

Criminalisation of Sex with Disabled People with Cognitive Impairments in Commonwealth Countries

A Colonial Remnant that Interferes with the Human Right to Sexual Agency

Anna Arstein-Kerslake

Melbourne Law School, University of Melbourne, Australia
anna.arstein@unimelb.edu.au
<https://orcid.org/0000-0002-8411-9724>

Yvette Maker

Faculty of Law, University of Tasmania, Australia
<https://orcid.org/0000-0002-3713-6273>

Anita Deutschmann

Melbourne Law School, University of Melbourne, Australia

Siane Richardson

Melbourne Law School, University of Melbourne, Australia

Submission date: 14 October 2020; Acceptance date: 13 January 2023; Publication date: 25 August 2023

ABSTRACT

Sexual offence laws in many Commonwealth jurisdictions criminalise sexual activity with disabled people with cognitive impairments. Many of these laws were created with the intent to protect disabled people with cognitive impairments from sexual abuse. However, they often preclude the possibility for the individual to consent to sexual activity. This preclusion from consenting to sex has the potential to create significant hardship for disabled people with cognitive impairments. It can create barriers to sexual expression and romantic relationships. In addition, it may interfere with the right of disabled people with cognitive impairments to sexual agency, which is protected as part of the right to legal capacity in Article 12 of the 2006 United Nations Convention on the Rights of Persons with Disabilities (CRPD). Many of these sexual offence laws are either colonial remnants or may be a product of colonial influence. Many

of the most restrictive laws date back to colonial rule and bear remarkable similarity to laws in the United Kingdom (UK) around the time of colonisation. The UK has since enacted reform in this area and has less restrictive laws. However, even these reformed laws often present barriers to the recognition of sexual consent from disabled people with cognitive impairments. This article reviews sexual offence laws across Commonwealth jurisdictions and analyses their compliance with Article 12 of the CRPD. It identifies a potential need to reform antiquated laws that appear to be a remnant of colonial rule and more modern laws that may continue to create barriers to sexual expression and romantic relationships for disabled people with cognitive impairments.

KEYWORDS

human rights; sexual offenses; cognitive impairments; consent to sex; legal capacity; sexual agency; Convention on the Rights of Persons with Disabilities (CRPD); Commonwealth; colonialism

I. Introduction

Sexual offence laws in many Commonwealth jurisdictions criminalise sexual activity with disabled people who have cognitive impairments*1 – including people with intellectual disability, mental health conditions, autism, dementia, Alzheimer’s, and other impairments that involve actual or perceived functional difference related to cognition. These laws often seek to protect disabled people with cognitive impairments due to assumptions that they are inherently vulnerable and unable to consent to sexual activity.*2 However, these assumptions stem from inaccurate understandings of cognitive impairments. They overlook the reality that disabled people with cognitive impairments are a highly diverse group whose needs related to sexual activity and protection from sexual abuse vary significantly.*3 Many disabled people

*1. In this article, we have chosen to use the term “disabled people with cognitive impairments” – we have done this to recognise the social model of disability. In some places, we have used other legislative and legal terms related to disability – we have done this in order to accurately describe the legislation or other law; however, in many cases, these terminologies are reflective of a medical model of disability and/or are not respectful or appropriate terms. We do not endorse the use of such terms, and have only used them here for accuracy and to highlight the need for reform.

*2. Arstein-Kerslake, A. and Flynn, E. (2016). Legislating Consent: Creating an Empowering Definition of Consent to Sex That is Inclusive of People with Cognitive Disabilities. *Social & Legal Studies*, 25, 225, 226; Arstein-Kerslake, A. (2015). Understanding Sex: The right to legal capacity to consent to sex. *Disability & Society*, 30, 1459; Clough, B. (2014). Vulnerability and Capacity to Consent to Sex – Asking the Right Questions. *Child and Family Law Quarterly*, 26, 371.

*3. Kramers-Olen, A. (2016). Sexuality, Intellectual Disability, and Human Rights Legislation. *South African Journal of Psychology*, 46, 504; Gil-Llario, M. D. et al (2018). The Experience of Sexuality in Adults with Intellectual Disability. *Journal of Intellectual Disability Research*, 62, 72; Medina-Rico, M., López-Ramos, H. and Quiñonez, A. (2018). Sexuality in People with Intellectual Disability: Review of literature. *Sexuality and Disability*, 36, 231.

with cognitive impairments lead rich and fulfilling sexual and romantic lives. Instead of protecting them from abuse, these laws may be perpetuating such inaccurate assumptions and creating barriers to sexual expression and romantic relationships.

In addition, the criminalisation of sexual activity of disabled people with cognitive impairments may be a violation of their human rights to sexual agency and freedom from abuse. It may be a violation of their right to sexual agency because such laws often fail to recognise or respect consent that they have given to sexual relations.*4 It may be a violation of their human right to be free from abuse because it may lead to greater vulnerability to abuse by disempowering and marginalising disabled people with cognitive impairments by not recognising them as sexual agents with the freedom to consent to sex on an equal basis with others.*5 In addition, there is little evidence to indicate that such laws are effective in reducing or preventing sexual abuse for this group of disabled people.*6 To ameliorate these potential rights violations, we argue that sexual offenses legislation should be re-framed to respect the sexual agency of disabled people with cognitive impairments and focus, instead, on criminalising unwanted sexual activity, as it does for most other groups.

To date, little research has been conducted on the prevalence of such laws or their human rights implications. To understand the prevalence of such laws, we undertook a review of the sexual offence laws in over 50 Commonwealth jurisdictions – spanning Africa, Asia, the Americas, Europe, and the Pacific.*7 These countries are either within the rule of the United Kingdom (UK) or are former territories of the British Empire. We chose to examine Commonwealth jurisdictions because there is a high number of Commonwealth jurisdictions that criminalise sexual activity with disabled people with cognitive impairments. In addition, many of these laws were created under British colonial rule or appear to have been heavily influenced by British rule. Focusing our research on these jurisdictions allowed us to undertake a comparative human rights analysis of over 50 different countries' sexual offences legislation. It also allowed us to analyse the potential impact of colonisation on this area of sexual offenses legislation and identify a need to re-examine and reform antiquated laws that may be a remnant of colonial rule and can cause harm to disabled people with cognitive impairments.

In this article, we first provide an overview of voices from the disability community that are demanding better protection for the right to sexual agency. We then offer an interpretation of the human rights to sexual agency and freedom from abuse of disabled

*4. Arstein-Kerslake and Flynn, "Legislating Consent" (n 1).

*5. Clough (n 1); Clough, B. (2017). Disability and Vulnerability: Challenging the capacity/incapacity binary. *Social Policy and Society*, 16, 469; Arstein-Kerslake, A. (2019). Gendered Denials: Vulnerability created by barriers to legal capacity for women and disabled women. *International Journal of Law and Psychiatry*, 66, 101501.

*6. Arstein-Kerslake and Flynn, 'Legislating Consent' (n 1).

*7. For details of the Commonwealth and its member countries, see The Commonwealth website, at <https://thecommonwealth.org/>.

people with cognitive impairments. Next we apply our interpretations of those rights to analyse the compliance of the sexual offences legislation in Commonwealth countries. We will also provide an analysis of the potential impact of British colonial rule on the development of such laws, including an in-depth analysis of the laws in England and Wales. Finally, we identify good practice – sexual offenses legislation that has the potential to respect the human rights to sexual agency and freedom from abuse.

2. Voices of Disabled People

Disabled People's Organisations (DPOs) or Organisations of Persons with Disabilities (OPDs, as they are often termed within UN circles) and disabled activists around the world have identified that laws that deny sexual agency to disabled people are having significantly negative impacts on the lives of disabled people.*8 These voices propelled us to instigate this research into sexual offenses legislation that may be jeopardising the sexual agency of disabled people.

Disabled men, women, and sexual and gender minorities are all impacted by laws that deny sexual agency on the basis of disability. While disabled men experience barriers to sexual agency,*9 there are unique issues facing disabled women and/or sexual and gender minorities and many of the DPOs and disability activists that have undertaken work in the area have focused on these groups. For example, Women with Disabilities Australia (WWDA) submitted two Position Statements to the former Special Rapporteur, Catalina Devandas Aguilar, on the sexual and reproductive health and rights of disabled women and girls.*10 These position statements included some of the clearest DPO positions on the right to sexual agency. They also provided recommendations regarding the legal capacity and sexual autonomy of disabled people:

*WWDA calls on the Australian Government to establish a nationally consistent supported decision-making framework that strongly and positively promotes and supports disabled people to effectively assert and exercise their legal capacity and enshrines the primacy of supported decision-making mechanisms, including the right of women and girls with disability to make free, informed and responsible choices about their bodies, sexual health, reproductive health, intimate and emotional relationships, and parenting.*11*

*8. For example, *Sanctuary* (Directed by Christian O'Reilly, Galway Arts Festival 2012); WWDA, 'WWDA Position Statement 4: Sexual and REPRODUCTIVE Rights' (2016), https://wwda.org.au/wp-content/uploads/2020/05/5ea654fbfc3264166cbe2ffe_Position_Statement_4_-_Sexual_and_Reproductive_Rights_FINAL_WEB.pdf, and see a discussion in Arstein-Kerslake and Flynn, 'Legislating Consent' (n 1).

*9. Shuttleworth, R. P. (2000). The Search for Sexual Intimacy for Men with Cerebral Palsy. *Sexuality and Disability* 18, 263; Wilson, N. J. et al (2011). Conditionally Sexual: Men and teenage boys with moderate to profound intellectual disability. *Sexuality and Disability* 29, 275.

*10. WWDA (2016). WWDA Position Statement 1: Right to Freedom from All Forms of Violence. <https://wwda.org.au/wp-content/uploads/2016/09/WWDA-Position_Statement_1_-_Violence_FINAL_WEB.pdf>; WWDA (n 7).

*11. WWDA (n 7), 5.

These recommendations are powerful assertions from the disability community that the right to sexual agency must be protected on an equal basis for disabled people.

Calls for the recognition and protection of the sexual agency of disabled women and gender minorities are also found in more informal commentaries on the importance of sexual autonomy for disabled women. Elsa S. Henry, a Scandinavian feminist scholar and disability rights activist, encapsulated the current approach to the sexual agency of disabled people when she wrote:

*Being sexual and being disabled are seen as mutually exclusive by so many, we are seen as unable to give consent. Unable to have sex. Literally unable to be sexual.*12*

Lydia X. Z. Brown, an American gender non-binary, queer, autistic disability rights activist, highlighted how the restrictions on sexual agency can also result in restrictions on a range of other rights, such as the right to participate in relationships or to receive adequate reproductive and sexual health education:

*We are frequently assumed incapable of having opinions or directing our own lives, treated as children even when we are adults, denied access to basic healthcare or education, deprived of accessible or meaningful sex education or even the opportunity to form romantic relationships, treated as though our opinions and ideas have no value, and discussed as though we are not present and cannot be.*13*

Bethany Stevens, an American queercrip sexologist and disability consultant, has also acknowledged the denial of sexual agency of disabled people and called for change:

*To be clear, we are NOT to blame for stigma dehumanizing us through stripping us of sexual agency and desirability. We do not have to continue to internalize shame over sexuality issues and we CAN work together to change our reality.*14*

The position statement of the WWDA and the comments of disability activists begin to illustrate the desire of disabled people to have their sexual agency recognised on an equal basis with others. These voices from the disability community were at the forefront of our minds when we began to see the prevalence of sexual offenses legislation that criminalises sex with disabled people with cognitive impairments. These voices are what propelled us to investigate this issue further and to undertake a legal analysis of the human rights implications of such legislation and its potential to deny the sexual agency of disabled people with cognitive impairments.

*12. Henry, E. S. (2014). Criplesque. In Caitlin Wood, *Criptiques*. May Day Publishing.

*13. Brown, L. X. Z. (2014). Disability in an Ableist World. In Caitlin Wood, *Criptiques*. May Day Publishing.

*14. Stevens, B. (2010). The Politics of Presenting Cripsex. *Crip Confessions*, 13 April 2010. Available at <http://cripconfessions.com/tag/event-planning/>

3. Human Rights to Sexual Agency and Freedom from Abuse

3.1 Convention on the Rights of Persons with Disabilities (CRPD)

The United Nations (UN) *Convention on the Rights of Persons with Disabilities* (CRPD), adopted by the UN General Assembly in 2006, represents a departure from medical and paternalistic approaches to disability. It adopts a human rights approach that aims to break down societal barriers and provide disabled people with the necessary resources and support to realise their human rights on an equal basis with others.*15 There are two articles of the Convention that are particularly relevant for sexual offenses legislation. The first is Article 12, which protects the right to legal capacity – including the ability to hold rights and to exercise legal agency.*16 It has been interpreted as protecting the right to sexual agency, as part of the right to exercise legal agency (as described in detail in the next section).*17 The second is Article 16, which protects the right to freedom from abuse, which is often an aim of sexual offences legislation.

3.2 Right to Legal Capacity and Sexual Agency

Article 12 of the CRPD provides for the right of all disabled people to equal recognition before the law. It includes the right to enjoy ‘legal capacity on an equal basis with others in all aspects of life’. ‘Legal capacity’ has been interpreted to include the recognition of an individual as a holder of rights and a legal agent. In other words, the law must recognise that a disabled person is a legal entity and has the power to legally transact on an equal basis with others.*18

The recognition of legal agency – or the power to legally transact – includes any decision, action, or inaction that has legal implications. Most decisions, actions, or inactions have the potential for legal implications. Therefore, Article 12 protects the right of disabled people to be recognised as legal decision-makers and to engage in a relatively broad scope of decisions and actions on an equal basis with others.*19 Consent to sexual activity has legal implications, via the criminal law and elsewhere, and therefore is an exercise of legal agency and is protected by Article 12. In other words, State Parties to the CRPD are required to recognise sexual consent given by

*15. Degener, T. (2016). Disability in a Human Rights Context. *Laws*, 5, 35.

*16. Arstein-Kerslake, A. and Flynn, E. (2017). The Right to Legal Agency: Domination, disability and the protections of Article 12 of the convention on the rights of persons with disabilities. *International Journal of Law in Context*, 13, 22.

*17. Arstein-Kerslake and Flynn, ‘Legislating Consent’ (n 1) 228; Arstein-Kerslake, ‘Understanding Sex’ (n 1); Committee on the Rights of Persons with Disabilities, ‘General Comment No. 1 – Article 12: Equal Recognition Before the Law’ 9; Arstein-Kerslake, A. and Flynn, E. (2016). The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A roadmap for equality before the law. *The International Journal of Human Rights*, 20, 471.

*18. Committee on the Rights of Persons with Disabilities (n 16).

*19. Arstein-Kerslake and Flynn, ‘The Right to Legal Agency’ (n 15).

disabled people – including disabled people with cognitive impairments – on an equal basis with others.*20

It is also important to highlight that Article 12 applies to all persons, regardless of decision-making skills. This interpretation of Article 12 can be found in the General Comment on Article 12 from the United Nations monitoring body of the CRPD – the Committee on the Rights of Persons with Disabilities.*21 This interpretation means that all people – including disabled people with cognitive impairments – have a right to sexual agency on an equal basis with others, regardless of decision-making skills. The law must respect an individual's choice to engage in sex, even if it is viewed as a 'bad' choice or if others believe that the individual's decision-making skills are poor. For non-disabled people, this principle is often taken for granted – non-disabled people are, for the most part, free to make 'bad' or 'risky' sexual choices. However, sexual offense laws that criminalise sex with disabled people with cognitive impairments often hold disabled people with cognitive impairments to a different standard. When disabled people with cognitive impairments seek to make a decision that others view as 'bad' or 'risky', they are often labeled as lacking sufficient decision-making skills and their right to make decisions can be denied via various legal mechanisms. Article 12 protects the right of all disabled people, regardless of decision-making skills, to sexual agency on an equal basis with others – meaning that disabled people have a right to make 'bad' or 'risky' sexual decisions, on an equal basis with non-disabled people. In most jurisdictions, there are limits to the 'bad' or 'risky' sexual decisions that all people can make – Article 12 simply demands that disabled people are free to take sexual risks on an equal basis with others.

There may be concerns that the freedom to take sexual risks on an equal basis with others will leave some disabled people with cognitive impairments more vulnerable to abuse. This is, of course, a valid concern that should be considered as part of any law reform effort. However, as discussed below, there is evidence that people are significantly more vulnerable to abuse when the law does not recognise them as decision-makers and does not require others to treat them as such.*22

In addition, Article 12 includes an obligation on States Parties to the convention to provide access to the support required to exercise legal capacity.*23 According to paragraph 4 of the Article, this state obligation must respect the 'rights, will, and preferences' of disabled people. We argue that this provision requires that disabled people are not only free to make sexual decisions on an equal basis with others, but that they are also provided with mental and physical support for engaging in sex. For example, accessible sex education that respects the right to sexual agency and facilitates the

*20. Arstein-Kerslake and Flynn, 'Legislating Consent' (n 1) 227; Arstein-Kerslake, 'Understanding Sex' (n 1).

*21. Committee on the Rights of Persons with Disabilities (n 16); Arstein-Kerslake and Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities' (n 16).

*22. Arstein-Kerslake, 'Gendered Denials' (n 4); Clough (n 1).

*23. *Convention on the Rights of Persons with Disabilities (CRPD) 2007 Article 12(3)*.

expression of will and preferences related to sex. There was not scope in this article to undertake an analysis of each jurisdiction's practice with regard to sex education and sexual choice for disabled people with cognitive impairments. However, it is important to note that Article 12 can be interpreted to require such things as part of the state obligation to provide support for the exercise of legal capacity.

3.3 Right to Freedom from Abuse

Article 16 of the CRPD provides for the protection of disabled people from 'all forms of exploitation, violence and abuse'.^{*24} Article 16 also requires State Parties to take appropriate measures to provide:

[...] assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse.

Article 16 could be raised in defense of stringent laws that criminalise sex with disabled people with cognitive impairments. However, we argue that laws which ignore or deny the sexual agency of disabled people may increase vulnerability to abuse because they create an environment in which disabled people's sexual choices are not recognised. There is evidence to suggest that this lack of recognition may further marginalise disabled people with cognitive impairments and make their sexual choices less likely to be supported via sexual education training and awareness, which is critical in order for an individual and those around them to have the tools necessary to recognise and potentially prevent sexual abuse.^{*25} It may also foster power imbalances that put disabled people with cognitive impairments at risk of abuse because they are not recognised as legal actors whose choices must be respected on an equal basis with others. In hierarchical relationships in which people with cognitive impairments are often already lacking in power – such as relationships with staff in institutional or other congregated settings – it is likely that legislation which denies them their sexual agency entrenches their lack of power in these relationships further. As such, the right to be free from abuse in Article 16 may not be well-served by the criminalisation of sexual activity of disabled people with cognitive impairments.

It is also important to note that criminal law itself is merely a means of retrospective accountability for those who take actions that are deemed to be illegal. Its ability to 'protect from abuse', as required in Article 16, is quite limited – since 'protection'

^{*24.} *Convention on the Rights of Persons with Disability*, above n12, art 16(2).

^{*25.} Arstein-Kerslake and Flynn, 'Legislating Consent' (n 1); Arstein-Kerslake, 'Understanding Sex' (n 1); Arstein-Kerslake, A. (2021). *Gendered Denials: Law, Policy and Practice*. In Anna Arstein-Kerslake (Ed.), *Legal Capacity & Gender: Realising the human right to legal personhood and agency of women, disabled women, and gender minorities*. Cham: Springer International Publishing. Retrieved from https://doi.org/10.1007/978-3-030-63493-3_4; Arstein-Kerslake, A. (2021). *Legal Capacity & Gender: Realising the human right to legal personhood and agency of women, disabled women, and gender minorities*. Cham: Springer International Publishing; Chenoweth, L. (1999). *Sexual Abuse of People with Disabilities: Denied sexuality and abuses of power. Disability, Diversity and Legal Change*, 301; Chenoweth, L. (1996). *Violence and Women with Disabilities: Silence and paradox. Violence Against Women*, 2, 391; Clough (n 1).

is generally understood as preventing harm before it occurs. The ‘protection’ that criminal law can offer is primarily in the form of deterrence. The idea is that people will be deterred from engaging in criminal behaviour because they fear punishment via the criminal justice system. In order for criminal law to protect disabled people with cognitive impairments from sexual abuse, there would have to be a sufficient fear of punishment through the criminal justice system. However, the deterrent effect of criminal law, in general, has been consistently questioned.*26 Further, the widespread sexual abuse of disabled people appears to indicate that criminal law, in its current form, is not having the desired deterrent effect.*27 This suggests that the criminalisation of the sexual activity of disabled people with cognitive impairments may not be a particularly effective means of protecting them from abuse.

3.4 Discussion

As a remedy, we argue that respecting the right to legal capacity in Article 12 of the CRPD will also serve to protect the right to be free from abuse in Article 16 of the CRPD better. We argue that the two rights can be ‘coupled’. This ‘coupling’ could entail ensuring that the law recognises the sexual agency of disabled people with cognitive impairments while also ensuring that sexual offenses legislation is suited to protect all groups from sexual abuse – including disabled people with cognitive impairments. We would argue that this should be done in a ‘disability neutral’ manner – meaning that there is no sexual offenses law that only applies to disabled people with cognitive impairments, but instead, sexual offenses law is crafted in an inclusive manner to criminalise unwanted sexual activity experienced by all people. Such ‘disability neutral’ legislation must be neutral in both the text of the legislation and its implementation – it must not be implemented in a manner that disproportionately negatively impacts disabled people with cognitive impairments or the sexual agency of disabled people with cognitive impairments.*28

*26. Chalfin, A. and McCrary, J. (2017). Criminal Deterrence: A review of the literature. *Journal of Economic Literature*, 55, 5; Paternoster, R. (2010). How Much Do We Really Know about Criminal Deterrence Centennial Symposium: A century of criminal justice – crimes and punishments. *Journal of Criminal Law & Criminology*, 100, 765; Ehrlich, I. (1972). The Deterrent Effect of Criminal Law Enforcement. *The Journal of Legal Studies*, 1, 259; Robinson, P. H. (2002). The Role of Deterrence in the Formulation of Criminal Law Rules: At its worst when doing its best. *Georgetown Law Journal* 91, 949; Robinson, P. H. and Darley, J. M. (2004). Does Criminal Law Deter? A behavioural science investigation. *Oxford Journal of Legal Studies*, 24, 173.

*27. Tomsa, R. et al. (2021). Prevalence of Sexual Abuse in Adults with Intellectual Disability: Systematic review and meta-analysis. *International Journal of Environmental Research and Public Health*, 18, 1980; Baladerian, N. J. (1991). Sexual Abuse of People with Developmental Disabilities. *Sexuality and Disability*, 9, 323; McCabe, M. P., Cummins, R. A. and Reid, S. B. (1994). An Empirical Study of the Sexual Abuse of People with Intellectual Disability. *Sexuality and Disability*, 12, 297; McCarthy, M. (1999). *Sexuality and Women with Learning Disabilities*. London and Philadelphia, PA: Jessica Kingsley Publishers.

*28. Similar arguments are made in scholarship related to “sexual citizenship” – see, for example, Bahner, J. (1998). *Sexual Citizenship and Disability: Understanding sexual support in policy, practice and theory*. Abingdon and New York: Routledge; Weeks, J. (1998). The Sexual Citizen. *Theory, Culture & Society*, 15, 35; Bell, D. and Binnie, J. (2004). Authenticating Queer Space: Citizenship, urbanism and governance. *Urban Studies*, 41, 1807.

In the next section, Article 12 and 16 of the CRPD are applied to sexual offenses legislation in Commonwealth jurisdictions. We identify different types of legislation across these jurisdictions and provide an analysis of their compliance with Articles 12 and 16 of the CRPD. We also identify that the heritage of such legislation appears to be from British colonial rule or is heavily influenced by laws in the United Kingdom. Our aim is to highlight the need for reform of such legislation and to underscore the on-going impact of colonisation, which, in this case, is manifesting itself in legislation that may be discriminatory and harmful and is likely jeopardising the rights of disabled people with cognitive impairments.

4. Sexual Offence Laws in Commonwealth Jurisdictions

4.1 Methodology

All Commonwealth jurisdictions were analysed – 54 countries spanning five regions: Africa, Asia, the Americas, Europe, and the Pacific. These countries are almost all former territories of the British Empire. Canada and Australia are both Commonwealth countries that are federal states. However, in Canada the federal government has exclusive jurisdiction to enact criminal law, therefore we only provided an analysis of Canadian federal criminal law. Conversely, in Australia, the state and territory governments have primary responsibility for criminal law. Therefore, we analysed each Australian state and territory separately. Within the UK, we analysed the laws of Scotland, Northern Ireland, and England and Wales – with a more in-depth analysis of the laws in England and Wales because England was the primary seat of British colonial power – as discussed in more detail below. In all jurisdictions, we focused on identifying the existence of sexual offense laws that criminalise sexual activity with disabled people with cognitive impairments – either on the basis of disability alone or on the basis of a functional test of ability to consent.

First, the legislation of each jurisdiction was reviewed to identify offences which explicitly criminalise sex on the sole basis that one party is a disabled person with cognitive impairments. Second, a more nuanced analysis of jurisdictions which did not have such blanket prohibitions was completed and these jurisdictions were categorised into a further four categories. The five categories that emerged from our analysis include:

- (1) *Status-based offences*: the criminalisation of (any) sexual activity with a person with a disability (27 jurisdictions);
- (2) *Functional test with disability-threshold offences*: the provision of a ‘functional test’ with a disability threshold to determine the level of cognitive capacity to consent (23 jurisdictions);
- (3) *Functional test offences*: the provision of solely a ‘functional test’ without a disability threshold (2 jurisdictions);
- (4) *Principal sexual offences are disability neutral, however disability-specific sexual offences exist* (4 jurisdictions);

- (5) *Disability-neutral with disability-specific sentencing provisions*: The relevant provisions are disability-neutral; however sentencing provisions distinguish victims with a disability and provide for longer sentences (3 jurisdictions).

Below is a further description of each category of offenses, an analysis of their compliance with the CRPD, and a discussion of their potential impact on disabled people with cognitive impairments.

4.2 Status-based Offences

Status-based offences are those that criminalise sexual activity solely by virtue of one party having a disability (often a cognitive impairment). The majority of jurisdictions analysed have status-based offenses – those jurisdictions include Antigua and Barbuda,*29 the Bahamas,*30 Barbados,*31 Botswana,*32 Cyprus,*33 Dominica,*34 Fiji,*35 Gambia,*36 Ghana,*37 Grenada,*38 Kenya,*39 Kiribati,*40 Lesotho,*41 Malawi,*42 Mauritius,*43 Nigera,*44 Saint Vincent and Grenadines,*45 Samoa,*46 Sierra Leone,*47 South Africa,*48 Tanzania,*49 Tonga,*50 Trinidad and Tobago,*51 Tuvalu,*52 Uganda,*53 Zambia,*54 and the state of Queensland in Australia.*55

*29. [Antigua and Barbuda] Criminal Law Amendment Act (1887) § 4(b).

*30. [Bahamas] Sexual Offences and Domestic Violence Act (2010) 12.

*31. [Barbados] Sex Offences Act (2002) § 8.

*32. [Botswana] Penal Code (2005) § 148.

*33. [Cyprus] Criminal Code (1959) § 155.

*34. [Dominica] Sexual Offences Act (1998) § 11.

*35. [Fiji] Crimes Act (2009) § 216.

*36. [Gambia] Criminal Code (2014) § 128.

*37. [Ghana] Criminal Code (1960) § 102.

*38. [Grenada] Criminal Code (Amendment) Act (2012) § 182.

*39. [Kenya] Penal Code (1930) §146 and [Kenya] Sexual Offences Act (2006) §§ 3 and 43.

*40. [Kiribati] Penal Code (1977) § 135.

*41. [Lesotho] Penal Code Act (2010) § 52.

*42. [Malawi] Penal Code (1930) § 139.

*43. [Mauritius] Criminal Code (1838) § 249.

*44. [Nigeria] Criminal Code Act (1916) § 221.

*45. [Saint Vincent and Grenadines] Criminal Code (1988) § 126.

*46. [Samoa] Crimes Act (2013) § 63.

*47. [Sierra Leone] Sexual Offences Act (2012) § 8.

*48. [South Africa] Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007) §§ 1(3)(d)(v) and 3.

*49. [Tanzania] Penal Code (1981) § 137.

*50. [Tonga] Criminal Offences (1988) § 118.

*51. [Trinidad and Tobago] Sexual Offences Act (1986) § 12.

*52. [Tuvalu] Penal Code (2008) § 135.

*53. [Uganda] Penal Code Act (1950) § 130.

*54. [Zambia] Penal Code Act (1930) § 139.

*55. [Queensland, Australia] Criminal Code Act (1899) § 216.

In addition, although England and Wales currently do not have status-based offences, they did have such offenses in legislation from 1885 until 2004. The Criminal Law Amendment Act 1885 included the UK's first status-based offense in legislation,*56 which was followed by the Sexual Offences Act 1956 (England and Wales), which stated, in Section 7:

It is an offence for a man to have unlawful sexual intercourse with a woman whom he knows to be an idiot or imbecile.

This provision was not repealed until 2004, with the enactment of the Sexual Offences Act 2003 (England and Wales). This status-based legislation was in force in the United Kingdom*57 during a time that many of the jurisdictions listed above were colonies of the British Empire (1885–2004).*58 This suggests that the status-based offense in the UK may have had an influence on the creation of similar offenses in these jurisdictions.

Status-based offences that criminalise sex due to one or more of the participants having a disability are likely to be in breach of Article 12 CRPD because they restrict legal capacity on the basis of disability – thereby not allowing disabled people to enjoy legal capacity to consent to sex on an equal basis with others. Such offences reflect the underlying prejudicial, and homogenising, notion that all disabled people with cognitive impairments are unable to make decisions regarding sex.*59 However, as noted above, having a cognitive impairment does not necessarily result in poor decision-making skills, and many disabled people with cognitive impairments are very capable of making sexual decisions, leading happy and healthy sexual lives.

4.3 Functional Test with Disability Threshold Offences

The second category of offences includes a functional test that has a threshold requirement of disability. In these types of legislation, there are two elements which must be proven for sex to be criminalised. First, a disability threshold must be fulfilled whereby the relevant individual must have some form of disability (this is most often a cognitive impairment). Second, the person's disability must have affected their ability to truly and freely consent to the sexual activity. These provisions often refer to the idea that the person consenting must be able to understand the nature and consequences of the act that they are consenting to. A detailed discussion of this type of legislation is provided later in the article – looking at the legislation in England and Wales.

*56. Sandland, R. (2013). Sex and Capacity: The management of monsters? *The Modern Law Review*, 76, 981, 981–2.

*57. The territorial extent of the Sexual Offences Act 1956 was primarily England and Wales. Sexual Offences Act 1956, Introductory Text.

*58. Darwin, J. (2009). *The Empire Project: The Rise and Fall of the British World-System, 1830–1970*. Cambridge and New York: Cambridge University Press.

*59. Arstein-Kerslake, “Understanding Sex” (n 1); Arstein-Kerslake and Flynn, “Legislating Consent” (n 1).

Countries that have offences that include a functional test with a threshold requirement of disability include Bangladesh,*60 Belize,*61 Brunei,*62 England and Wales,*63 Guyana,*64 India,*65 Jamaica,*66 Malta,*67 Namibia,*68 New Zealand,*69 Northern Ireland,*70 Pakistan,*71 Papua New Guinea,*72 Saint Lucia,*73 Scotland,*74 Singapore,*75 Solomon Islands,*76 Sri Lanka,*77 Vanuatu,*78 and the Australian states of South Australia,*79 New South Wales,*80 Western Australia,*81 and the Australian Capital Territory.*82 As mentioned above, England and Wales amended their legislation from status-based to a functional test with a disability threshold in 2004.*83 Most of the jurisdictions with similar legislation enacted such legislation post-2004. This, again, suggests that the United Kingdom may influence (perhaps inadvertently) the legislation in these jurisdictions.

Similar to status-based offenses, these offences are likely in breach of Article 12 CRPD. They discriminate on the basis of disability and limit disabled people's legal capacity on an unequal basis with others. The trend towards this type of legislation, potentially stimulated by the 2004 reform in the United Kingdom, is concerning due to the incompatibility with the CRPD and the lack of protection for disabled people's sexual autonomy that is inherent in such legislation.

*60. [Bangladesh] Penal Code (1860) § 90 and 375.

*61. [Belize] Criminal Code Amendment (No. 2) Act (2014) § 47(E-F).

*62. [Brunei] SYARIAH PENAL CODE ORDER (2013) § 75(f).

*63. [England and Wales] Sexual Offences Act (2003) § 30–41.

*64. [Guyana] Sexual Offences Act (2010) § 23–6.

*65. [India] Penal Code Act (1860) § 375–6.

*66. [Jamaica] Sexual Offences Act (2009) § 16.

*67. [Malta] Criminal Code (1854) §§ 198 and 201.

*68. [Namibia] Combating of Rape Act (2000) § 2.

*69. [New Zealand] Crimes Act (1961) §138.

*70. [Northern Ireland] Sexual Offences Order (2008) § 43.

*71. [Pakistan] Penal Code (1860) § 90 and 375.

*72. [Papua New Guinea] Criminal Code (1974) § 347.

*73. [Saint Lucia] Criminal Code (2005) § 123.

*74. [Scotland] Sexual Offences Act (2009) § 17.

*75. [Singapore] Penal Code (1871) §§ 375, 90, and 376F.

*76. [Solomon Islands] Penal Code (Amendment) (Sexual Offences) Act (2016) § 138A.

*77. [Sri Lanka] Penal Code (1980) §§ 83 and 363.

*78. [Republic of Vanuatu] Penal Code (2006) § 7 and 90.

*79. [South Australia, Australia] Criminal Law Consolidated Act (2018) §§ 46 and 48.

*80. [New South Wales, Australia] Crimes Act (2018) §§ 61HA and 66F.

*81. [Western Australia] Criminal Code Act (2018) § 330.

*82. [Australian Capital Territory, Australia] Criminal Code (2018) §§ 54 and 67.

*83. Sexual Offences Act 2003 (section 30).

4.4 Disability-neutral Functional Test Offences

The third category includes offences containing a functional test which is disability-neutral on the face of the text. An example of such laws can be found in Section 130 of the Seychelles' Penal Code:

*A person does not consent to an act which if done without consent constitutes an assault under this section if [...] the person's understanding and knowledge are such that the person was incapable of giving consent.*84*

This functional test refers to the individual's understanding and knowledge of the nature of the sexual act in which they are partaking. These tests can theoretically be applied to anyone regardless of disability and are therefore disability-neutral on the face of the text. Jurisdictions with this type of legislation include Cameroon*85 and Seychelles.*86 It is not clear whether these jurisdictions had a specific intent to create disability-neutral legislation.

Functional test offences that are disability-neutral (meaning that they do not include a disability threshold) may be compliant with Article 12 CRPD, if they are also disability-neutral in their application. In other words, they must not have a discriminatory effect in practice.*87 These discriminatory effects can occur when legal actors make the prejudicial assumption that disabled people with cognitive impairments are, as a group, generally unable to understand the nature and consequence of a sexual act and are therefore unable to consent. Due to persistent prejudice against cognitive impairments, it may be very difficult – and perhaps currently impossible – for a jurisdiction to have a disability neutral functional test that does not disproportionately affect disabled people with cognitive impairments in practice.

4.5 Disability-neutral Functional Test with Additional Disability-specific Sex Offences

The fourth category is jurisdictions that have disability-neutral functional tests within their main sexual offense laws yet also have a range of disability-specific sexual offenses. These offenses relate to sexual relationships that arise between a disabled person and someone who provides that person with care or a service (generally related to their disability).*88 Jurisdictions with this type of legislation include Canada*89 and the Australian states of Victoria,*90 Tasmania,*91 and the Northern Territory.*92

*84. [Seychelles] Penal Code (1955) § 130.

*85. [Cameroon] Penal Code (1967) § 296.

*86. [Seychelles] Penal Code (1955) § 130.

*87. Flynn, E. and Arstein-Kerslake, A. (2017). State Intervention in the Lives of People with Disabilities: The case for a disability-neutral framework. *International Journal of Law in Context*, 13, 39.

*88. Further research will be required to identify how these prohibitions against those who provide services for disabled people may restrict or eliminate the provision of services by sex workers to disabled people.

*89. [Canada] Criminal Code (1985) §§ 265 and 153.

*90. [Victoria, Australia] Crimes Act (1958) §§ 38, 37A, 37B, and 50–2.

*91. [Tasmania, Australia] Criminal Code Act (1924) §§ 2A, 126, and 185.

*92. [Northern Territory, Australia] Criminal Code Act §§ 130 and 192.

These jurisdictions have the issues identified above in the discussion of jurisdictions with only disability-neutral legislation – the risk that disability-neutral legislation has a discriminatory effect on disabled people. In addition, the disability-specific sex offences may be in breach of Article 12 CRPD due to their disability-specific nature. If disabled people’s right to legal capacity to consent to sex is being restricted on an unequal basis to non-disabled people, then Article 12 is implicated.

For example, Victoria, Australia has both the potential for its legislation to have a discriminatory effect and for disability-specific legislation to impact the right to legal capacity to consent to sex of disabled people with cognitive impairments. The definition of consent in Victoria includes a disability-neutral functional test. A person is considered to not have given consent to sexual activity where “the person is incapable of understanding the sexual nature of the act.”*93 The sexual offenses legislation does not generally criminalise sex with disabled people with cognitive impairments.*94 However, Section 37A of the *Crimes Act 1958* (Vic) includes within the objectives of the sexual offenses provisions ‘the protection from exploitation of people with cognitive impairments’. Section 37B goes further and refers to people with ‘cognitive impairments’ as ‘vulnerable persons’.*95 In addition, throughout the provisions, people with ‘cognitive impairments’ appear to be placed within a similar category as children.*96 This association with children and vulnerability may lead legal actors to internalise the belief that disabled people with cognitive impairments are inherently vulnerable and in need of protection. This may inform their approach to a functional test for consent – disproportionately applying the test to disabled people with cognitive impairments and thereby making their expression of sexual agency subjected to disproportionate scrutiny that is not experienced by others. This could amount to indirect discrimination, which could inhibit the expression of sexual agency of disabled people with cognitive impairments.

In addition, Victoria has disability-specific sex offenses. For example, section 16 of the Crimes (Sexual Offenses) Act 2006 states:

A person who provides medical or therapeutic services to a person with a cognitive impairment who is not his or her spouse or domestic partner must not take part in an act of sexual penetration with that person.

The intention of this provision was likely to protect disabled people with cognitive impairments from abuse by care workers – who are often in positions of power. However, it also overlooks the possibility that a person with cognitive impairments

*93. [Victoria, Australia] Crimes Act (1958) § 36(2)(g).

*94. It does criminalise sex with a disabled person with cognitive impairments where there is a relationship of treatment or services provision. [Victoria, Australia] Crimes Act (1958) § 52B.

*95. Scholars have noted the problem with assuming inherent vulnerability related to disability, especially with regards to sex. Hollomotz, A. (2009). Beyond “Vulnerability”: An Ecological Model Approach to Conceptualising Risk of Sexual Violence against People with Learning Difficulties. *The British Journal of Social Work*, 39, 99; Arstein-Kerslake, “Gendered Denials” (n 4).

*96. For example, [Victoria, Australia] Crimes Act (1958) § 37A(b) and 37B(c).

could consent to sexual activity with a person who provides medical or therapeutic services to them. People without cognitive impairments are not subjected to the same restrictions on their freedom to consent to sex. This denial of the recognition of the legal capacity of disabled people with cognitive impairments to consent to sex is likely in violation of Article 12 because it restricts the legal capacity of disabled people on an unequal basis with others.

4.6 Disability-neutral Offences with Increased Sentencing

The fifth category is jurisdictions where sexual offence legislation does not criminalise sexual acts on the basis of disability and instead has increased sentences when the survivor of a sexual offence has a disability. Most of these jurisdictions have disability-neutral functional tests. Jurisdictions with this type of legislation include Malaysia,^{*97} Nauru,^{*98} and Rwanda.^{*99} Such offences do not explicitly limit the legal capacity of disabled people with cognitive impairments. However, there is a risk that they may have a discriminatory effect in practice. This discriminatory effect may occur due to the functional tests, discussed above. It also may occur due to the disability-specific sentencing. For example, a discriminatory effect could occur where such increased sentencing legitimises the idea that sexual offences where the survivor is a person with cognitive impairments are somehow worse than those where the victim is not a person with cognitive impairments. This differentiation may reinforce the stigma experienced by disabled people with cognitive impairments in relation to their sexual agency and may contribute to the notion that they are more vulnerable and in need of protection than others. However, there is also an argument that such increased sentences are necessary in order to recognise potential hate crimes against disabled people with cognitive impairments – in the form of sexual offenses – and also to recognise the on-going social barriers that disabled people with cognitive impairments face in exercising their sexual agency.

The European Union Agency for Fundamental Rights has argued that the implementation of ‘enhanced penalties’ for offences where the survivor is a disabled person are not only compliant with the CRPD but are required to ensure access to the rights and protections offered by the Convention.^{*100} The approach taken by the European Agency and many of the European Union’s Member States is that, in recognition of the increased levels of violence experienced by disabled people, more must be done in order to prevent and discourage its continuation.^{*101} Further research needs to be undertaken to determine whether such increased sentencing is effective in combating

*97. [Malaysia] Penal Code (1968) § 375.

*98. [Nauru] Crimes Act (2016) § 9, 102, and 105.

*99. [Rwanda] Penal Code (2012) § 3 and 197.

*100. European Union Agency for Fundamental Rights (2015). *Equal Protection For All Victims Of Hate Crime: The Case Of People With Disabilities*. European Union Agency for Fundamental Rights. Available at <http://fra.europa.eu/en/publication/2015/equal-protection-all-victims-hate-crime-case-people-disabilities>

*101. *Ibid.*, 4.

such targeted violence against disabled people – or whether they create greater harm by furthering the prejudicial notion that disabled people are inherently vulnerable and therefore in need of increased protections in relation to sexual activity.

4.7 Discussion

Most of the Commonwealth countries analysed continue to have sexual offenses legislation that criminalises sexual activity based on the status of one of the actors as cognitively disabled – the first category listed above. This is similar to the legislation that existed in the United Kingdom from 1885–2004.*102 England and Wales amended their legislation in 2003 to remove the status-based offence and replace it with a functional test with a disability threshold – the second category listed above.*103 Several Commonwealth countries have followed suit, as discussed above. However, this type of legislation – while generally an improvement on the older status-based legislation – continues to treat consent from disabled people with cognitive impairments differently than consent from non-disabled people. It also results in disabled people with cognitive impairments being offered a different form of justice than non-disabled people.

5. England and Wales: Legislation and Case Law

As Commonwealth member countries, all the jurisdictions examined here are influenced to some degree by the United Kingdom*104 – which is, for many of these countries, their former coloniser.*105 Many of these countries inherited or adopted laws from the United Kingdom as a result of colonisation.*106 For this reason, we have taken a more in-depth exploration of sexual offenses legislation in England, in particular, because it is the jurisdiction within the United Kingdom that has historically held significant colonial power. As discussed above, England and Wales' current

*102. [England and Wales] Sexual Offences Act (1956); Sandland (n 56) 981–2.

*103. [England and Wales] Sexual Offences Act (2003) § 30–41.

*104. Agozino, B. (2004). Imperialism, Crime and Criminology: Towards the decolonisation of criminology. *Crime, Law and Social Change*, 41, 343; Blagg, H. (2016). *Crime, Aboriginality and the Decolonisation of Justice*. Alexandria: Federation Press; Hopkins, A. G. (2017). Globalisation and Decolonisation. *The Journal of Imperial and Commonwealth History*, 45, 729; Veracini, L. (2007). Settler Colonialism and Decolonisation. Faculty of Law, Humanities and the Arts – Papers (Archive). Available at <https://ro.uow.edu.au/lhapapers/1337>

*105. It is relevant to note here that not all jurisdictions within the United Kingdom (UK) participated to the same degree in colonisation. For example, during periods of history, parts of the UK (N. Ireland, Scotland and Wales) experienced subjugation under *English* rule. Much of the global colonisation that occurred arising from countries in the UK was undertaken by what was then known as the “British Empire” and was led by England. Lloyd, T. (2006). *Empire: A History of the British Empire* (London and New York: A&C Black).

*106. For example, for a discussion of the impact of English constitutional law on Commonwealth countries see, Harding, A. (20024). The “Westminster Model” Constitution Overseas: Transplantation, adaptation and development in Commonwealth states. *Oxford University Commonwealth Law Journal*, 4, 143.

sexual offenses law related to disabled people with cognitive impairments falls into the second category of offenses listed above. It includes an offense with a functional test and a disability threshold for that test.*107

5.1 Legislation

On May 1, 2004 the Sexual Offences Act 2003 (SOA 2003) came into force in England and Wales.*108 This new Act replaced the 1956 equivalent, in the hope of addressing a perceived inefficiency in detecting and punishing sexual offending.*109 The SOA 2003 created 12 new offences in relation to persons with a “mental disorder”. They also include a functional test of ability to consent. In other words, these provisions apply where the sexual acts are related to a person who has a “mental disorder” and is determined to not have the ability to consent.

These offences include problematic language that suggest a medical and/or deficit model of disability – such as “mental disorder”. They are also likely in breach of Article 12 CRPD because they employ a disability threshold which effectively denies the legal capacity and sexual agency of disabled people.*110 Lord Falconer, upon introducing the Sexual Offences Bill, opened by saying “[a] responsibility rests on the Government adequately to protect everyone in society from such crimes, especially those who are most vulnerable to abuse: children and persons with a mental disorder or learning disability...”.*111 The second reading speeches that accompanied the Bill and the Bill itself strongly suggest that protection is prioritised over autonomy for disabled people with cognitive impairments.

The SOA 2003 creates three categories of offences for the “protection” of persons with a mental disorder. Mental disorder is defined as “any disorder or disability of the mind”.*112 The legislation rests on a distinction between three different types of perceived vulnerability of people with mental disorders. The first category includes those who have a mental disorder that impairs mental functioning to such an extent that they are perceived as being unable to make any decision related to sexual activity. The second applies to those who are perceived to have the mental functioning necessary to consent to sexual activity but who, due to a mental disorder,

*107. [England and Wales] Sexual Offences Act (1956).

*108. Scotland has a separate sexual offenses act, Sexual Offences (Scotland) Act 2009.

*109. Sandland (n 56) 981–2.

*110. The United Kingdom ratified the CRPD on June 8, 2009.

*111. [England and Wales] Sexual Offences Bill [H.L.], HL Deb February 13, 2003 vol 644 cc771–810, The Minister of State, Home Office (Lord Falconer of Thoroton).

*112. As defined in section 1 of the Mental Health Act 1983, as amended by the Mental Health Act 2007. The relevant Code for Crown Prosecutors states that this includes serious mental illness, lifelong learning disability and persons who develop dementia – Crown Prosecution Service, Rape and Sexual Offences – Chapter 2: Sexual Offences Act 2003 – Principal Offences, and Sexual Offences Act 1956 – Most commonly charged offences. Revised: April 12, 2019, <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-sexual-offences-act-2003-principal-offences-and>

are more vulnerable to inducements, threats, or deception. The third category covers those who have a mental disorder and can otherwise consent to sexual activity but are in what is deemed to be a position of dependency upon a care worker. See the below table for a description of the elements of the offenses contained in each category. Each one of these categories contains a threshold of “mental disorder” before the provision can be enlivened.

5.2 Case Law

To demonstrate how such laws are used in England and Wales, and the impact that they may be having on disabled people with cognitive impairments, we conducted an examination of relevant case law. The two cases described below provide examples of how sexual offense law in England and Wales is being applied in ways that may be detrimental to disabled people with cognitive impairments – and may violate Articles 12 and 16 CRPD. The first case highlights how the sexual offenses law in England and Wales can be used to criminalise consensual sex of disabled people with cognitive impairments. This is likely a violation of Article 12 CRPD because it does not recognise the legal capacity to consent to sex of a disabled person with cognitive impairments on an equal basis with others. The second case demonstrates the use of disability-specific offenses to achieve a significantly lower sentence for the offender. This use of disability-specific offenses could lead to greater vulnerability to abuse of disabled people with cognitive impairments because it signals a different type of justice for disabled people with cognitive impairments. This may amount to a violation of Article 16 CRPD, which guarantees freedom from abuse for disabled people.

5.2.1 *R v Adcock: Criminalising Consensual Sex*

In *R v Adcock*, a man pleaded guilty to three counts of sexual activity with a disabled person with cognitive impairments.*113 The “victim” was Mr. Adcock’s 57-year-old wife, BG. BG was diagnosed with Huntington’s disease and lived in a care home, where Mr. Adcock visited her on virtually a daily basis. Following a severe stroke, BG had impaired vision, issues with memory processing and needed prompting and support to take care of herself. While she was a resident at the care home, she had displayed disinhibited sexual and non-sexual behaviour. Justice Williams described BG only in terms of her perceived impairments. His Honour stated that “she could not hold full conversations with people but restricted her answers to ‘yes’ and ‘no’”. To sum up his short (eight sentence) description of BG, Justice Williams concluded, “she was not someone who was able to decide whether or not to take part in a physical relationship with someone”.

On the day of the alleged offending, Mr. Adcock was visiting BG at the care home. Care assistants saw Mr. Adcock and BG in the residents lounge together, where Mr. Adcock was seen to be rubbing BG’s vagina over her underwear and was later observed holding her hand and rubbing her right breast. Importantly, Justice

*113. *R v Adcock* [2010] EWCA Crim 700.

Williams found that, “[t]he two care assistants noted that both the appellant and BG appeared to be smiling”. The matter was reported to police and Mr. Adcock was charged. Although Mr. Adcock did plead guilty, he submitted that “[BG] initiated the contact by guiding the defendant’s hand and encouraged him to continue”. If we are to take what Mr. Adcock has said in conjunction with the evidence provided by the care assistants that BG was smiling, it is possible that BG was giving her consent.

If BG was consenting in the sexual acts with Mr. Adcock – her husband – her choosing to do so is an exercise of legal capacity. Article 12 CRPD requires that this exercise of BG’s legal capacity is recognised by the law. In prosecuting and imprisoning Mr. Adcock, the State is undermining BG’s exercise of legal capacity and substituting their decision for her own. In this way, sections 30 to 41 of the Sexual Offences Act can be used to criminalise consensual sex for disabled people with cognitive impairments.

5.2.2 *R v Jones: Failing to Prosecute Rape*

In *R v Jones*, a 76-year-old woman with severe dementia received life-threatening injuries when being put to bed by Jones, a care assistant.*114 The court found that the injuries had most likely been caused by insertion into her vagina of a penis or penis-sized object. Jones was convicted of an offense under section 38(1) of the Sexual Offences Act 2003 – sexual activity with a person with a mental disorder by a care worker. Jones appealed the decision to the Court of Appeal on the basis that the sentence of nine years imprisonment was manifestly excessive.

The Court of Appeal upheld the determination of the court of first instance. However, section 38 offenses that involve penetration have a maximum sentence of 14 years, whereas the maximum sentence for the offense of rape is life imprisonment.*115 The use of the section 38 offence in this instance resulted in a significantly lower sentence than may have been given if Jones had been prosecuted for rape. This demonstrates one of the dangers of having separate sexual offenses that only apply to disabled people. They allow for a different legal standard to be applied to offenders when survivors of sexual assault are disabled people with cognitive impairments. This can result in manifestly different justice outcomes for disabled people with cognitive impairments who are survivors of sexual assault and rape – as it did in this case. It also sends a message to the public that the sexual assault and rape of disabled people with cognitive impairments is different to that of non-disabled people. This has the potential to create greater vulnerability to abuse for disabled people with cognitive impairments, because it perpetuates disempowering and marginalising conceptualisations of disabled people with cognitive impairments as different and not worthy of the same justice as non-disabled people.

5.3 Discussion

The majority of Commonwealth countries continue to have sexual offenses legislation that criminalise sex explicitly on the basis of disability (the first category, above).

*114. *R. v Jones (Gareth William)* [2009] EWCA Crim 237.

*115. [England and Wales] Sexual Offences Act (2003) § 1(4) and 38(3).

These laws appear to be largely inherited from British colonial rule or are very similar to laws in existence in Britain. Similarly, in recent years, following reforms in England and Wales, there has been a reform trend in Commonwealth countries towards laws that do not criminalise sex with disabled people unless the disabled person at issue fails a functional test of decision-making skills (the second through fifth categories, above). Both types of legislation present significant issues in terms of Articles 12 and 16 CRPD compliance – for various reasons, discussed above.*116 They both treat disabled people with cognitive impairments differently than others – they either subject them to tests of sexual decision-making that others are often not subjected to, or they simply remove the recognition of their consent altogether. These types of legislation present conflicts with the mandate from Article 12 CRPD to ensure that disabled people enjoy legal capacity on an equal basis with others. There is also evidence that suggests they jeopardise disabled people with cognitive impairments’ right to be free from abuse, secured in Article 16 CRPD, because they create a separate – and often unequal – justice system for disabled people. These separate systems sometimes include different tests for ability to consent and different sentencing – as evidenced in the examples in England and Wales, above. The influence of the United Kingdom in these Commonwealth countries is significant. That influence appears to have resulted in the wide-spread adoption of these laws that criminalise sex with disabled people with cognitive impairments in various ways – many of which raise significant questions of human rights compliance, and have the potential to prevent disabled people with cognitive impairments from enjoying sexual and romantic relationships on an equal basis with others.

6. Conclusion

This article identifies the criminalisation of sex with people who have cognitive disabilities as a potential violation of the right to sexual agency. It has examined sexual offense laws across Commonwealth jurisdictions and identified those that criminalise sex with disabled people with cognitive impairments. The research revealed that there were five categories of offenses, four of which are likely not CRPD compliant. The one that may be compliant with the CRPD is where there is fully disability-neutral legislation – legislation that criminalises unwanted sex on an equal basis for disabled and non-disabled people. Above, we caution that such legislation is only CRPD compliant if it is disability-neutral in both the text and implementation of the legislation. Here, we would also like to caution against taking a fully “disability-neutral” approach to addressing the right of disabled people with cognitive impairments to respect for their sexual agency and to be free from sexual abuse. We argue for disability-neutral

*116. For a discussion of other issues within England and Wales laws that are limiting the legal capacity to consent to sex of disabled people, see Series, L. (2014). Sex, Capacity and Forensic Cotton Wool: IM v LM [2014] EWCA Civ 37. *Journal of Social Welfare and Family Law*, 36, 317; Series, L. (2015). Mental Capacity and the Control of Sexuality of People with Intellectual Disabilities in England and Wales. In Tom Shakespeare (Ed.), *Disability Research Today: International perspectives*. Abingdon and New York: Routledge.

legislation in order to ensure that the right to consent to sex is respected on an equal basis for all. However, we argue that disability-neutral legislation needs to be paired with *disability-inclusive* sexual education, training, awareness, and reporting. A *disability-inclusive* approach means that sexual education, training, awareness, and reporting is specifically tailored to the needs of disabled people and the disability community – including addressing the marginalisation and formidable social barriers that disabled people face in relation to sex, romantic relationships, and life in general.

In sum, we argue that to meet the demands of Articles 12 and 16 of the CRPD, we must:

1. Create *disability-neutral* sexual offenses legislation that respects the sexual agency of disabled people with cognitive impairments (in line with Article 12(2) CRPD) and criminalises unwanted sex on an equal basis for everyone;
2. Provide *disability-inclusive* support for disabled people with cognitive impairments for decisions and actions related to sex (in line with Article 12(3 & 4) CRPD); and
3. Provide *disability-inclusive* access to reporting mechanisms for those who are at risk of being abused or have been abused (as required by Article 16 CRPD).

In addition, although it is beyond the scope of this article, it is important to note that there are also critical changes that need to be made to service delivery for disabled people – including the dismantling of congregated residential settings – to minimise environments with heavily imbalanced power structures, which often lead to abuse.*117

Lack of respect for the sexual agency of disabled people with cognitive impairments has a profound impact – as is demonstrated above with the statements from DPOs and others from the disability community. It can create barriers to the development of romantic and sexual relationships. It may also leave disabled people with cognitive impairments more vulnerable to abuse because it fosters perception of disabled people with cognitive impairments as objects without decision-making power. This perception may deter the development of sex education for disabled people with cognitive impairments and discourage disability services from providing support for romantic and sexual relationships.

This article aims to expose the widespread existence of legislation that criminalises sex with disabled people with cognitive impairments. It also aims to highlight the damage that such legislation may be doing – and the human rights arguments for reforming such legislation. There is much research that remains to be done in this area – hopefully, this article has provided a foundation on which further analysis of sexual offenses legislation can be done – to better protect disabled people with cognitive impairments from sexual abuse and to ensure that the sexual agency of disabled people with cognitive impairments is respected on an equal basis with others.

*117. Goffman, E. (2017). *Asylums: Essays on the social situation of mental patients and other inmates*. London and New York: Routledge. <https://www.taylorfrancis.com/books/9781351327763>; Lau, V. M. H. et al (2007). The Nursing Gaze: Power relations in a study of nurse–resident interactions in learning disability. *Journal of Psychiatric and Mental Health Nursing*, 14, 346; Hamlin, A. and Oakes, P. (2008). Reflections on Deinstitutionalisation in the United Kingdom. *Journal of Policy and Practice in Intellectual Disabilities*, 5, 47.