

LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION:
FACT OR FURPHY

A DISCUSSION PAPER
PREPARED FOR
SEX WORKERS OUTREACH PROJECT

By
INTELLECTUAL DISABILITY RIGHTS

DISCUSSION PAPER LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

1 Introduction

At present there is a significant disparity between the aspirations of consumers of disability services to give expression to their sexuality in the least restrictive manner possible and service providers' perceptions of their role in supporting those aspirations. The consequence is that many people with disability are denied opportunities for sexual expression enjoyed and taken for granted by the rest of the population.

The reasons for the reticence of many disability service providers to accept a role in facilitating the sexual expression of consumers are, no doubt, multiple and complex. This paper looks at only one reason: that "the law" prevents the involvement of service providers in this facet of consumers' individual needs. While frequently touted, the basis of this reason is rarely unpacked. Rarely does anyone squarely state what laws prevent what sort of assistance and why.

The purpose of this paper is to raise some of the laws that are relevant to the issue and to consider whether, in fact, they prevent disability workers from supporting consumers in expressing their sexuality and, if so, to what extent. It has not been possible to conduct exhaustive research and so the paper remains general in nature and superficial. Hopefully, the paper can be part of a dialogue about legal rights and safeguards between service providers and consumers that is long overdue. Interested parties are encouraged to provide IDRS with their own views or research so that the body of knowledge on this issue can be expanded and widely disseminated.

The legal views expressed in this paper are tentative and general. They should not be relied upon as an alternative to specific legal advice in relation to individual practices and circumstances.

2 Starting Point of Consumer Rights: Disability Services Act 1993 (NSW)

The *Disability Services Act 1993 (NSW)* ("DSA") sets out minimum standards for disability service providers that receive funding from the government. To be eligible for funding, the service providers must provide a service that complies with the objects, principles and application of principles in the DSA. Those relevant to the expression of service users' sexuality are:

2.1 objects

to ensure the provision of services:

- necessary to enable persons with disabilities to achieve their maximum potential as members of the community (s3(a));
- to enable persons with intellectual disabilities to achieve positive outcomes... (s3(b)(ii)); and
- that are provided in ways that ... enhance their self-esteem (s3(b)(iii)).

2.2 principles

persons with disabilities:

DISCUSSION PAPER LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

- are individuals who have the inherent right to respect for their human worth and dignity (1(a));
- have the right to realise their individual capacities for physical, social, emotional and intellectual development (1 (c));
- have the same rights as other members of Australian society to services which will support their attaining a reasonable quality of life (1(d));
- have the right to choose their own lifestyle and to have access to information, provided in a manner appropriate to their disability and cultural background, necessary to allow informed choice (1(e));
- have the same right as other members of Australian society to participate in decisions which affect their lives (1(f));
- receiving services have the same rights as other members of Australian society to receive those services in a manner which results in the least restriction of the rights and opportunities (1(g))
- have the right to protection from neglect, abuse and exploitation (1(i)).

2.3 application of principles

services and programs must:

- have as their focus the achievement of positive outcomes for persons with disabilities ... (2(a));
- contribute to ensuring that the conditions of everyday life of persons with disabilities are the same as, or as close as possible to, norms and patterns which are valued in the general community;
- to meet individual needs and goals of the persons with disabilities receiving services (2(d));
- to provide opportunities for persons with disabilities to reach goals and enjoy lifestyles which are valued by the community generally and are appropriate to their chronological age (2(j));
- to recognise the importance of preserving the family relationships ... (2(m))
- to respect the rights of persons with disabilities to privacy and confidentiality (2(p)).

The expression of sexuality is simply one of the many potential individual needs or lifestyle goals of a service user. There is nothing in the DSA that suggests it should be treated any differently from other lifestyle needs and goals. The DSA creates a prima facie obligation on the part of funded service providers to administer their programs in a way that meets the individual needs of service users, including those relating to the expression of their sexuality.

3 Laws commonly cited as impediments

3.1 Criminal Offences

3.1.1 Offences where the absence of consent is relevant

A valid consent to sexual activity for legal purposes is simply free agreement to the specific physical activity involved. It is not necessary for a person to understand the social or emotional significance of the physical act or any of the practical consequences of that act, for instance, pregnancy. While the goal of any individual plan should be for a consumer to have a more

DISCUSSION PAPER

LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURHY

meaningful basis for consent, bald consent to the physical act is sufficient to avoid criminal legal liability for an offence.

3.1.1.1 sexual assault

It is an offence to have sexual intercourse with a person if you know that person does not consent: s611 *Crimes Act*. For the purposes of the *Crimes Act*, sexual intercourse means:

- (a) the penetration to any extent of the genitalia of a female or the anus of anyone by a part of the body or an object, except for proper medical purpose; (b) introduction of the penis of one person to the mouth of another person; (c) cunnilingus (introduction of the mouth of a person to the genitals of a female); and (d) the continuation of sexual intercourse as defined in (a), (b) or (c).

Nothing in the *Crimes Act* says that people with disabilities cannot consent to sexual intercourse. Some people with disabilities will be able to consent and others will not; each case would be considered by reference to the individuals involved. However, to avoid any potential exploitation, service providers must support people with disabilities, especially those with cognitive disabilities, to make informed and personal decisions about how they will express their sexuality. This is particularly important since the *Crimes Act* specifies that a person who is reckless about whether or not another consents to sexual intercourse, that person is taken to know that the other person has not consented: s61R.

3.1.1.2 assault and battery

An assault occurs if a person puts another in fear of imminent personal harm.

Battery is the application of force by one person against another. Sometimes, it is difficult to decide when physical contact amounts to a battery. However, physical contact will not be not regarded as battery if it does not cause actual bodily harm and the person consents to the contact. Thus, for instance, if a consumer asked a staff member to assist him in putting on a condom, the staff member would not be regarded as having committed a battery or assault by complying with the request.

3.1.1.3 acts of indecency

It is an offence to commit an act of indecency towards a person: s6 IN. An act of indecency is an act which a right minded person would consider to be contrary to community standards of decency. Where there is no unequivocal sexual connotation, the act must intended to obtain sexual gratification: *Rv Harkin* (1989) 38 A Crim R, 296. The offence is not made out if the person to whom the act is directed consents to it.

3.1.1.4 Sexual assault by forced self manipulation

It is an offence to force someone to manipulate an object in their own vagina or anus by threatening or engaging in intimidatory or coercive conduct: s80A.

DISCUSSION PAPER

LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

3.1.2 Offences where consent is not relevant

3.1.2.1 sexual intercourse between a person with intellectual disabilities and someone in authority

It is an offence under the *Crimes Act* for a person to have sexual intercourse with a person with an intellectual disability who is under the authority of the person: s66F(2). This absolutely precludes staff of service providers from having sexual intercourse with service users. The offence is generally referred to as the "carers" offence". It is designed to prevent carers from taking advantage of their special position of power in relation to those in their care. It is a protective provision that arises out of the historical reality that people with intellectual disability are particularly vulnerable to sexual abuse by those in positions of authority over them. The offence represents a policy decision that, while people with intellectual disability may, formally, be consenting to and, even, enjoying the sexual intercourse with a carer, as a matter of policy, that consent cannot be taken to be valid.

For the purposes of sexual offences under the *Crimes Act*, intellectual disability is defined as an appreciably below average general intellectual function that results in the person requiring supervision or social habitation in connection with daily life activities. This is not a clinical definition of intellectual disability and it may include some people who do not technically have intellectual disabilities but who, as a result of physical, environmental and social limitations on their ability to learn, have low intellectual function.

3.1.2.2 taking advantage of a person with intellectual disabilities

It is also an offence for anyone to have sexual intercourse with a person with intellectual disabilities with the intention of taking advantage of the person's vulnerability to sexual exploitation: s66F(3).

3.1.2.3 minors

It is unlawful to have sexual intercourse with a person under the age of 16 even if that person is consenting: s66C. It is unlawful to have homosexual intercourse (defined as anal intercourse involving males or the introduction of the penis to the mouth of a male) with a man under the age of 18, even if he is consenting: s78K. It is also unlawful to commit an act of indecency towards a person under the age of 16 even if that person is consenting.

3.1.2.4 Conclusion for services providers re primary offences

Staff of service providers are prohibited from engaging in behaviour that constitutes an offence. However, none of the offences prevent service providers from supporting consumers in the expression of their sexuality, any more than they prevent consenting adults from engaging in sexual activity. Indeed, the existence of the offences increases the importance of service providers actively supporting consumers to make informed and free decisions.

DISCUSSION PAPER

LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

3.1.3 Subsidiary Offences

3.1.3.1 inciting offending behaviour

In some cases, a person who incites unlawful conduct will also be guilty of an offence. "Incite" means to cause, stimulate, urge or spur on, stir up or animate: *Young v Cassells (1914) 33 NZLR 852*.

3.1.3.2 aiding and abetting

It is unlawful for a person to aid, abet, counsel, procure, solicit or incite the commission of an offence: s249F.

3.1.3.3 Conclusion for service providers re subsidiary offences

Service providers may be nervous that, by supporting consumers to give expression to their sexuality, they may, inadvertently, render themselves liable to a subsidiary offence if an offence is committed against the consumer in the course of the sexual acts they have supported. For example, the service may be concerned that a carer who makes an appointment with a sex worker for a client may become liable for aiding and abetting an offence if the sex worker engaged in acts to which the consumer did not consent. Unless the carer was reckless about whether or not the consumer was consenting at the time of making the appointment, this concern is far-fetched and unreasonable. The carer would be no more liable at criminal law than a brothel receptionist or the licensing authority that registered the brothel.

3.1.4 Conclusion re Criminal Law

The Crimes Act proscribes only a very narrow range of sexual acts, none of which seem to be being pursued by consumers. Policies focusing on ensuring consumers are informed and supported to make informed decisions about how to express their sexuality are not only required by the DSA, but would be much better protection for consumers and staff from breaches of the criminal law than existing policy prohibitions.

3.2 Negligence

Service providers owe a duty of care to their consumers. That duty of care requires service providers to take reasonable steps to protect the consumers from foreseeable harms. In situations where there may be some question as to whether a consumer is consenting to sexual activity and the service providers is actively involved in supporting the consumer in carrying out that activity, the service provider has a duty to take reasonable steps to ensure the consumer is consenting to the activity.

Doubt as to whether a consumer is consenting might arise where consumers have cognitive disabilities or a physical disability that places a significant limitation on the consumers' communication ability.

DISCUSSION PAPER LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

3.3 Protection of Staff

Service providers may argue that staff safety laws prevent them from exposing staff to requests for assistance with sexual expression or from obliging staff to comply with such requests.

3.3.1 Sexual harassment

Sexual harassment in the workplace is prohibited by state and federal laws.

s22A of the *Anti-Discrimination Act 1977* NSW and s28A of the *Sex Discrimination Act 1984* (Cth) provide, almost identically, that a person sexually harasses another person if.

- (a) The person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or (b) The person engages in other unwelcome conduct of a sexual nature in relation to the other person

In circumstances where a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated. This raises the question as to whether a request for assistance to express sexuality or compliance with such a request could amount to sexual harassment. The answer is yes, it could.

3.3.1.1 Whether support could constitute a relevant act

It is possible that a request for assistance in the expression of sexuality or compliance with a request could be characterised as an unwelcome "sexual advance" or "request for sexual favours" or "conduct of a sexual nature". There is a strong argument that:

- "sexual advance" and "sexual favours" should not be interpreted as extending to mere requests for facilitation;
- the words "advance" and "favour" require that the sexual attentions be directed at the person to whom the advance is made or the favour asked - not to a person who is merely playing a facilitation role, who is not the object of the sexual expression at all; and
- that requests or compliance with requests for support is not conduct of a sexual nature but, rather, an integral part of the lifestyle support of a person with disabilities.

Despite the worthiness of these arguments, we consider that requests for support and the provision of it are likely to be regarded as falling within the range of acts capable of amounting to discrimination. There is some danger in suggesting otherwise since it might effectively remove the sexual expression in the context of a funded service from the domain of sexual harassment laws entirely. People with disabilities require the protection of these laws.

3.3.1.2 Objective/Subjective Test

The test for whether a relevant act amounts to harassment is a hybrid one. It is objective because an act only amounts to harassment if a "reasonable person" would have anticipated that it would be experienced as such by the person alleging the harassment. However, it is subjective in that it requires reference to what the specific individual alleging the harassment would have felt. A reasonable person might anticipate that an inexperienced staff member who had never received

DISCUSSION PAPER

LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

any training in rights or sexuality may be feel offended, humiliated and intimidated by a request for support or complying with such a request. This makes the need for awareness raising and training for staff members critical to producing an harassment free workplace that also respect the individual needs of consumers.

3.3.1.3 Relevant circumstances

The service imperatives of the DSA is relevant in the determination of whether an act amounts to harassment. It creates an entitlement on the part of a person with disabilities using a funded service to express sexuality his or her and to receive support to do so. While the DSA does not say that this right overrides a staff member's right to an harassment free workplace, the anticipation of a reasonable person would be that service providers would, in principle, be required to take steps to support consumers in the expression of their sexuality. Thus, while an individual staff member at a service conducted by a religious order may be offended by a consumer request to visit a sex worker, a reasonable person would not anticipate such a reaction and it is unlikely that such a request would amount to harassment as legally defined. By contrast, a request by a consumer that a staff member manipulate his penis for the purpose of masturbation may amount to harassment.

3.3.1.4 Responsibility for harassment

If an act of harassment occurs, it is the consumer who is primarily liable for it. The service provider is not vicariously liable because such liability only extends to harassment caused by employees or agents. However, the employer may be regarded as having aided or abetted the harasser by its policies or practices or may be liable directly for harassment on the basis that practices or policies created a sexually charged workplace that allowed harassment to prosper.

3.3.1.5 Conclusion for service providers

The best way to avoid harassment in the workplace is to ensure that appropriate sexuality policies, awareness raising and practical training are provided to staff and consumers. All policies should be developed with consumers and staff members. It is salutary to note that disability service staff are routinely subjected to harassment by consumers who have had no sexuality training or education. It is an inevitable consequence of ignorance and frustration that this will occur. Failure to cater for consumers' sexual needs does not protect staff from sexual harassment.

3.3.2 Occupational Health and Safety

Under the *Occupational Health and Safety Act 2000* ("OHS Act employers have an obligation to "ensure the health, safety and welfare at work" of its employees (s8). This extends to:

- ensuring the "systems of work and the working environment of the employees are safe and without risks to health" (s8(c)); and
- "providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work" (s8(d)).

DISCUSSION PAPER

LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

The employer must also ensure that non-employees are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work. This creates an obligation in respect of consumers at their group homes or activity centres or anywhere where the funded service provider conducts its work. The employer does not have obligations under the OHS Act for consumers when they are outside the employer's place of work, for instance, at a brothel.

It is possible for psychological or physical harm to be occasioned to an employee as a result of supporting consumers with the expression of their sexuality without appropriate training and policy support. Employers are obliged to consult with employees in making decisions affecting their health, safety and welfare at work (s13). It would be necessary (and sensible), therefore, for staff to be involved in the development of sexuality policies, to the extent that the policy might impact on their workplace health, safety and welfare.

4 Legal options for consumers to oblige service providers to support them in the expression of their sexuality

4.1 breach of the DSA

The DSA is a piece of "aspirational" legislation. It sets out the standards by which services *should* be provided but it specifically provides that those standards cannot be enforced in any civil action before the courts. This effectively prevents a consumer from suing a service for breach of contract and limits the use that can be made of the standards in negligence actions.

It is possible to challenge the continued funding of a service that fails to comply with the DSA in the Administrative Decisions Tribunal. However, there are a number of technical impediments to success in such an action and, in any event, the outcome would be the de-funding of the service rather than the enforcement of the standards. Thus, administrative law is a blunt instrument for redress service failures.

Complaints about failure to comply with the DSA can be made to the Community Services Commission ("CSC"). If the failure cannot be resolved through negotiation, the CSC might recommend to a funded service that it alter its practices to bring it into compliance. A decision by the funded service to reject the CSC's recommendation can be challenged in the Administrative Decisions Tribunal. This way of enforcing the DSA would be time consuming and the Tribunal's ability to set aside the funded service's decision is limited.

4.2 Discrimination

The *Anti-discrimination Act NSW* and the *Disability Discrimination Act Cth* both prohibit discrimination on the ground of disability in the provision of services. To found a complaint of discrimination, consumers would have to show that they are being treated less favourably than the service provider would treat a person who does not have a disability. The trouble is that disability services do not provide services to people without disabilities and their services would not be necessary for people without disabilities. Thus, we can't say that consumers are being

DISCUSSION PAPER

LEGAL IMPEDIMENTS TO SEXUAL EXPRESSION: FACT OR FURPHY

treated less favourably than people without disabilities would be treated and we can't say there is discrimination on the basis of disability.

The NSW Law Reform Commission has recently recommended to government that it amend the Antidiscrimination Act to change the definition of discrimination from "less favourable" to "unfavourable" treatment. This would remove the need to make a comparison with people without disabilities. If the government decides to amend the legislation, there would be a basis for a discrimination action.

IDRS is a community legal centre for people with intellectual disabilities. We conduct a free telephone legal advice service for people with intellectual disability from 2pm - 5pm every weekday. Our contact details are:

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