup>25</sup> the provision still has the effect of criminalising all sexual contact with a 'person with an impairment of the mind' unless proven otherwise. This creates a situation where even if the sexual activity involved people who were fully capable of giving consent and may have been in a consensual relationship for a long period of time, if charges were brought, the onus would be on the alleged perpetrator to prove that their relationship was not one of sexual exploitation.

The creation of an offence that is presumed to have occurred on the basis that a person with 'an impairment of the mind' is incapable of engaging consensually in any sexual activity is inconsistent with the rights of persons with disability as outlined in international human rights conventions and other Queensland laws. This is discussed further in part 4 ('Inconsistency with other legal frameworks'). Section 216 also appears to be the most restrictive of this type of offence provision among Australian states and territories. This will be discussed further in part 3 of this report.

## 2.2 Application of section 216 in the courts

One method for developing greater insight into how section 216 is working in practice involves examining how the provision is being applied and interpreted by criminal courts.

It is important to note, however, that the number of offences under section 216 that have proceeded through the courts is not necessarily an indicator of the section's usefulness or effectiveness. Many factors contribute to whether a person is convicted or even whether a charge is commenced.

<sup>22</sup> *Criminal Code Act 1899* (Qld) s 216 .

<sup>23</sup> *Criminal Code Act 1899* (Qld) s 24.

<sup>24</sup> *Criminal Code Act 1899* (Qld) s 27.

<sup>25</sup> *Criminal Code Act 1899* (Qld) s 216 (4)(b).

Given the small proportion of instances of abuse that do progress through to trial, and the small numbers of prosecutions overall, the cases reported in this section are presented to illustrate different issues; they are not a representative sample.

Two forms of available data are considered; the number of people sentenced on a section 216 conviction, and written reasons of published appeal cases.

Table 1 (over) shows that for the period from 2011-17, there have been 22 matters where a section 216 offence was the most serious offence (when the offender was charged with a combination of offences) for which a person was sentenced in Queensland.

**Table 1: Sentenced events where section 216 records the most serious outcome for the most serious offence, Queensland Sentencing Information Service (Q SIS), January 2011 to December 2017**

| Section                  | Described in Q SIS   | Number |
|--------------------------|--|--------|
| Section 216(1)           | Unlawful carnal knowledge of a person with an impairment of the mind                             | 3      |
| Section 216(1)(3)        | Unlawful carnal knowledge of a person with an impairment of the mind under care/as a guardian    | 3      |
| Section 216(2) & 564(3A) | Unlawful carnal knowledge of a person with an impairment of the mind – domestic violence offence | 1      |
| Section 216(2)           | Abuse of person with an impairment of the mind   | 7      |
| Section 216(2)(3)        | Abuse of person with an impairment of the mind as a guardian/under care                          | 6      |
| Section 216(2)(3A)       | Abuse of person with an impairment of the mind who is a lineal descendant                        | 2      |
| TOTAL                    |  | 22     |

Source: Q SIS

**Table 2: Section 216 sentenced events by year, Q SIS, January 2011 to December 2017**

| Year  | Number |
|-------|--------|
| 2011  | 3      |
| 2012  | 1      |
| 2013  | 4      |
| 2014  | 2      |
| 2015  | 3      |
| 2016  | 4      |
| 2017  | 4      |
| TOTAL | 21     |

Source: Q SIS

Note: Sentencing remarks for one matter were missing from Q SIS

When convictions are considered through the lens of published appeal cases, it is apparent that there have been particular difficulties caused by the way that section 216 is framed. In particular, this is an issue for people with a cognitive impairment who may have capacity to consent in relationships that are clearly not exploitative, and in circumstances where the accused is also affected by cognitive impairment.

The broad definition of impairment of the mind has caused tensions not only in prosecutions under section 216, but also for prosecutions of other criminal offences, including rape. The Court of Appeal expressed concern that the definition is so broad that it 'embraced many persons who would not by any stretch of the imagination be regarded as intellectually impaired as that term is





ordinarily understood'.<sup>26</sup> It could include people who do not have 'any diminution in the capacity to acquire knowledge', and simply requires some level of 'neurological impairment that affects the power to communicate'.<sup>27</sup> As already noted, the definition is so wide as to 'include a cerebral palsy sufferer of genius IQ'.<sup>28</sup>

In *Mrzljak*<sup>29</sup> all three judges of the Court of Appeal made clear that the existence of an intellectual impairment does not mean that a person is incapable of giving or withholding consent.

In *Little*<sup>30</sup> the complainant was assessed as having an intellectual disability (with a full-scale IQ of 64) but also held an adequate understanding of sexuality and relationships. The complainant and the defendant, a taxi driver, both considered they were in a relationship. The complainant considered the defendant was her boyfriend, and the defendant said he wanted to move in with her. The 'complainant' in this case did not actually complain or report the incident to the police; after telling an employee at a workshop where she worked that she had a boyfriend, the employee told the complainant that her conduct was wrong, discussed the matter with another staff member, who took advice and referred the matter to police. In this case, the defendant was convicted under section 216, and the fact that the judge considered her able to give informed consent to sex not in itself a defence.

The interpretation of the broad term 'sexual exploitation' was also considered in *Little*. The term, not defined in the *Criminal Code*, took its ordinary meaning of 'selfish utilisation', which involved 'an assessment of the nature of the relationship between the complainant and the appellant, the appellant's understanding appreciation and knowledge of that relationship, and whether he abused that relationship for his own sexual gratification'.<sup>31</sup> The question for a jury is whether a defendant can establish, on the balance of probabilities, that they believe on reasonable grounds that the sexual conduct did not amount to exploitation. The jury would be required to assess the evidence of both the complainant and the defendant, which required 'the making of value judgements about the notoriously difficult matter of the nature of other peoples' intimate relationships'<sup>32</sup>:

Cases like this involving the alleged sexual exploitation of intellectually impaired young women can be expected to arouse strong emotions. On the one hand, intellectually impaired people like the complainant are vulnerable to sexual predators. But on the other hand, the complainant, a young woman with a pleasant personality and disposition, was able to give informed consent to sex and had an adequate understanding of sexuality and relationships; she was entitled to make her own decisions about forming intimate relationships. There was no evidence the appellant was cruel or unkind to the complainant.<sup>33</sup>

The Court considered that the issues and evidence in this case were finely balanced, and properly instructed juries could reasonably have reached different conclusions.<sup>34</sup> In such a case, it was 'critical' that the trial judge does everything possible to ensure the defendant receives a fair trial.<sup>35</sup>

The published appeal cases provide insight into the variety of circumstances of persons accused of contravening section 216. Whilst there are a number of defendants who appear – from the circumstances of the offending – to fall within the category of persons who knowingly take advantage of at-risk people for their own gratification, there also appear to be a significant proportion of those accused who are vulnerable themselves. Almost half of the accused in published cases had also been diagnosed with intellectual impairments themselves,<sup>36</sup> in some cases with significant implications for their understanding of the complainants' ability to give

<sup>26</sup> *R v Mrzljak* [2004] QCA 420 at [68].

<sup>27</sup> *Ibid* at [68]. [*R v Mrzljak* [2004] QCA 420]

<sup>28</sup> *Ibid*. [*R v Mrzljak* [2004] QCA 420]

<sup>29</sup> *R v Mrzljak* [2004] QCA 420.

<sup>30</sup> *R v Little* [2013] QCA 223.

<sup>31</sup> *Ibid* at [26]. [*R v Little* [2013] QCA 223]

<sup>32</sup> *Ibid* at [28]. [*R v Little* [2013] QCA 223]

<sup>33</sup> *Ibid* at [28]. [*R v Little* [2013] QCA 223]

<sup>34</sup> *Ibid* at [28]. [*R v Little* [2013] QCA 223]

<sup>35</sup> *Ibid* at [29]. [*R v Little* [2013] QCA 223]

<sup>36</sup> 5 of the 11 cases considering section 216 published on the Supreme Court Library website as at May 2020 involved a defendant with an intellectual disability: *R v AM* [2015] QDCPR 5; *R v Baird* [2008] QCA 338; *R v Hansen* [2018] QCA 153; *R v Mrzljak* [2004] QCA 420; *R v Raphael* [2009] QCA 145.





informed consent. The defendants' own level of impairment could have significant implications for the appropriate level of culpability to be ascribed to them,<sup>37</sup> and, if convicted, on the appropriateness and proportionality of terms of imprisonment.<sup>38</sup>

In summary, analysis of sentencing data and published appeal decisions indicates that:

- the complex and potentially value-laden judgements involved in the application of the offence provisions by juries, and poor understanding and/or communication by trial judges, has led to quashed convictions on several occasions; and,
- the defendants prosecuted by the Office of the Director of Public Prosecutions are not a homogenous group, and include people with intellectual impairments, which raises questions about culpability and the appropriateness of the punishments that were ordered.

### 3. Alternative approaches from other jurisdictions

Two different but related themes emerge from legislation regarding sexual offences in Australia. The first of these themes is consent. Most sexual offences turn on the issue of consent to sexual activity. All Australian jurisdictions consider issues such as the meaning of consent, when consent is freely and voluntarily given, and situations where consent may be negated.

The second theme is the provision of special protection. Special protections arise where lawmakers take an interventionist role and develop targeted legislative provisions designed to offer additional protections to groups, most often children or people with disability. Nearly all Australian jurisdictions have special protections for people with disability that relate to both the commission of sexual offences and, more generally, sexual activity.

Across all states and territories there exist four different legislative approaches:

- (1) Application of general sexual offences that apply to all members of the community, rather than specific provisions for people with intellectual disabilities (ACT)
- (2) Prohibition of sexual relations with persons in positions of authority or influence over the person (NSW, VIC, TAS, NT, SA)
- (3) Requiring consideration of the person's capacity to consent as an element of the offence or as a defence (WA, SA)
- (4) Prohibiting all sexual activities with persons with mental impairment, irrespective of whether the person has capacity to consent (QLD) – described in Section 2.

Appendices B and C include detailed comparisons of the relevant provisions, definitions, defences and how consent is treated in each jurisdiction. A summary of each is provided below.

#### New South Wales

In New South Wales it is an offence for a person:

- To have sexual intercourse with a 'person who has a cognitive impairment' if they are 'responsible for the care' of that person;<sup>39</sup> and
- To have sexual intercourse with a person who has a 'cognitive impairment' with the intention of taking advantage of that person's impairment.<sup>40</sup>

The definition of a person 'who has a cognitive impairment' is much narrower than that used in the Queensland legislation, being confined to a person who specifically has an intellectual disability, a developmental disorder (including autism spectrum disorder), a neurological disorder, dementia, a severe mental illness, or a brain injury.<sup>41</sup>

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<sup>37</sup> *R v Mrzljak* [2004] QCA 420.

<sup>38</sup> *R v Baird* [2008] QCA 338; *R v Hansen* [2018] QCA 153.

<sup>39</sup> *Crimes Act 1900* (NSW) s 66F(2).

<sup>40</sup> *Crimes Act 1900* (NSW) s 61H(1A).

<sup>41</sup> *Crimes Act 1900* (NSW) s 61H(1A).

Persons responsible for the care of someone with a cognitive impairment include people who attend the place where a person lives to provide paid or voluntary care, professional health care, education, home care or supervision.<sup>42</sup>

Defences include the accused not knowing that the person has a cognitive impairment, if the accused was married or a defacto partner of the person, or if the act was for the purpose of any proper medical or hygienic purposes.<sup>43</sup>

Consent is not a defence, nor is it in regard to the general offences of indecent assault and acts of indecency if;

- the offending is against a person with a cognitive impairment,<sup>44</sup> or,
- the offender is responsible for the care of the person or the offender intended to take advantage of the impairment.<sup>45</sup>

## Victoria

In Victoria, it is a criminal offence for a person who provides treatment or support services to sexually penetrate/be penetrated,<sup>46</sup> inappropriately sexually touch/be touched,<sup>47</sup> engage in sexual activity in the presence of<sup>48</sup> or expose sexual activities<sup>49</sup> to a person with a cognitive impairment.<sup>50</sup>

The definition of 'cognitive impairment' includes 'impairment because of intellectual disability, dementia, neurological disorder or brain injury'.<sup>51</sup> Treatment or support services include those provided by government or any other person or body associated with mental health/medical treatment as well as therapeutic, personal care or support services.<sup>52</sup>

Defences provided under Victorian legislation include, if the accused reasonably believed that:

- They are married or in a domestic relationship with the person;<sup>53</sup>
- The person did not have a cognitive impairment or mental illness;<sup>54</sup>
- As a worker, the service provider was not providing services to the person.<sup>55</sup>

Consent is not a required element for these offences and is specifically excluded as being a relevant consideration regarding whether the sexual touching or exposure is inappropriate.<sup>56</sup>

## South Australia

In South Australia two sets of offences exist. It is an offence for a person to have sexual intercourse with another person, knowing that the other person has an intellectual disability and is unable to understand the nature or consequence of sexual intercourse.<sup>57</sup> It is also an offence for a person who provides a service<sup>58</sup> to a person with a 'cognitive impairment' if the person obtains, through undue influence, sexual intercourse or indecently contacts the person with the cognitive impairment.<sup>59</sup> Further, it is an offence if the person who provides a service behaves in an indecent manner in the presence of a person with a cognitive impairment without consent or with the person's consent where the consent was obtained by undue influence.<sup>60</sup>

<sup>42</sup> *Crimes Act 1900* (NSW) s 66F(1).

<sup>43</sup> *Crimes Act 1900* (NSW) s 66F(7).

<sup>44</sup> See specifically, *Crimes Act 1900* (NSW) ss 61KC, 61KD, 61KE, and 61KF as per s 66F(6).

<sup>45</sup> *Crimes Act 1900* (NSW) s 66F(6).

<sup>46</sup> *Crimes Act 1958* (Vic) s 52B.

<sup>47</sup> *Crimes Act 1958* (Vic) s 52C.

<sup>48</sup> *Crimes Act 1958* (Vic) s 52D.

<sup>49</sup> *Crimes Act 1958* (Vic) s 52E.

<sup>50</sup> Regarding offences involving sexual penetration and sexual touching, it is also an offence should the accused have an animal involved in such contact, see ss 52B(1)(a)(iii)(B) and (C), 52C(1)(a)(iii)(B) and (C).

<sup>51</sup> *Crimes Act 1958* (Vic) s 52A.

<sup>52</sup> *Crimes Act 1958* (Vic) s 52A, *Mental Health Act 2014* (Vic) s 4.

<sup>53</sup> *Crimes Act 1958* (Vic) ss 52G, 52H.

<sup>54</sup> *Crimes Act 1958* (Vic) s 52I.

<sup>55</sup> *Crimes Act 1958* (Vic) s 52J.

<sup>56</sup> *Crimes Act 1958* (Vic) ss 52C(4)(b), 52D(4)(b).

<sup>57</sup> *Criminal Law Consolidation Act 1935* (SA) s 49(6).

<sup>58</sup> There is no definition in the legislation regarding what providing a service means.

<sup>59</sup> *Criminal Law Consolidation Act 1935* (SA) s 51(1).

<sup>60</sup> *Criminal Law Consolidation Act 1935* (SA) s 51(2).



While intellectual disability is not defined in the legislation, 'cognitive impairment' is defined as including: an intellectual disability; a developmental disorder (including an autistic spectrum disorder); a neurological disorder; dementia; mental impairment; or a brain injury.<sup>61</sup>

The provision does not apply if the two people involved are married or domestic partners to each other.<sup>62</sup> Consent is presumed to have been obtained through undue influence if the accused was in a position of power, trust, or authority in relation to the victim, and the onus is on the accused to prove otherwise.<sup>63</sup>

### Tasmania

In Tasmania it is an offence for a person responsible for the care of a person with a mental impairment to have sexual intercourse with that person.<sup>64</sup> 'Mental impairment' is defined to mean senility, intellectual disability, mental illness or brain damage,<sup>65</sup> and 'mental illness' is further defined as a person experiencing a serious impairment of thought (including delusions), mood, volition, perception or cognition.<sup>66</sup> A person is 'responsible for the care' of another if they provide medical, nursing, therapeutic or educative services to the person with a mental impairment in connection with that impairment.<sup>67</sup>

It is a defence if:

- The persons were married or in a significant relationship with each other;<sup>68</sup>
- It is proven that the person with the impairment consented to the act, and the consent was not unduly influenced by the fact that the accused was responsible for their care.<sup>69</sup>

### Western Australia

In Western Australia, it is an offence for a person who knows or ought to know that another person is an 'incapable person' to engage in sexual acts with the 'incapable person'.<sup>70</sup> Sexual acts include: sexual penetration;<sup>71</sup> engaging in sexual behaviour;<sup>72</sup> indecently dealing;<sup>73</sup> doing an indecent act;<sup>74</sup> and indecently recording.<sup>75</sup>

An 'incapable person' is defined as a person who is so mentally impaired as to be incapable of understanding the nature of the act constituting the offence, or of guarding themselves against sexual exploitation.<sup>76</sup>

It is a defence to the set of offences to prove that the offender and the incapable person were lawfully married to each other.<sup>77</sup> Consent is not an element in considering this offence.

### Northern Territory

In the Northern Territory it is an offence for a person providing disability support services to a 'mentally ill or handicapped' person to have sexual intercourse with or commit an act of gross indecency upon that person.<sup>78</sup>

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<sup>61</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(5).

<sup>62</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(3).

<sup>63</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(4).

<sup>64</sup> *Criminal Code Act 1924 (Tas)* s 126(1).

<sup>65</sup> *Criminal Code Act 1924 (Tas)* s 126(4).

<sup>66</sup> *Criminal Code Act 1924 (Tas)* s 126(4) and *Mental Health Act 2013* s 4.

<sup>67</sup> *Criminal Code Act 1924 (Tas)* s 126(3).

<sup>68</sup> *Criminal Code Act 1924 (Tas)* s 126(2)(b).

<sup>69</sup> *Criminal Code Act 1924 (Tas)* s 126(2)(a).

<sup>70</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330.

<sup>71</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(2).

<sup>72</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(3).

<sup>73</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(4).

<sup>74</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(5).

<sup>75</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(6).

<sup>76</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(1).

<sup>77</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(9).

<sup>78</sup> *Criminal Code Act (NT)* s 130(2).

A 'mentally ill or handicapped person' is defined as a person who, because of an 'abnormality of mind, is unable to manage themselves or to exercise responsible behaviour'.<sup>79</sup>

A 'disability support service' is defined as 'a medical or therapeutic service provided to a mentally ill or handicapped person that is related to that illness or handicap'.<sup>80</sup> The provider of such a service includes a person who provides that service voluntarily or for remuneration but does not include a person who at the time is also 'mentally ill or handicapped'.<sup>81</sup>

Under this legislation, it is a defence to prove that at the time of offending, the accused was married to or was a de facto partner of the person, or the accused did not know that the person was 'mentally ill or handicapped'.<sup>82</sup> Consent to the offending acts is not a defence.<sup>83</sup>

### Australian Capital Territory

In the Australian Capital Territory, there are no specific offences that apply only to people with impaired capacity regarding sexual offences, instead such offending is covered through provisions dealing with sexual offending generally.

### Analysis

The type of sexual contact prohibited varies between jurisdictions, with some prohibiting sexual intercourse only, while others prohibit more general sexual contact, including exposing people to sexual activities.

In terms of commonalities, New South Wales, Victoria, Tasmania, the Northern Territory and South Australia all have specific offences prohibiting sexual contact between a person with a disability and a service provider.<sup>84</sup> However, they all exclude circumstances where the sexual contact is between people in a persistent relationship such as a marriage.<sup>85</sup>

New South Wales, South Australia and Western Australia have offences similar to Queensland's section 216, where sexual intercourse<sup>86</sup>, or any sexual contact, is an offence.<sup>87</sup> However, there are elements of these offences that make their application less prohibitive to people with impaired decision-making ability. In New South Wales, it must be proved that the offender had the intention of taking advantage of the person's impairment.<sup>88</sup> In Western Australia and South Australia, the person's impairment must be to such a degree that they are unable to understand the nature of the sexual act,<sup>89</sup> with the additional alternative condition in Western Australia that the person is unable to guard themselves against sexual exploitation.<sup>90</sup>

Overall, the legislative provisions in other jurisdictions across Australia appear, in comparison with Queensland, to provide additional acknowledgment of the agency of people with disability and create provisions specifically for situations where exploitation may occur, such as when service providers are involved or when the person concerned is unable to consent to the activity and/or protect themselves against it.

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<sup>79</sup> *Criminal Code Act (NT)* s 126.

<sup>80</sup> *Criminal Code Act (NT)* s 130(1).

<sup>81</sup> *Criminal Code Act (NT)* s 130(1).

<sup>82</sup> *Criminal Code Act (NT)* s 130(3).

<sup>83</sup> *Criminal Code Act (NT)* s 139A.

<sup>84</sup> *Crimes Act 1900 (NSW)* s 66F(3); *Crimes Act 1958 (Vic)* ss 52B – E; *Criminal Code Act 1924 (Tas)* s 126(1); *Criminal Code Act (NT)* s 130(2); *Criminal Law Consolidation Act 1935 (SA)* s 51.

<sup>85</sup> *Crimes Act 1900 (NSW)* s 66F(7); *Crimes Act 1958 (Vic)* ss 52G, 52H; *Criminal Code Act 1924 (Tas)* s 126(2)(b); *Criminal Code Act (NT)* s 130(3); *Criminal Law Consolidation Act 1935 (SA)* s 49(8).

<sup>86</sup> *Crimes Act 1900 (NSW)* s 66F(3); *Criminal Law Consolidation Act 1935 (SA)* 2 49(6).

<sup>87</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330.

<sup>88</sup> *Crimes Act 1900 (NSW)* s 66F(3).

<sup>89</sup> *Criminal Law Consolidation Act 1935 (SA)* s 49(6); *Criminal Code Act Compilation Act 1913 (WA)* s 330(1).

<sup>90</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 330(1).

## 4. Inconsistency with other legal frameworks

In addition to section 216 of Queensland's Criminal Code potentially being at odds with other jurisdictions, it is also incongruent with the rights of people with disability recognised in other Queensland and Commonwealth laws and international human rights instruments.

### 4.1 Queensland legislation

#### *Anti-Discrimination Act 1991*

The *Anti-Discrimination Act 1991* (Qld) sets out the Queensland Government's commitment to promote equality of opportunity for all persons by protecting them from unfair discrimination. The Preamble to the Act refers to a number of international human rights instruments, including the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.<sup>91</sup> It also states that:

- everyone has the right to equal protection and equal benefit of the law without discrimination;
- the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society; and
- the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.<sup>92</sup>

Discrimination on the basis of certain attributes is prohibited under the *Anti-Discrimination Act*, including due to an impairment.<sup>93</sup> This is defined further as including 'a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'.<sup>94</sup>

Accordingly, section 216, which was specifically created to criminalise sexual relations with people with 'an impairment of the mind', would breach the principles and the broader intent of the *Anti-Discrimination Act*. It particularly undermines the principle of an educated community appreciative and respectful of the dignity and worth of all individuals. Under section 216, the attribute of impairment creates a situation in which the sexual relations of people with an impairment are treated differently based on that attribute, regardless of the person's capacity to consent. Nonetheless, the prosecution of people under section 216 would not amount to a breach of the *Anti-Discrimination Act*.<sup>95</sup>

<sup>91</sup> *Anti-Discrimination Act 1991* (Qld) Preamble para 2.

<sup>92</sup> *Anti-Discrimination Act 1991* (Qld) Preamble para 6.

<sup>93</sup> *Anti-Discrimination Act 1991* (Qld) s 7(h).

<sup>94</sup> *Anti-Discrimination Act 1991* (Qld) sch 1.

<sup>95</sup> Section 216 and the administration of that provision would not be considered 'discrimination' under the *Anti-Discrimination Act*. Discrimination occurs under the Act when 'direct' or 'indirect' discrimination (*Anti-Discrimination Act 1991* (Qld) s 9) occurs against a person with an attribute (such as an 'impairment' as defined above). Direct discrimination occurs when a person treats another person with an attribute less favourably or materially differently than another person without the attribute (*Anti-Discrimination Act 1991* (Qld) s 10). Indirect discrimination is defined as occurring when a person imposes a term that a person with an attribute cannot comply with, and a higher proportion of people without the attribute can comply with, and this term is not reasonable (*Anti-Discrimination Act 1991* (Qld) s 11). Section 216 operates when the complainant/victim has the 'attribute', and the person being 'treated' would be the person charged with the offence. The person charged (defendant) is not themselves being directly or indirectly discriminated against as they are not being charged based on any attributes of their own. A complainant is not being directly or indirectly discriminated against as they are not being 'treated' by the person charging the defendant. They may be affected by the prosecution, but not 'discriminated' against as defined in the legislation. Even if the enforcement of section 216 was found to be discriminating against a person with impaired decision-making ability, the *Anti-Discrimination Act* provides for an exception that an act is not unlawfully discriminatory if it was necessary to comply with, or is specifically authorised by an existing provision ('Existing provision' means a provision that was in existence at the commencement of this section of the *Anti-Discrimination Act*, 30 June 1992, *Anti-Discrimination Act 1991* (Qld) s 106(2)) of another Act (*Anti-Discrimination Act 1991* (Qld) s 106(1)(a)). Considering that section 216 has remained largely unaltered since 1989 (as discussed above), it is likely that it would be considered an existing provision and therefore exempt from the *Anti-Discrimination Act*.





## Guardianship and Administration Act 2000

The *Guardianship and Administration Act 2000* (Qld), along with the *Powers of Attorney Act 1998* (Qld), provide for the laws and general principles about decision-making for adults with impaired decision-making capacity in Queensland.

The *Guardianship and Administration Act* seeks to strike an appropriate balance between the right of an adult with impaired decision-making capacity to enjoy the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate support for decision-making.<sup>96</sup> The Act acknowledges that a person's capacity to make decisions may vary according to the nature and extent of the impairment, the type of decision to be made (including the complexity of the decision) and the support available from members of the adult's existing support network.<sup>97</sup>

The Act also contains a set of general principles (and health care principles) that must be applied by all persons performing a function or exercising a power under the Act (such as guardians and administrators) in relation to an adult with impaired decision-making capacity for a matter.<sup>98</sup> The Act also encourages the community in general to apply and promote these principles.<sup>99</sup>

The general principles under the *Guardianship and Administration Act* reflect and advance the purpose and acknowledgements articulated in the introductory provisions of the Act. They include statements noting the presumption of decision-making capacity for all adults, that all adults have the same human rights regardless of decision-making capacity and recognising the importance of preserving the adult's right to make their own decisions through providing support for decision-making. They also note the importance of taking into consideration the adult's views and wishes and exercising powers or functions in the way that is least restrictive of the person's rights.<sup>100</sup>

These principles contrast with the language and operation of section 216 of the *Criminal Code*. The *Criminal Code* brings together all 'impairments' of the mind, making no distinction between individuals' capacity or ability to give consent, and criminalises all sexual activity involving people with an 'impairment'. In contrast, the *Guardianship and Administration Act* recognises the individual circumstances and lived experience of people with disability, notes that capacity can vary between individuals, across time and according to the situation, and recognises the importance of encouraging, supporting and empowering an adult to achieve their maximum potential, and to the greatest extent practicable, to make his or her own decisions.

As such, section 216 of the *Criminal Code* is not consistent with the broader goals of the *Guardianship and Administration Act* to recognise a person's capacity and encourage their autonomy and equal participation in society.

## Disability Services Act 2006

The *Disability Services Act 2006* (Qld) regulates the delivery and funding of disability support services by the Queensland government.

The objects of the Act acknowledge the rights of people with disability, including by promoting their inclusion in the life of the community generally.<sup>101</sup> Further, the Act has a disability rights section with a list of human rights principles. The principles include that people with disability have the same human rights as others.<sup>102</sup> The Act provides that people with disability should be empowered to exercise these rights,<sup>103</sup> have the right to respect for their human worth and dignity as individuals, the right to realise their individual capacities for physical, social, and emotional development,<sup>104</sup>

<sup>96</sup> *Guardianship and Administration Act 2000* (Qld) s 6.

<sup>97</sup> *Guardianship and Administration Act 2000* (Qld) s 5(c).

<sup>98</sup> *Guardianship and Administration Act 2000* (Qld) s 11B(1).

<sup>99</sup> *Guardianship and Administration Act 2000* (Qld) s 11B(3).

<sup>100</sup> *Guardianship and Administration Act 2000* (Qld) s 11B.

<sup>101</sup> *Disability Services Act 2006* (Qld) s 6(a).

<sup>102</sup> *Disability Services Act 2006* (Qld) s 18.

<sup>103</sup> *Disability Services Act 2006* (Qld) s 18(1).

<sup>104</sup> *Disability Services Act 2006* (Qld) s 18(2)(b).

and have the right to recognition of their individual autonomy and independence, including the freedom to exercise choice and have control of their lives.<sup>105</sup>

Again, section 216 of the *Criminal Code* is potentially inconsistent with these principles, especially those recognising the right of people with disability to develop their individual capacities and live autonomously, including having choice and control over their lives.

### *Human Rights Act 2019*

The main objects of the *Human Rights Act 2019* (Qld) are 'protecting and promoting human rights', 'to help build a culture in the Queensland public sector that respects and promotes human rights,' and to promote community dialogue about human rights.<sup>106</sup> The preamble to the Act explicitly recognises the inherent dignity and worth of all human beings, which are essential in a democratic and inclusive society that respects the rule of law. Rights should only be limited after careful consideration, and in a way that can be justified in a free and democratic society based on human dignity, equality, freedom and the rule of law.<sup>107</sup>

The Act applies to public entities, defined to mean all government entities, including the Queensland Police Service, the Director of Public Prosecutions, registered disability providers performing functions of a public nature, public health, disability, education services and members of Queensland's guardianship and administration system.<sup>108</sup>

The Act lists several human rights, which are noted to be in *addition* to other rights and freedoms arising under Commonwealth laws and international human rights conventions.<sup>109</sup> The rights relevant to the discussion in this paper include:

- the right to recognition and equality before the law, including the right to enjoy human rights, to enjoy equal protection of the law without discrimination, and the right to effective protection against discrimination;<sup>110</sup>
- freedom from arbitrary interference with a person's privacy, family, home or correspondence;<sup>111</sup>
- the right to access education appropriate to a child's needs, and the right to access, based on the person's abilities, further vocational education and training that is equally accessible to all; and<sup>112</sup>
- the right to access health services without discrimination.<sup>113</sup>

Human rights may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and several factors are provided to help decide whether a limit is reasonable and justifiable (also called the proportionality principle).<sup>114</sup> Among these factors is consideration of the 'nature and purpose of the limitation, and whether there are any less restrictive and reasonably available ways to achieve the purpose'.

Section 216 is potentially inconsistent with several rights protected by the *Human Rights Act*. This includes the right to equality and non-discrimination, and to not be subject to arbitrary interference with private and home life. To the extent that the criminalisation of sexual acts with people with mental impairments indirectly limits their access to education and sexual health services, the provision could also have the effect of denying or limiting a person's rights to health and education.

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<sup>105</sup> *Disability Services Act 2006* (Qld) s 18(2)(e).

<sup>106</sup> *Human Rights Act 2019* (Qld), s 3.

<sup>107</sup> *Human Rights Act 2019* (Qld), Preamble.

<sup>108</sup> *Human Rights Act 2019* (Qld), ss 9 and 10.

<sup>109</sup> *Human Rights Act 2019* (Qld) s 12.

<sup>110</sup> *Human Rights Act 2019* (Qld) s 15.

<sup>111</sup> *Human Rights Act 2019* (Qld) s 25.

<sup>112</sup> *Human Rights Act 2019* (Qld) s 36.

<sup>113</sup> *Human Rights Act 2019* (Qld) s 37.

<sup>114</sup> *Human Rights Act 2019* (Qld) s 13.



## 4.2 Commonwealth legislation

### *National Disability Insurance Scheme Act 2013*

The *National Disability Insurance Scheme Act 2013* (Cth) establishes the National Disability Insurance Scheme (NDIS) and creates a nationally funded program to provide supports for Australians with disability, their families, and carers. The NDIS is designed to provide people with disability with the reasonable and necessary supports they need to participate fully in the community.

The *National Disability Insurance Scheme Act* was passed in 2013 and represents a contemporary approach to the concept of disability.<sup>115</sup> This is achieved through the principles and objects in the Act.

Similarly to the *Disability Services Act* above, the principles in this Act recognise people's rights to participate in social life and realise their potential in the development of various aspects of their lives. The objects further note that the Act is designed to support people with disability to achieve independence and social and economic participation, and to enable people with disability to maximise independent lifestyles and obtain full inclusion in the community.<sup>116</sup>

The objects are followed by general principles under the Act, which include the statement that people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development, and that people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.<sup>117</sup> The principles also recognise that people with disability should be supported to take reasonable risks<sup>118</sup> and have the same right as other members of society to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that affect their lives.<sup>119</sup>

The objects of the *National Disability Insurance Scheme Act*<sup>120</sup> specifically aim to give effect to Australia's obligations under the *Convention on the Rights of Persons with Disabilities*.<sup>121</sup>

Based on the above, it is reasonable to observe that section 216 of the *Criminal Code* may not operate to advance the 'General principles guiding actions' under the *National Disability Insurance Scheme Act 2013*.

## 4.3 International treaties and conventions

The universality and indivisibility of the concepts of equality and non-discrimination before the law have been reiterated in various international instruments. These rights have also evolved over time, specifically in relation to the protection of people with disability.<sup>122</sup> Protective and paternalistic attitudes have been replaced by concepts more consistent with the 'social model of disability', which underpins the *Convention on the Rights of Persons with Disabilities*.<sup>123</sup> This Convention

<sup>115</sup> Although there is other Commonwealth legislation that affects and protects the rights of people with a disability such as the *Disability Discrimination Act 1992* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth), the principles contained in those legislation is broad and does not address the issue of individual participation and freedom in society apart from general statements of rights such as of universality; see, for example *Disability Discrimination Act 1992* (Cth) s 3, *Australian Human Rights Commission Act 1986* (Cth) s 10A.

<sup>116</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 3.

<sup>117</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 4(1)&(2).

<sup>118</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 4(4).

<sup>119</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 4(8).

<sup>120</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 3.

<sup>121</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).

<sup>122</sup> See, for example, *International Covenant on Civil and Political Rights* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856/XXVI, UNGAOR, 26th sess, 2027th mtg, UN Doc A/RES/2856(XXVI) (20 December 1971); *Declaration on the Rights of Disabled Persons*, GA Res 3447/XXX, UNGAOR, 30th sess, 2433rd mtg, UN Doc A/RES/3447(XXX) (9 December 1975); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).

<sup>123</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).



recognises that disability is a social construct; the result of a society that places physical, social, and attitudinal barriers in the way of people with disability.

Although the application of international obligations to Australian states and territories presents various legal and constitutional challenges, it is clear that successive Queensland governments support their fundamental human rights principles and have intended that various statutes comply with these instruments.<sup>124</sup>

Within this context, section 216 does appear to be inconsistent with a number of obligations under the *Convention on the Rights of Persons with Disabilities*.

Article 23 – Respect for home and the family:

1. States 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, so as to ensure that:
  - (a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;
  - (b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;
  - (c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

Further, article 23 of the Convention provides that persons with disabilities also have the right to have access to information and reproductive education and the means necessary to enable them to exercise these rights. The Public Advocate is aware of concerns raised by disability service providers that the broad wording of section 216 has discouraged them from providing sexual health and relationships education to their clients.<sup>125</sup>

As part of this discussion, it is also appropriate to consider article 16 of the Convention – Freedom from exploitation, violence, and abuse:

1. 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.
- ...
5. 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.

This article creates an obligation on member states to protect people with disabilities from exploitation, violence, and abuse. It could be argued that section 216 of the *Criminal Code* is seeking to achieve this. Section 216 clearly operates to 'protect' people with mental impairment from sexual exploitation, however its drafting has not considered the varying capacities of people with mental impairment, treating them instead as a homogenous group of people without the capacity to legally consent to sexual relations. Such a provision, while protecting a limited cohort of

<sup>124</sup> See, for example, *Anti-Discrimination Act 1991* (Qld) Preamble paras 1-4; Explanatory Notes, *Guardianship and Administration and Other Legislation Amendment Bill 2017* (Qld) 22.

<sup>125</sup> Office of the Public Advocate (Queensland), *Submission to the Legal Affairs and Community Safety Committee – Human Rights Inquiry* (April 2016) 11.

people with significant mental impairment who do not have the capacity to consent to sexual relations, can act to deny members of this cohort who do have the capacity to consent, the right to live autonomous lives and make independent choices and have sexual relationships. Amended drafting of section 216 will potentially alleviate this issue, to achieve its protective purpose without denying people with disability their fundamental rights to independence, relationships, and family.

## 5. Implications and alternative interventions

The criminal law does not operate in isolation from the policies, practices and cultures of society and service environments which shape the lived experience of people with disability. The criminal law and criminal justice processes are not the only institutions involved in responding to the abuse and exploitation of people with disability. In this section consideration is given to:

- the implications and unintended consequences of section 216, particularly on policies and practices in services; and
- the positive role that other interventions and investments, particularly in education, can play in supporting people with cognitive disabilities to protect themselves and realise their rights to sexual expression and relationships.

### 5.1 Implications and unintended consequences

One of the most significant implications associated with the breadth of section 216 is the risk that service providers, support workers and professionals will be reluctant to provide or support access to sex education and sexual health services for clients for fear of placing clients – or themselves – at risk of criminal prosecution.

The *Criminal Code* holds not only principal offenders liable for offences, but also any other persons who may be considered to be a 'party' to the offending.<sup>126</sup> Any person deemed to be a party to the offence can be charged with actually committing it.<sup>127</sup> For example, a person is deemed to be a party if they do anything that enables or aids another person to commit an offence, or if they counsel or procure another person to commit the offence.<sup>128</sup>

If a person with an 'impairment of the mind' has a sexual encounter with another person, the elements of section 216 are satisfied. Due to the party provisions of the *Criminal Code*, if someone supporting the person with a disability had helped to facilitate the sexual encounter, then that could be considered enabling or aiding that offence. The supporter would be considered a party and could be charged with committing the offence.

These party provisions could also extend to other assistance that supporters may provide, including:

- assisting a person with disability to be transported to a location where they have a sexual encounter with another person;
- facilitating social encounters between people with disability to find relationships;
- arranging for legal sex work to be provided to a person with disability who has requested and is seeking such services; and
- providing contraceptive medication or condoms to people with disability.

Clearly in these scenarios, the defence that the person with disability was not being sexually exploited applies. However, the issue is that there is an offence that initially criminalises everyday activities unless it can be proven otherwise by the accused person.

The Public Advocate is aware, anecdotally, that section 216 has prevented some service providers and disability support workers from providing sex education to clients with intellectual disability and other conditions that may impact on a person's decision-making ability. This is because service providers have been concerned that such actions may be interpreted as encouraging or aiding

<sup>126</sup> *Criminal Code Act 1899* (Qld) ch 2.

<sup>127</sup> *Criminal Code Act 1899* (Qld) s 7(1).

<sup>128</sup> *Criminal Code Act 1899* (Qld) s 7(1).

the commission of an offence. Denying access to knowledge that may help people with disability to better understand their bodies and sexuality, to learn what amounts to consent, and to understand the fundamentals of healthy sexual relationships, exposes them to the risk of abuse and exploitation. Withholding this knowledge also denies them the right to develop a normal understanding of their own sexuality and to learn what is socially appropriate in terms of expressing their sexual feelings. While these matters may be challenging to some, it is important to recognise that having a healthy understanding of one's body and sexuality is fundamental to exhibiting socially appropriate behaviour and avoiding developing inappropriate or overtly sexualised behaviours.

Many researchers, commentators and law reform commissions have emphasised the importance of providing accessible appropriate sex education to people with intellectual disabilities to not only support them to realise their sexual rights, but equally importantly, to help reduce the risk of sexual assault.<sup>129</sup> Done well, accessible sex education contributes to reducing vulnerability as well as to reducing instances of inappropriate sexual expression.<sup>130</sup> Inadequate sexual education, on the other hand, places individuals with intellectual disability at a greater risk of sexual abuse, sexually transmitted infections, and can place individuals at risk of contact with the criminal justice system.<sup>131</sup>

## Conclusion and Recommendations

This paper discusses section 216 (and the related provision of section 217) of the *Criminal Code* from a range of perspectives and has been prepared to prompt further discussion and debate regarding the provision and its impact on Queenslanders with impaired decision-making ability.

A review of section 216 does appear to be necessary and potentially overdue. The review needs to consider the legal frameworks and principles that exist in various jurisdictions, as well as policy questions concerning the ongoing level of protection that some people may require. It also needs to incorporate the experience of people with disability.

Public discussion and debate about this matter will be informed by strong and compelling opinions, experiences, and views. Therefore, a wide consultation is required to consider the views of the various stakeholders who will wish to have a say.

The Public Advocate recommends that there be a referral of section 216 to the Queensland Law Reform Commission for review. The Public Advocate will continue to promote this issue and participate in future discussions and developments in this area to ensure that the rights of adults with impaired decision-making ability are promoted and protected.

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<sup>129</sup> Victorian Law Reform Commission (2004) *Sexual Offences Final Report*, p. 339.

<sup>130</sup> A Swango-Wilson, 'Caregiver perceptions and implications for sex education for individuals with intellectual and developmental disabilities' *Sex and Disability* (2008) vol 26, p. 169.

<sup>131</sup> B McDaniels and A Fleming, 'Sexuality education and intellectual disability: Time to address the challenge', *Sexuality and Disability* (2016) vol. 34, no. 2.

## Appendix A – History of section 216

| Act  | Offence / Charges  |
|--|--|
| <i>Criminal Code Act 1899</i>                                    | <p>215. Defilement of Girls under Fourteen and of Idiots.<br/>Any person who-</p> <p>(1) Has or attempts to have unlawful carnal knowledge of a girl under the age of fourteen years; or</p> <p>(2) Knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her; is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years.</p> <p>It is a defence to a charge of either of the offences firstly defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of fourteen years.</p> <p>A prosecution for either of the offences firstly defined in this section must be begun within two months after the offence is committed.</p> <p>A person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness.<br/>The wife of the accused person is a competent but not a compellable witness.</p> |
| <i>Criminal Code Amendment Act (No.2) 1913</i>                   | <p>The age of fourteen is replaced by the age of seventeen.<br/>The prosecution can be begun within six months instead of two months.</p>  |
| <i>Criminal Law Amendment Act 1945</i>                           | <p>Penalty increased to five years.</p>  |
| <i>Criminal Code Amendment Act 1976</i>                          | <p>Age of consent for girls changed to sixteen.</p>  |
| <i>Evidence Act 1977</i>   | <p>Removal of the words 'The wife of the accused person is a competent but not a compellable witness'.</p>   |
| <i>Corrective Services (Consequential Amendments) Act 1988</i>   | <p>Removal of the words 'with hard labour'.</p>  |
| <i>Criminal Code, Evidence Act and Other Amendments Act 1989</i> | <p>Replaced section 215 with the following –</p> <p>216. Abuse of intellectually impaired persons</p> <p>(1) Any person who has or attempts to have unlawful carnal knowledge of an intellectually impaired person is, subject to subsection (3), guilty of a misdemeanour, and is liable to imprisonment for five years.</p> <p>(2) Any person who-</p> <p>(a) unlawfully and indecently deals with an intellectually impaired person;</p> <p>(b) unlawfully procures an intellectually impaired person to commit an indecent act;</p> <p>(c) unlawfully permits himself to be indecently dealt with by an intellectually impaired person;</p>  |

|  |   |
|--|---|
|  | <p>(d) wilfully and unlawfully exposes an intellectually impaired person to an indecent act by the offender or any other person;</p> <p>(e) without legitimate reason, wilfully exposes an intellectually impaired person to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or</p> <p>(f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of an intellectually impaired person, is, subject to subsection (3), guilty of a misdemeanour, and is liable to imprisonment for three years.</p> <p>(3) If the intellectually impaired person is not the lineal descendant of the offender but the offender is the guardian of that person or, for the time being, has that person under his care, the offender is guilty of a crime, and is liable-</p> <p>(a) in the case of the offence of having unlawful carnal knowledge, to imprisonment for life;</p> <p>(b) in the case of an attempt to have unlawful carnal knowledge, to imprisonment for fourteen years;</p> <p>(c) in the case of an offence defined in subsection (2), to imprisonment for ten years.</p> <p>In the case of an offence defined in subsection (2), if the intellectually impaired person is, to the knowledge of the offender, his lineal descendant, the offender is guilty of a crime, and is liable to imprisonment for ten years.</p> <p>(4) It is a defence to a charge of an offence defined in this section to prove-</p> <p>(a) that the accused person believed on reasonable grounds that the person was not an intellectually impaired person; or</p> <p>(b) that the doing of the act or the making of the omission which, in either case, constitutes the offence did not in the circumstances constitute sexual exploitation of the intellectually impaired person.</p> <p>(5) A person may be convicted of an offence defined in subsection (1) or (2) upon the uncorroborated testimony of one witness, but the Court shall warn the jury of the danger of acting on such testimony unless they find that it is corroborated in some material particular by other evidence implicating that person.</p> <p>(6) In this section-</p> <p>'deals with' includes doing any act which, if done without consent, would constitute an offence;</p> <p>'intellectually impaired person' means a person who is so intellectually impaired as to be incapable of guarding himself or herself against sexual exploitation'.</p> |
| <p><i>Criminal Code and Another Act Amendment Act 1990</i></p> | <p>Inserted the definition: 'carnal knowledge' includes carnal knowledge by anal intercourse.</p>   |
| <p><i>Prostitution Laws Amendment Act 1992</i></p>             | <p>Removed the definition of 'intellectually impaired person' from section 216 and created section 229F –</p> <p>229F. Meaning of 'intellectually impaired person'</p> <p>A person is an 'intellectually impaired person' if the person has a disability—</p> <p>(a) that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and</p> <p>(b) that results in—</p> <p>(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and</p> <p>(ii) the person needing support.</p>   |



|   |  |
|---|--|
| <i>Criminal Law Amendment Act 1997</i>  | <p>Changed the offences from 'misdemeanour' to 'crime'.</p> <p>Increased penalties from 5 years to 14; 3 years to 10; 14 years to life; 10 years to 14 years; 10 years to 14 years.</p> <p>Changed definitions to:<br/>         'carnal knowledge' does not include sodomy;<br/>         'deals with' includes doing any act that, if done without consent, would constitute an assault.</p> |
| <i>Justice and Other Legislation Amendment Act 2005</i>                         | <p>After the ';' in section 216(3)(a) and (b), inserted 'or'.</p>  |
| <i>Criminal Code and Other Acts Amendment Act 2008</i>                          | <p>Changed the words 'intellectually impaired persons' with the words 'person with an impairment of the mind' throughout the <i>Criminal Code</i>.</p> <p>Removed section 229F and inserted the definition of 'person with an impairment of the mind' into section 1.</p>  |
| <i>Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013</i> | <p>Replaced the words 'subsections (3)(c)' under section 216(2) with 'subsections (3)(c) and (3A)'.</p>  |
| <i>Health and Other Legislation Amendment Act 2016</i>                          | <p>Changed the wording of section 216(1) to read: 'carnal knowledge with or of'.</p> <p>Removed the definition of carnal knowledge from section 216.</p>   |



## Appendix B – Other Australian jurisdictions

| Jurisdiction    | Offence  | Definitions   | Defence/Consent  |
|-----------------|--|---|--|
| New South Wales | It is an offence for a person to have sexual intercourse with 'a person who has a cognitive impairment' if they are 'responsible for the care' of that person. <sup>1</sup>              | 'Cognitive impairment' is defined as a person who has an intellectual disability, a developmental disorder (including autism spectrum disorder), a neurological disorder, dementia a severe mental illness, or a brain injury. <sup>2</sup>   | Defences to this offence are that the accused did not know the person had a cognitive impairment, the accused was married or was a de facto partner, or the act was for the purpose of any proper medical or hygienic purpose. <sup>4</sup>  |
|                 | It is an offence for a person to have sexual intercourse with a person who has a 'cognitive impairment' with the intention of taking advantage of that person's impairment. <sup>8</sup> | A person is 'responsible for care' of another if they are providing care to a person with a cognitive impairment at a facility where such persons are detained, reside, or attend, or at the home of that person in the course of a program under which any such facility or other government or community organisation provides care to persons with a cognitive impairment. This care includes voluntary care, health professional care, education, home care and supervision. <sup>3</sup> | Consent is not a defence to either of the above offences. <sup>5</sup> Consent is also not a defence regarding general offences of indecent assault and act of indecency if the offending is against a person with a cognitive impairment, <sup>6</sup> if the offender is responsible for the care of the person or the offender intended to take advantage of the impairment. <sup>7</sup> |

<sup>1</sup> *Crimes Act 1900* (NSW) s 66F(2).

<sup>2</sup> *Crimes Act 1900* (NSW) s 61H(1A).

<sup>3</sup> *Crimes Act 1900* (NSW) s 66F(1).

<sup>4</sup> *Crimes Act 1900* (NSW) s 66F(7).

<sup>5</sup> *Crimes Act 1900* (NSW) s 66F(5).

<sup>6</sup> See specifically, *Crimes Act 1900* (NSW) ss 61L, 61M(1), 61N(2), 61O(1A) and 61P as per s 66F(6).

<sup>7</sup> *Crimes Act 1900* (NSW) s 66F(6).

<sup>8</sup> *Crimes Act 1900* (NSW) s 66F(3).

|                 |   |  |   |
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| <p>Victoria</p> | <p>It is an offence for a person who provides treatment or support services or a worker for a service provider that provides such services to sexually penetrate/be sexually penetrated by,<sup>9</sup> or inappropriately sexually touch/be touched,<sup>10</sup> engage in sexual activity in the presence of,<sup>11</sup> and expose sexual activities to,<sup>12</sup> a person with impaired capacity.<sup>13</sup></p> | <p>'Cognitive impairment' is defined to include 'impairment because of intellectual disability, dementia, neurological disorder or brain injury'.<sup>14</sup></p> <p>'Mental illness' is defined as a 'medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.'<sup>15</sup></p> <p>'Treatment or support services' includes mental health/medical treatment as well as therapeutic, personal care or support services.<sup>16</sup></p> <p>'Service provider' is also defined to include various services and facilities provided by government as well as any person or body that provides treatment or support services.<sup>17</sup></p> | <p>It is not an offence if the accused is, or reasonably believes they are, married to or is in a domestic relationship with the person.<sup>18</sup> It is a defence if the accused can prove that they reasonably believed that the person did not have a cognitive impairment or mental illness,<sup>19</sup> or if the accused as a worker reasonably believed that the service provider was not providing services to the person.<sup>20</sup> It is also a defence if sexual penetration is done in the course of a procedure carried out for genuine medical or hygienic purposes.<sup>21,22</sup></p> <p>Consent or lack thereof is not a required element to these offences and is specifically excluded as being a relevant consideration regarding whether the sexual touching/exposure is inappropriate.<sup>23</sup></p> |
|-----------------|---|--|---|

<sup>9</sup> *Crimes Act 1958* (Vic) s 52B.

<sup>10</sup> *Crimes Act 1958* (Vic) s 52C.

<sup>11</sup> *Crimes Act 1958* (Vic) s 52D.

<sup>12</sup> *Crimes Act 1958* (Vic) s 52E.

<sup>13</sup> Regarding offences involving sexual penetration and sexual touching, it is also an offence should the accused have an animal involved in such contact, see ss 52B(1)(a)(iii)(B) and (C), 52C(1)(a)(iii)(B) and (C).

<sup>14</sup> *Crimes Act 1958* (Vic) s 52A.

<sup>15</sup> *Crimes Act 1958* (Vic) s 52A, *Mental Health Act 2014* (NSW) s 4.

<sup>16</sup> *Crimes Act 1958* (Vic) s 52A.

<sup>17</sup> *Crimes Act 1958* (Vic) s 52A.

<sup>18</sup> *Crimes Act 1958* (Vic) ss 52G, 52H.

<sup>19</sup> *Crimes Act 1958* (Vic) s 52I.

<sup>20</sup> *Crimes Act 1958* (Vic) s 52J.

<sup>21</sup> *Crimes Act 1958* (Vic) s 52F.

<sup>22</sup> And if the sexual penetration involved animals, it is a defence if done for genuine veterinary, agricultural or scientific research purposes: s 52F(b).

<sup>23</sup> *Crimes Act 1958* (Vic) ss 52C(4)(b), 52D(4)(b), 52E(4)(b).

|                    |   |  |  |
|--------------------|---|--|--|
| Tasmania           | It is an offence for a person responsible for the care of a person with a mental impairment to have sexual intercourse with that person. <sup>24</sup>  | <p>'Mental impairment' is defined to mean senility, intellectual disability, mental illness or brain damage.<sup>25</sup> 'Mental illness' is further defined as a person experiencing a serious impairment of thought (including delusions), mood, volition, perception or cognition.<sup>26</sup></p> <p>A person is 'responsible for the care' of another if they provide medical, nursing, therapeutic or educative services to the person with a mental impairment in connection with that impairment.<sup>27</sup></p>   | <p>It is a defence if the persons were married or in a significant relationship with each other.<sup>28</sup></p> <p>It is also a defence to prove that the person with the impairment consented to the act, and the consent was not unduly influenced by the fact that the accused was responsible for their care.<sup>29</sup></p> |
| Northern Territory | It is an offence for a person providing disability support services to a 'mentally ill or handicapped' person to have sexual intercourse with or commit an act of gross indecency upon that person. <sup>30</sup> | <p>'Mentally ill or handicapped person' is defined as a person who, because of 'abnormality of mind', is unable to manage themselves or to exercise responsible behaviour.<sup>31</sup></p> <p>A 'disability support service' is defined as a medical or therapeutic service provided to a mentally ill or handicapped person that is related to that illness or handicap.<sup>32</sup> The provider of such a service includes such a person that provides that service voluntarily or for remuneration but does not include a person who at the time is also mentally ill or handicapped.<sup>33</sup></p> | <p>It is a defence to prove that at the time of offending, the accused was married or was a de facto partner to the person or did not know that the person was mentally ill or handicapped.<sup>34</sup></p> <p>Consent to the offending acts is not a defence.<sup>35</sup></p>   |

<sup>24</sup> *Criminal Code Act 1924* (Tas) s 126(1).

<sup>25</sup> *Criminal Code Act 1924* (Tas) s 126(4).

<sup>26</sup> *Criminal Code Act 1924* (Tas) s 126(4) and *Mental Health Act 2013*.

<sup>27</sup> *Criminal Code Act 1924* (Tas) s 126(3).

<sup>28</sup> *Criminal Code Act 1924* (Tas) s 126(2)(b).

<sup>29</sup> *Criminal Code Act 1924* (Tas) s 126(2)(a).

<sup>30</sup> *Criminal Code Act* (NT) s 130(2).

<sup>31</sup> *Criminal Code Act* (NT) s 126.

<sup>32</sup> *Criminal Code Act* (NT) s 130(1).

<sup>33</sup> *Criminal Code Act* (NT) s 130(1).

<sup>34</sup> *Criminal Code Act* (NT) s 130(3).

<sup>35</sup> *Criminal Code Act* (NT) s 139A.

|                    |   |  |   |
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| South<br>Australia | <p>Two distinct sets of offences exist in South Australia:<br/>It is an offence for a person to have sexual intercourse with another person, knowing that the other person having an intellectual disability<sup>36</sup> is unable to understand the nature or consequence of sexual intercourse.<sup>37</sup></p>   | 'Intellectual disability' is not defined in legislation.   | <p>This provision does not apply if the two persons involved are married to each other.<sup>38</sup></p> <p>Consent is not a defence to this offence.<sup>39</sup></p>  |
|                    | <p>It is an offence for a person who provides a service (whether for remuneration or not)<sup>40</sup> to a person with a 'cognitive impairment' if the person obtains through undue influence sexual intercourse or indecently contacts the person with the cognitive impairment.<sup>41</sup></p> <p>It is an offence if the person who provides a service behaves in an indecent manner in the presence of a person with a cognitive impairment without consent or with the person's consent where the consent was obtained by undue influence.<sup>42</sup></p> | 'Cognitive impairment' is defined as including: an intellectual disability; a developmental disorder (including an autistic spectrum disorder); a neurological disorder; dementia; mental impairment; or a brain injury. <sup>43</sup> | <p>This provision does not apply if the two persons involved were married or domestic partners to each other.<sup>44</sup></p> <p>Consent is presumed to have been obtained through undue influence if the accused was in a position of power, trust, or authority in relation to the victim, and the onus is on the accused to prove otherwise.<sup>45</sup></p> |

<sup>36</sup> 'Intellectual disability' is not further defined in legislation.

<sup>37</sup> *Criminal Law Consolidation Act 1935 (SA)* s 49(6).

<sup>38</sup> *Criminal Law Consolidation Act 1935 (SA)* s 49(8).

<sup>39</sup> *Criminal Law Consolidation Act 1935 (SA)* s 49(7).

<sup>40</sup> There is no definition in the legislation regarding what providing a service means.

<sup>41</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(1).

<sup>42</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(2).

<sup>43</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(5).

<sup>44</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(3).

<sup>45</sup> *Criminal Law Consolidation Act 1935 (SA)* s 51(4).

|                                     |  |   |   |
|-------------------------------------|--|---|---|
| <p>Western Australia</p>            | <p>It is an offence for a person who knows or ought to know that another person is an 'incapable person' to engage in sexual acts with the 'incapable person'.<sup>46</sup> The sexual acts include: sexual penetration;<sup>47</sup> engaging in sexual behaviour;<sup>48</sup> indecently dealing;<sup>49</sup> doing an indecent act;<sup>50</sup> and indecently recording.<sup>51</sup></p> | <p>'Incapable person' is defined as a person who is so mentally impaired as to be incapable of understanding the nature of the act constituting the offence, or of guarding themselves against sexual exploitation.<sup>52</sup></p> <p>There are circumstances of aggravation for these offences, including if the incapable person was under the accused person's care, supervision, or authority.<sup>53</sup></p> | <p>It is a defence to the set of offences to prove that the offender and the incapable person were lawfully married to each other.<sup>54</sup></p> <p>Consent is not an element in considering this offence.</p> |
| <p>Australian Capital Territory</p> | <p>In the Australian Capital Territory, there are no specific offences that apply only to people with impaired capacity regarding sexual offences, instead such offending is covered through provisions dealing with sexual offending generally.</p>   |   |   |

<sup>46</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330.

<sup>47</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330(2).

<sup>48</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330(3).

<sup>49</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330(4).

<sup>50</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330(5).

<sup>51</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330(6).

<sup>52</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330(1).

<sup>53</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 330(7)(b), 330(8)(b).

<sup>54</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330(9).

## Appendix C – Consent and capacity

| Jurisdiction       | Consent   | Capacity  |
|--------------------|---|---|
| Queensland         | Consent must be freely and voluntarily given. <sup>55</sup>   | Consent can only be given by a person with the cognitive capacity to give the consent. <sup>56</sup>  |
| New South Wales    | A person consents to sexual intercourse if the person freely and voluntarily agrees to it. <sup>57</sup>        | A person does not consent to sexual intercourse if they do not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity. <sup>58</sup><br>It can be established that a person does not consent to sexual intercourse if the person has abused their position of authority or trust. <sup>59</sup> |
| Victoria           | Consent means free agreement. <sup>60</sup>   | A person does not consent to the act if they are incapable of understanding the sexual nature of the act. <sup>61</sup>   |
| Tasmania           | Consent means free agreement. <sup>62</sup>   | A person does not freely agree to an act if they are unable to understand the nature of the act, <sup>63</sup> or if they agree or submit because they are overborne by the nature or position of another person. <sup>64</sup>   |
| Northern Territory | Consent means free and voluntary agreement. <sup>65</sup>   | A person does not consent where they are incapable of understanding the sexual nature of the act. <sup>66</sup>   |
| South Australia    | A person consents to sexual activity if they freely and voluntarily agree to the sexual activity. <sup>67</sup> | A person is taken not to freely and voluntarily agree to sexual activity if the person is affected by a physical, mental, or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing, <sup>68</sup> or the person is unable to understand the nature of the activity. <sup>69</sup>             |
| Western Australia  | Consent is required to be given freely and voluntarily. <sup>70</sup>   | No specific provisions exist in legislation regarding capacity to consent.  |

<sup>55</sup> *Criminal Code Act 1899* (Qld) s 348(1).

<sup>56</sup> *Criminal Code Act 1899* (Qld) s 348(1).

<sup>57</sup> *Crimes Act 1900* (NSW) s 61HA(2).

<sup>58</sup> *Crimes Act 1900* (NSW) s 61HA(4)(a).

<sup>59</sup> *Crimes Act 1900* (NSW) s 61HA(6)(c).

<sup>60</sup> *Crimes Act 1958* (Vic) s 36(1).

<sup>61</sup> *Crimes Act 1958* (Vic) s 36(2)(g).

<sup>62</sup> *Criminal Code Act 1924* (Tas) s 2A(1).

<sup>63</sup> *Criminal Code Act 1924* (Tas) s 2A(2)(i).

<sup>64</sup> *Criminal Code Act 1924* (Tas) s 2A(2)(e).

<sup>65</sup> *Criminal Code Act* (NT) s 192(1).

<sup>66</sup> *Criminal Code Act* (NT) s 192(2)(d).

<sup>67</sup> *Criminal Law Consolidation Act 1935* (SA) s 46(2).

<sup>68</sup> *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e).

<sup>69</sup> *Criminal Law Consolidation Act 1935* (SA) s 46(3)(f).

<sup>70</sup> *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

|                                    |  |  |
|------------------------------------|--|--|
| Australian<br>Capital<br>Territory | Consent is not specifically defined in legislation.<br><br>However, consent is negated if obtained by threats, intoxication, mistake, fraud, abuse, if the person does not have the capacity to consent or unlawful detention. <sup>71</sup> | Consent is negated if it was obtained through the abuse by the offender from their position of authority, profession, or other position of trust, <sup>72</sup> or the complainant's physical helplessness or mental incapacity to understand the nature of the act to which consent is given. <sup>73</sup> |
|------------------------------------|--|--|

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<sup>71</sup> *Crimes Act 1900* (ACT) s 67(1).

<sup>72</sup> *Crimes Act 1900* (ACT) s 67(1)(h).

<sup>73</sup> *Crimes Act 1900* (ACT) s 67(1)(i).