CONSTRUCTING INCAPACITY: CRIMINAL LAW, CONSENT AND THE ARCHITECTURE OF PATERNALISM

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I INTRODUCTION

This essay examines the regulation of consent to sexual activity under the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*') as it applies to people with impaired decision-making capacity. In particular, it considers whether the *CLCA*'s approach to consent prioritises protection at the expense of autonomy, resulting in a form of rights-erasing paternalism. I argue that the *CLCA* constructs capacity in a manner that regards impairment as incompatible with meaningful consent, thereby invalidating sexual agency.[1] Firstly, this essay canvasses the scope of consent, especially as it relates to sexual offences and the distinction between lived understandings of consent and legally recognised consent. Secondly, it assesses the conceptual limits of treating consent as a binary threshold when capacity is fluctuating, contextual and relational. The final section of this essay evaluates how protective rationales ingrained in criminal law can metamorphose into paternalism in practice. The *CLCA*'s regulation of consent to sexual activity, ostensibly protective in nature, ultimately diminishes the legal recognition of autonomy for people with impaired decision-making capacity.

II STATUTORY CONSTRUCTION

A *Scope of Consent under Common Law*

The absence of consent is the 'essential element' of sexual offences in Australian law.[2] In its ordinary meaning, to consent means to 'express willingness, give permission [or] agree.'[3] In *Question of Law (No 1 of 1993)*,[4] King CJ set out the common law principle of consent in South Australia: 'consent must be a free and voluntary consent.…[it] may be withdrawn [or given] as a consequence of persuasion.'[5]

In *R v Mueller,*[6] both Hunt AJA and Hulme J demonstrated they held reservations about this statement of law. Referring to dictionary definitions, Hulme J observed that 'freely' is defined as, inter alia, 'of one's own

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[1] See generally Jamie L. Small, 'Conceptualizing Consent: How Prosecutors Identify Sexual Victimization in Statutory Rape Cases' (2020) 45(1) *Law & Social Inquiry* 111, 114.

[2] Brendon Murphy, 'Constructing consent in the Australian Capital Territory' (2020) 17(1) *Canberra Law Review* 23, 23.

[3] Ibid 25.

[4] (1993) 59 SASR 214.

[5] Ibid 220 (King CJ).

[6] (2005) 62 NSWLR 476.

accord; without restraint or reluctance; unreservedly, without stipulation; readily willingly'; whilst 'voluntary' includes in its definition: 'arising or developing in the mind without external constraint, not constrained, prompted or suggested by another.'[7] The law is clear that 'consent need not accord with many of these [dictionary] meanings', especially since consent 'given reluctantly or only after a deal of persuasion' is still legally recognised consent.[8] However, as held by Hunt AJA, there will 'inevitably be difficulties for a jury in understanding how consent may at the same time be both (a) freely and voluntarily given and (b) given reluctantly or after persuasion.'[9]

B *Scope of Consent under the CLCA*

In South Australia, consent to sexual activity is governed by Part 3, Division 11 of the *CLCA*. Whether a complainant has consented to sexual intercourse is a question of fact for the jury.[10] An absence of consent forms part of the *actus reus* of offences such as rape (s 48(1)) and indecent assault (s 56(1)).[11] Akin to the common law principle, s 46(2) provides that a person consents to sexual activity 'if the person freely and voluntarily agrees to the sexual activity.'[12] That definition is qualified by s 46(3) which specifies circumstances in which a person is taken not to freely and voluntarily agree to sexual activity, including where 'the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing.'[13]

In *M, B v Police*,[14] the Supreme Court of South Australia held that the considerations identified in *R v Mobilio* are relevant when determining whether the complainant was capable of 'freely and voluntarily agreeing' to sexual activity under the *CLCA*.[15] The passage reads:

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[7] Ibid 480 [133]–[134] (Hulme J).

[8] Ibid 480 [135] (Hulme J).

[9] Ibid 477 [2] (Hunt AJA).

[10] *R v Blayney* (2003) 87 SASR 354 [20].

[11] *Criminal Law Consolidation Act 1935* (SA) ss 48(1), 56(1) ('*CLCA*').

[12] Ibid s 46(2).

[13] Ibid s 46(3)(e).

[14] [2019] SASC 58 (Parker J).

[15] Ibid [132] (Parker J).

> ‘In our opinion… the law requires that a woman* must understand the nature and character of sexual intercourse before she can be capable of consenting to it, but the fact she does understand that does not necessarily establish her capacity to consent…[H]er capacity to make a decision may be relevant. A jury might think that a woman whose intellect was insufficient to enable her to make a refusal of consent or to know that she had a right to refuse consent, lacked the capacity to consent despite her understanding of the nature and character of sexual intercourse.[16]

Accordingly, Parker J construed the requirement in s 46(3)(e) as necessitating more than cognitive understanding of sexual activity, but less than an assessment of morality or social acceptability.[17] It was acknowledged that the complainant demonstrated sexual interest, pleasure and awareness of sexual matters but that cognitive understanding of sexual activity, does not, of itself, establish a capacity to give free and voluntary consent.[18] Instead, freedom and voluntariness are defined negatively with the inquiry contingent on the complainant’s ability to refuse or resist participation.[19] Ultimately, Parker J held that the prosecution failed to discharge its burden of proving that the complainant was incapable of freely and voluntarily agreeing to sexual activity *on the facts and evidence* presented in that *specific* case. Indeed, his Honour caveated his judgement with the ‘highly apposite’[20] observation made in *R v P, LB*:

> ‘I add that this acquittal does not necessarily mean that the accused did not take unfair advantage of the complainant.… It is quite likely that the complainant had a very imperfect understanding of [sexual activity]… but so do many “ordinary” persons who are not intellectually disabled.…The criminal law does not prohibit, outright, acts of sexual intercourse with an intellectually disabled adult person. In order to make out a criminal offence, the prosecution must prove beyond reasonable doubt each of the elements of the relevant offence including any subjective elements. In this difficult case the crown has been unable to do this.’[21]

Moreover, s 49(6) criminalises sexual intercourse in circumstances where ‘a person who, knowing that another is by reason of intellectual disability unable to understand the nature or consequences of sexual intercourse, has sexual intercourse with that other person’ and s 49(7) provides that consent to sexual

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[16] Ibid [130] (Parker J); *R v Mobilo* [1991] 1 VR 339. *Sexual assault is not gender-specific; references to women reflect facts of decided cases.

[17] Ibid [130], [134], [138] (Parker J).

[18] Ibid [133]–[134] (Parker J).

[19] Ibid [105], [110] [112] (Parker J); *R v Mobilo* [1991] 1 VR 339, 351 (Crockett, McGarvie and Beach JJ); *R v Eastwood* (1998) 114 A Crim R 448, 456-457 [32] (Phillips CJ).

[20] *M, B v Police* [2019] SASC 58 [143] (Parker J).

[21] *R v P, LB* [2008] SADC 6 [99] (Nicholson J).

intercourse is not a defence.[22] The charge is proved irrespective of whether the complainant consented because the law 'merely concerns itself with the act of sexual intercourse no matter how it came about.'[23] In *R v Richardson*, King CJ considered what constitutes 'nature' and 'consequences' and said this:

> 'An understanding of the nature of an act of sexual intercourse is, I apprehend, an understanding of the physical actions constituting the act together with an appreciation that the act is of a sexual character and not of a character of a different kind such as a medical or hygienic procedure. The understanding of consequences which is contemplated is not an exhaustive understanding of all the possible physical and psychological consequences of sexual intercourse, but the sort of understanding of consequences possessed by ordinary persons who are not mentally deficient.'[24]

Section 51(1) makes it an offence where 'a person provides a service (whether for renumeration or not) to a person with a cognitive impairment…if he or she obtains or procures, by undue influence, sexual intercourse or indecent contact with that person.'[25] It does not make consent a constitutive element of the offence. The relevant Hansard debate acknowledged that 'by removing the issue of consent, limits [on sexual rights] are arbitrarily imposed' but that, in certain circumstances, this was justified; namely, where there is 'an inherent power imbalance between a person with a cognitive impairment and the offender and the breach of trust inherent in any sexual contact in this situation.'[26] In fact, s 51 seemingly regulates the scope of consent not by reference to the complainant's internal capacity alone, but by the relational context in which the sexual conduct arises through the concept of 'undue influence'.[27]

Undue influence is defined to include 'the abuse of a position of trust, power or authority.'[28] Excluding spouses or domestic partners, where a relationship of trust, power or authority exists, the legislation presumes that consent was obtained by undue influence, unless the defendant proves otherwise on the

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[22] *CLCA* (n 11) s 49(6)–(7).

[23] *R v P, LB* [2008] SADC 6 [17]-[18] (Nicholson J).

[24] *R v P, LB* [2008] SADC 6 [67] (Nicholson J); *R v Richardson* (Supreme Court of South Australia, King CJ, 20 June 1990).

[25] *CLCA* (n 11) s 51(1).

[26] South Australia, Parliamentary Debates, House of Assembly, 29 October 2014, 2486–2487.

[27] See also Anna Arstein-Kerslake and Eilionóir Flynn, 'The right to legal agency: domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13(1) *International Journal of Law in Context* 22.

[28] *CLCA* (n 11) s 51(5).

balance of probabilities.[29] The presence of undue influence will be a question of fact and judgement, depending on the 'nature and degree of the cognitive impairment and the nature and degree of the influence or persuasion applied by the service provider.'[30] While this approach reflects Parliament's concern that some relationships are 'particularly situated to exploit' vulnerability, it embeds a precautionary logic in which consent given within relationships of structured dependence is treated as presumptively suspect, revealing a form of relational paternalism that operates through evidentiary presumptions rather than forthright exclusion.[31]

Ultimately, these provisions circumscribe how consent is regulated as a matter of law and, in doing so, delineate who is constituted as a legal subject capable of authorising sexual activity.

III THRESHOLD OF CAPACITY

A *Interface Between Psychology and Law*

As a preface to the following discussion, it is worth considering the interface between the disciplines of psychology and law vis-à-vis assessing capacity. Psychological inquiry operates in a 'multifactorial space, using continuous variables', taking account of 'the whole range of human experience' by situating an individual's capacity to consent to sexual acts across factors including 'sexual knowledge, interest and desire; decision-making ability; assertiveness, socialisation for compliance; life experience and intelligence.'[32]

Conversely, the binary nature of criminal law necessitates reaching determinate conclusions within a framework of 'dichotomous variables', in which a person is either 'guilty or not guilty, has capacity or does not have capability', with 'no half measures or shades of grey.'[33] This distinction elucidates why legal standards of consent are framed as thresholds rather than continua. Imposing 'a high standard of knowledge'

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[29] *CLCA* (n 11) s 51(3)–(4); South Australia, Parliamentary Debates, House of Assembly, 29 October 2014, 2487.

[30] South Australia, Parliamentary Debates, House of Assembly, 29 October 2014, 2487.

[31] Ibid.

[32] Clare Graydon, 'Protection or paternalism? A critical evaluation of Australian legislation relating to sexual acts involving persons with intellectual disability' (PhD Thesis, Murdoch University, 2007) 7 ('Protection or paternalism?').

[33] Ibid.

as a prerequisite for recognising capacity extends protection but restricts 'freedom of sexual expression.'[34] The *CLCA*'s response to this dilemma is not to accommodate gradations of capacity but rather to resolve uncertainty through a fixed threshold capable of application in an epistemic and adversarial process, thereby exacerbating the risk of 'paternalistic interference' of law on autonomy.[35]

B *Conceptualising Capacity*

The *CLCA*'s construction of consent to sexual activity reflects a facile approach to decision-making capacity. Under ss 46, 49 and 51, capacity operates as a precondition to the legal recognition of consent. Once a person is found to be incapable of understanding the 'nature or consequences'[36] of the sexual activity or of 'freely and voluntarily'[37] agreeing to it, their consent is vitiated. This approach is not unique to 'mental or intellectual condition or impairment'.[38] Transitory incapacity arising from unconsciousness,[39] intoxication[40] or youth[41] similarly negates consent. Cognitive impairment may be a short-term condition, but for clients of the Public Advocate, it is often permanent or progressive (e.g., intellectual disability and dementia respectively).[42] Categorising these exceptions to legally recognised consent together trivialises the permanent lack for capacity of people with cognitive disability.

In contexts outside of criminal law, capacity is understood to be fluctuating, contextual and relational. Namely, under the *Advance Care Directives Act 2013* (SA) ('*ACD Act*'), a person is presumed to have full decision-making capacity in respect of decisions about, inter alia, their personal affairs, and must be allowed and supported to make such self-determined decisions for as long as they are able.[43] It is a decision-specific inquiry and the *ACD Act* stipulates that a person will not be taken to have impaired decision-making capacity

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[34] Ibid 6.

[35] Ibid 6–7.

[36] *CLCA* (n 11) s 49(6).

[37] Ibid s 46(e).

[38] Ibid.

[39] Ibid s 46(c).

[40] Ibid s 46(d).

[41] Ibid s 57(1).

[42] Aayush Dhakal and Bradford D. Bobrin, 'Cognitive Deficits' *StatPearls* (Webpage, February 2023) <https://www.ncbi.nlm.nih.gov/books/NBK559052/>; Office of the Public Advocate, *Annual Report* (Report, 2024–25) 20.

[43] *Advance Care Directives Act 2013* (SA) s 10(c)–(e).

for a particular decision even if they are: incapable of understanding information of a 'technical or trivial nature', only able to 'retain the information for a limited time', has capacity which 'may fluctuate' and where 'a decision made by the person results, or may result, in an adverse outcome for the person.'[44]

The *CLCA* does not provide for a supported decision-making framework for assessing capacity to consent to sexual activity. The involvement of support persons risks being mischaracterised as undue influence under s 51 or treated as inconsistent with the definitional ambit of 'free and voluntary' agreement in s 46, thereby foreclosing recognition of supported sexual decision-making. Part IV moves to consider the implications of this threshold-based framework, namely, the risk that its protective rationale undermines autonomy.

IV FROM PROTECTION TO PATERNALISM

A *R v P, LB* vs *R v Beattie*

Under the *CLCA*, protection operates as both a justification and a constraint in the regulation of consent to sexual activity. The judicial reasoning in the following cases illustrates how the application of the criminal law fosters paternalistic outcomes. Specifically, it interrogates the evidence (or lack thereof) regarding the complainant's knowledge of the consequences of sexual intercourse as presented by the prosecution in each case. *R v P, LB* and *R v Beattie* both concerned the charge of unlawful sexual intercourse with a woman who had an intellectual disability under s 49(6) of the *CLCA*.

In *R v P, LB*, Nicholson J found, on the evidence adduced, there was a 'reasonable possibility' that the complainant, having discussed sexual matters with her parents, had a 'rudimentary understanding of the connection between an act of penile vaginal sexual intercourse and female pregnancy leading to the female having a baby.'[45] Other consequences (e.g., sexually transmitted disease) which can arise from sexual intercourse was not addressed in evidence. In fact, there was 'minimal, if any, evidence' on whether the complainant did or did not have understanding of any other consequences.[46] However, since prosecution bore

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[44] Ibid s 7(2)(a)–(d).

[45] *R v P, LB* [2008] SADC 6 [81], [85] (Nicholson J).

[46] Ibid [86] (Nicholson J).

the burden of proof, his Honour 'did not need to decide which, if any, other consequences would ordinarily need to be considered.'[47] Ergo, the defendant was found not guilty.

In *R v Beattie*, the Supreme Court of South Australia upheld a conviction for unlawful sexual intercourse under s 49(6) of the *CLCA* notwithstanding the fact that the complainant did not resist, 'made no complaint about the intercourse to her friends', 'spoke to the accused again' and engaged in further sexual activity with another man.[48] Crucially, White J stated that 'it was clear that [the complainant] did not understand the consequences of the sexual act, in particular the primary consequence of possible pregnancy' and, in accordance with the statutory provision, treated this lack of understanding as decisive of incapacity, even though there was evidence of her awareness of sexual matters.[49]

It begets larger questions: would the accused in *R v P, LB* have been convicted if prosecution had raised evidence that the complainant did not have understanding of any other consequences or was the complainant's knowledge of pregnancy enough to acquit him? These cases did not hinge on the accused's knowledge that the complainant lacked requisite understanding, though this raises questions about how a person is to surmise that, especially in circumstances where the complainant does not always present with indices of intellectual disability. Instead, it hinged on the *actus reus*: that the complainant was *unable* to understand the nature or consequences of sexual intercourse *by reason of* intellectual disability. Yet, the wording of 'unable' sits uneasily here. Does their inability stem from a lack of sex education or the fact that, by virtue of their intellectual disability, a person is unable to comprehend sex education in a manner that would allow them to understand the nature and consequences of sexual intercourse? Certainly, people falling in the latter category undoubtedly fit the rationale of this provision but ultimately, the Supreme Court's reasoning demonstrates that, under s 49(6), participation or expressed willingness are legally inconsequential where the complainant has an intellectual disability *and* is found to lack the requisite understanding of consequences (e.g., due to no sex education).[50] This interpretation reflects a protective but paternalistic construction of sexual autonomy.

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[47] Ibid.

[48] *R v Beattie* (1981) 26 SASR 481; Graydon, 'Protection or paternalism?' (n 32) 114.

[49] *R v Beattie* (1981) 26 SASR 481; Graydon, 'Protection or paternalism?' (n 32) 115.

[50] See *R v Beattie* (1981) 26 SASR 481; Graydon, 'Protection or paternalism?' (n 32) 114.

B The *R v Morgan* Standard

South Australia's approach is distinct from the approach taken in other Australian jurisdictions where, following the precedent set in *R v Morgan*,[51] capacity turns only on understanding the nature and character of sexual intercourse.[52] In *R v Morgan*, it was held that for incapacity to consent to be proved it must be established that '[a person] has not sufficient knowledge or understanding to comprehend (a) that what is proposed to be done is the physical fact of penetration of her body by the male organ or, if that is not proved, (b) that the act of penetration proposed is one of sexual connexion as distinct from one of totally different character.'[53] This direction was elaborated upon in *R v Mueller* where the jury was directed that 'if the complainant has knowledge or understanding of what the act comprises, and of its character…then she has all that the law requires for capacity to consent. That knowledge or understanding need not be a sophisticated one. It is enough that she has sufficient rudimentary knowledge of what the act comprises, and of its character, to enable her to decide whether to give or withhold consent.'[54]

The South Australian provision goes beyond this definition, reflecting the standard of consent required in the medical field in that it necessitates 'an understanding of not only the nature of sexual penetration, but also the consequences of, or indeed the risks and benefits associated with the act.'[55] It prioritises informed consent and safeguards individuals from sexual exploitation; however, it has been criticised as 'taking protection too far' as it would find 'more people incapable of consenting to sexual intercourse than the definition set out in *Morgan*' (i.e., under the common law everywhere else in Australia).[56] The South Australian test has been rejected by the Model Criminal Code Officers' Committee[57] and Victorian Law Reform Commission on the ground that it would unduly restrict sexual autonomy.[58] A report prepared by a

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[51] *R v Morgan* [1970] VR 337.

[52] Graydon, 'Protection or paternalism?' (n 32) 28.

[53] *R v Morgan* [1970] VR 341.

[54] *R v Mueller* (2005) 62 NSWLR 476 [20].

[55] Bernadette McSherry, 'Sexual assault against individuals with mental impairment: Are criminal laws adequate?' (1998) 5(1) *Psychiatry, Psychology and Law* 107, 109.

[56] Ibid 110.

[57] Model Criminal Code Officers' Committee, *Chapter 5: Sexual Offences Against the Person* (Discussion Paper, November 1996) 32.

[58] Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning* (Report No 15, June 1988) [33]–[40].

number of disability interest groups for the New South Wales Law Reform Commission 'recommended that the level of understanding required for sexual intercourse be reduced (and therefore the test for capacity widened) so that "a person is capable of consenting to sexual intercourse provided that he or she understands the physical act of sexual intercourse, without necessarily understanding the nature and consequences of sexual intercourse".'[59]

Protection of vulnerable individuals should always be balanced against curtailing their autonomy, yet South Australia's higher and more exclusionary threshold renders consent legally irrelevant under s 49(7) of *CLCA* and enables courts to effectively substitute an objective assessment of cognitive understanding for the complainant's subjective experience of choice. The effect is to deny legal recognition to sexual agency where understanding is imperfect despite the fact that such imperfect understanding is prevalent among individuals without impaired decision-making capacity. This approach collapses vulnerability into incapacity and privileges risk avoidance over recognition of autonomy, exemplifying a form of benevolent paternalism embedded in the judicial application of s 49(6)–(7).

C Balancing Protection Against Sexual Autonomy

The *Morgan* standard preserves sexual autonomy, wherein people with the 'requisite knowledge of the nature and character of [sexual intercourse] would be free to exercise their right to sexual expression.'[60] This is important given that 'only about half the population with intellectual disability reports having ever received any sex education.'[61] Necessitating both nature and consequences of sexual activity under the standard of knowledge (as under s 49(6)) would 'mean that about half the population with mild to moderate levels of intellectual disability would be found incapable of consent.'[62] Given that people with intellectual disability have 'historically had expression of their sexuality discouraged', been 'subjected to involuntary sterilisation

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[59] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report No 80, December 1996) [8.5].

[60] Clare Graydon, 'Can consent by uniformed? Suggested reform of sexual offences against persons with intellectual disability' (Conference Paper, Social Change in the 21st Century Conference, 27 October 2006) 5 (Can consent by uniformed?).

[61] Ibid; Marita P. McCabe, 'Sexual Knowledge, Experience and Feelings Among People with Disability' (1999) 17(2) *Sexuality and Disability* 157, 157–159; Marita P. McCabe and Robert A. Cummins, 'The Sexual Knowledge, Experience, Feelings and Needs of People with Mild Intellectual Disability' (1996) 31(1) *Education and Training in Mental Retardation and Development Disabilities* 13.

[62] Graydon, 'Can consent by uninformed?' (n 60) 5–6; Glynis H. Murphy and Ali O'Callaghan, 'Capacity of adults with intellectual disabilities to consent to sexual relationships' (2004) 34(7) *Psychological Medicine* 1347–1357.

for eugenic purposes' and have had 'many of their rights denied', legislating consent in this manner results in sexual autonomy being 'out of reach for such a large proportion of this population.'[63]

Notwithstanding, the right to sexual expression, there is a competing right to protection. The most significant objection to the South Australian standard of consent is that around 'half the population with intellectual impairment [would be] unable to achieve the required standard'; however, only half this population reported having sex education.[64] There may be a causal link between 'having received sex education and achieving capacity to consent', especially since people who attended formal classes 'knew significantly more about all aspects of sex.'[65] This should be qualified with the understanding that sex education may have only been given to 'higher functioning participations', so their 'higher level of knowledge could be attributed as much to their IQ as to the [sex] education.'[66] However, in general, people with intellectual disability 'wish to have the opportunity to gain knowledge about many aspects of sexuality' and so, it should be necessary for sex education programs to be tailored to suit their cognitive ability.[67] People with varying degrees of mental impairment are capable of learning and achieving in other areas of life, 'so why not the area of sexuality'? Akin to the *ACD Act,* a person should be able to exercise supported decision-making and allowed to 'repeat sex education a number of times' for 'factual information to be understood, internalised and normalised.'[68]

V CONCLUSION

The *CLCA*'s regulation of consent to sexual activity involving people with impaired decision-making capacity is irreconcilable with contemporary understandings of autonomy.[69] By constructing capacity as a threshold that negates the legality of expressed sexual choices, the *CLCA* treats cognitive impairment as incompatible with meaningful consent rather than as a circumstance capable of accommodation through supported decision-making. Although impelled by a legitimate concern to protect vulnerability, the scheme

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[63] Graydon, 'Can consent by uninformed?' (n 60) 5–6.

[64] Ibid.

[65] Ibid; Murphy and O'Callaghan (n 62). See generally Vanessa E. Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41(4) *Akron Law Review* 923, 950.

[66] Graydon, 'Can consent by uninformed?' (n 60) 5–6.

[67] Marita P. McCabe, 'Sexual Knowledge, Experience and Feelings Among People with Disability' (1999) 17(2) *Sexuality and Disability* 157, 157, 168

[68] Graydon, 'Can consent by uninformed?' (n 60) 5–6.

[69] Theresia Degender, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35, 42.

ends up collapsing vulnerability into incapacity, thereby resulting in a form of rights-erasing paternalism through precautionary, but draconian, exclusions.

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