

Legal issues in aged care

19 November 2014

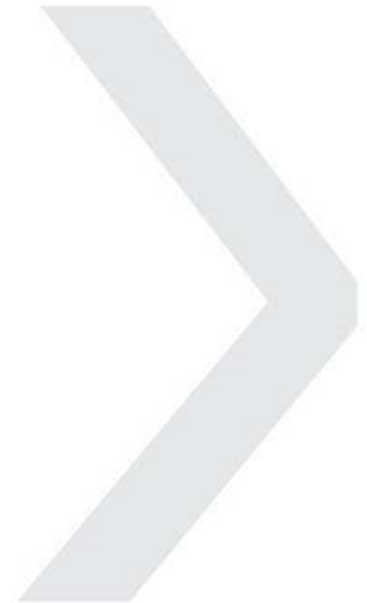
Victor Harcourt, Principal



Case Study



- > 87 year old woman with dementia in bed with underwear down
- > Younger male in room pulling up pants
- > Woman called him her boyfriend and said she enjoyed his visits – he said she was beautiful and kissed her
- > She denied sexual contact
- > A test revealed evidence of intercourse



Case Study



- > 81 year old male with dementia who could no longer be cared for at home by his wife
- > Husband was verbally aggressive and physically intimidating to his wife
- > In her absence he was not challenging until he went looking for his wife
- > When the wife visited the husband would aggressively take her to his room and close the door
- > Sex was used as a means to calm the husband

Case Study



- > 76 year old woman with dementia
- > Married 50 years
- > Husband lives at home and visits regularly
- > The husband and wife have consensual sex in her room at the RACS

Sex, Dementia and the Law

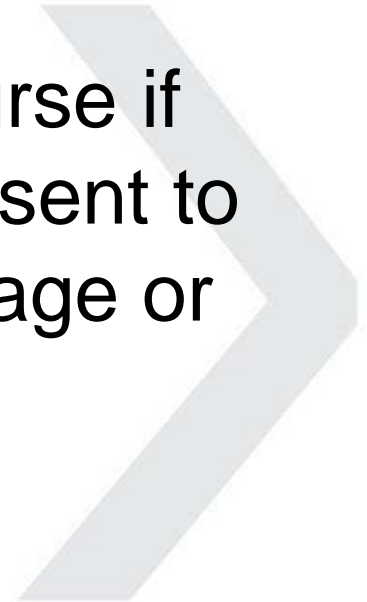


- > R v Savins 1996 (Qld) – Accused sought to have sex with a resident with dementia who could not give consent – 3 years
- > R v Adcock 2010 (UK) – Husband of resident in aged care facility had consensual sexual acts with another resident with dementia – 3 years
- > What has been our experience?

Sex, Dementia and the Law



- > Crimes Act 1900 - Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment
- > A person does not consent to sexual intercourse if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity



Sex, Dementia and the Law

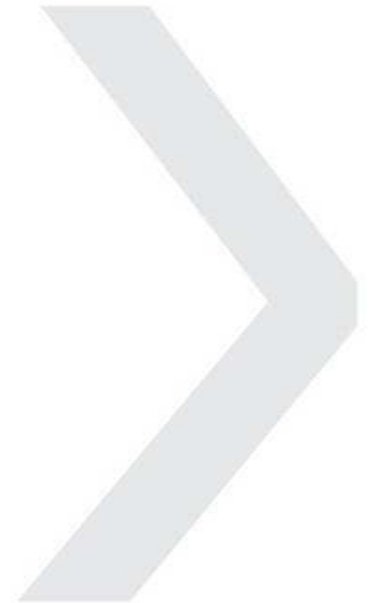


> A person has a cognitive impairment if the person has: ...

(c) a neurological disorder, or

(d) dementia, or ...

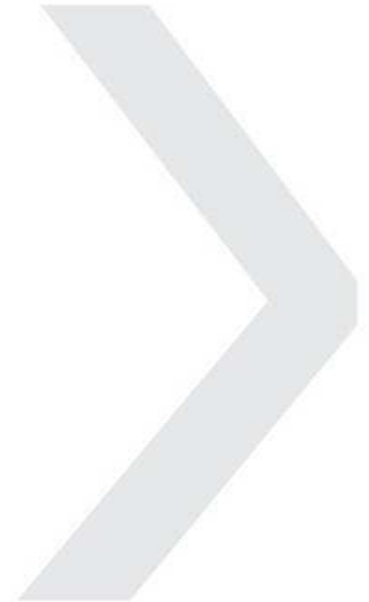
that results in the person requiring supervision or social habilitation in connection with daily life activities.



Sex, Dementia and the Law



- > Sexual offences against a person with a cognitive impairment:
 - > Person Responsible for care
 - > Person taking advantage of the victim's cognitive impairment
 - > Consent is not a defence



Sex, Dementia and the Law



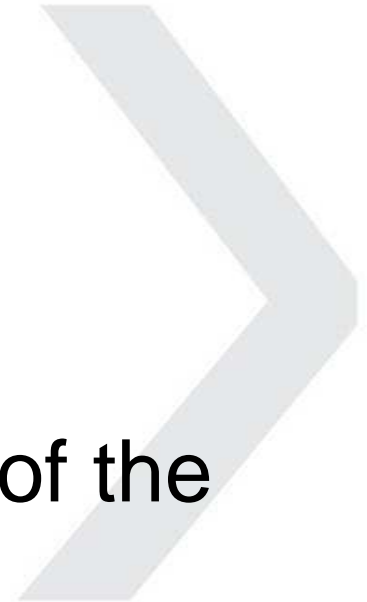
- > Sexual offences against a person with a cognitive impairment defences:
 - > Accused did not know the victim had a cognitive impairment
 - > The accused and victim were married or in a de facto relationship



Sex, Dementia and the Law



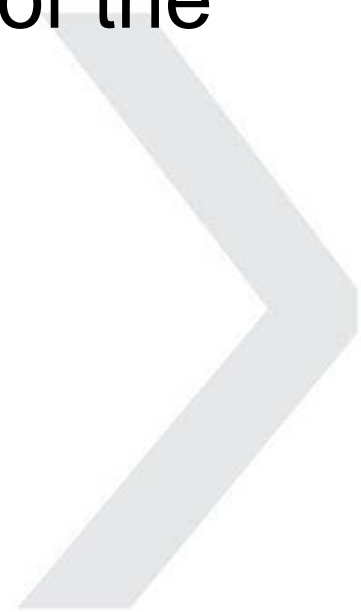
- > Apart from the cognitive impairment offences, the existence of a cognitive impairment is not enough to prove that a person does not have the capacity to consent to sex
- > What is required is that the person:
 - > Knows what the sexual act is; and
 - > Understand the nature and significance of the sexual act



Sex, Dementia and the Law



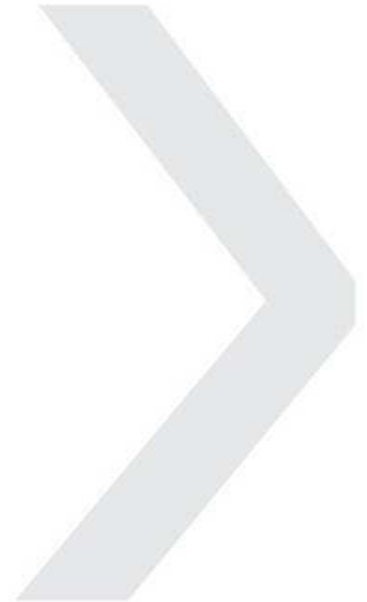
- > Knows what the sexual act is –
 - > more than that touching taking place.
 - > understands its sexual nature.
- > Understand the nature and significance of the sexual act –
 - > broad approach –
 - > general understanding



Capacity Assessment



- > Lichtenberg & Strzepek Assessment Tool:
 - > Resident's awareness of the relationship
 - > Resident's ability to avoid exploitation
 - > Resident's awareness of potential risks



Capacity Assessment



- > Resident's awareness of the relationship
 - > Is the resident aware of who is initiating sexual contact?
 - > Does the resident believe that the other person is a spouse and thus acquiesce out of a delusional belief, or are they cognizant of the other's identity and intent?
 - > Can the resident state what level of sexual intimacy they would be comfortable with?

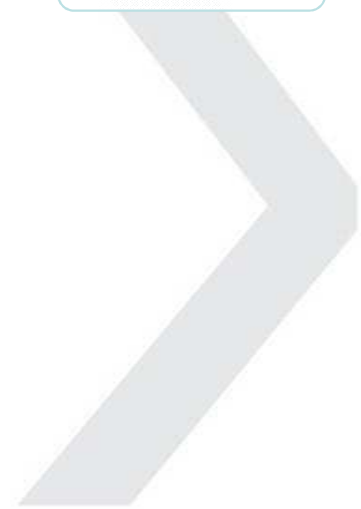
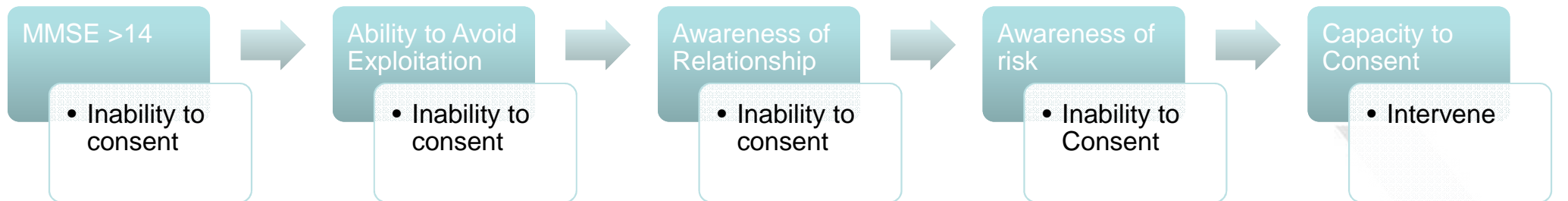
Capacity Assessment



- > Resident's ability to avoid exploitation
 - > Is the behaviour consistent with formerly held beliefs/values?
 - > Does the resident have the capacity to say no to any uninvited sexual contact?
- > Resident's awareness of potential risks
 - > Does resident realise that this relationship may be time limited?
 - > Can the resident describe how they will react when the relationship ends?



Lichtenberg Decision Tree



Capacity



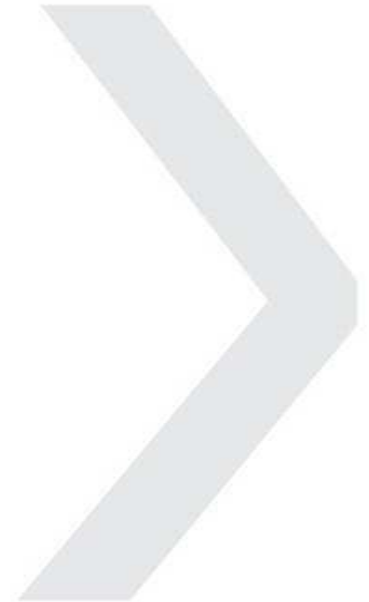
- > Bauer, Fetherstonhaugh, Tarzia (2012) criticise the Assessment Tool:
 - > Overly reliant on verbal communication
 - > Reference to formerly held beliefs ignores that people may change
 - > Unrealistic to ask about the level of sexual intimacy that would be comfortable with
 - > Threshold for capacity too high



The Pursuit of Happiness



- > Assume the right of residents with dementia to engage in sexual relationships
- > Support this right with strategies and guidelines
- > Manage the risk of harmful, unlawful or abusive relationships



The Pursuit of Happiness



- > Monitor the happiness of the resident and step in if there is any sign of distress or objection
- > Step in if there is a case of mistaken identity at the heart of the sexual relationship
- > Educate staff about the sexual needs of residents and appropriate responses



Reportable Assaults



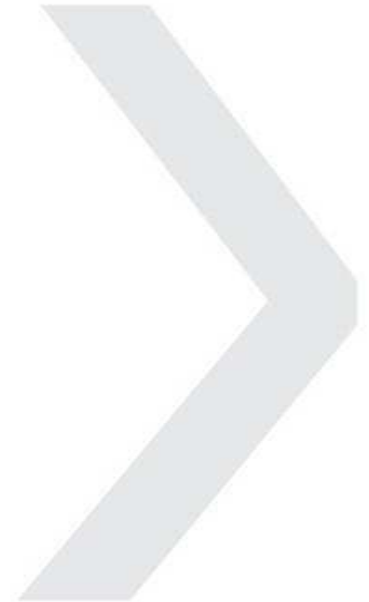
- > In 2012–13, 2,256 notifications
- > 1,878 recorded as alleged or suspected unreasonable use of force,
- > 349 as alleged or suspected unlawful sexual contact and
- > 29 as both.
- > Incidence of reports of suspected or alleged assaults was 1.0 per cent.



Research



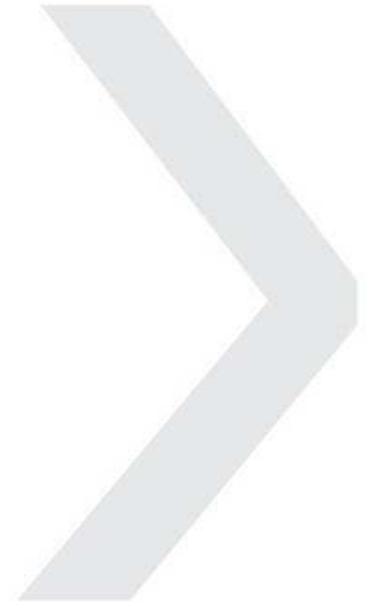
- > The majority of alleged perpetrators are other male residents
- > The incidence of successful prosecutions low
- > The victims were usually women with cognitive impairments



Research



- > Older age groups most vulnerable [80-90 years]
- > Those with communication and cognitive impairment more likely targets
- > Victims' cognitive impairments lead to disbelief of reports
- > We rely on witnesses or medical evidence
- > Action is often not taken



Research



- > No set of identifiable characteristics to identify perpetrators
- > Sex offenders are a heterogeneous group with no profile of personality, mental health age, socioeconomic or educational characteristics that enables them to be identified
- > Sexual offenders are attracted by vulnerability and availability, rather than by physical attributes of potential victims



Research - Perpetrators



- > Those who seek employment to gain access to victim groups
- > Those with an offending history have remained active perpetrators
- > Those with an offending history who have demonstrated periods of internal control who revert to old behavioural repertoires

Research - Perpetrators



- > Those with no offending history who demonstrate
 - > late onset disinhibited or
 - > predatory behaviour
- > Those with no offending history who fail to recognise the inability of a partner to provide informed consent



Cognitive Decline and Sex



- > Norm – Increased sexual apathy is reported in 23% of cases
- > Sexually inappropriate behaviours in persons with cognitive decline is reported to be very low, ranging from between 2.6% to 8%

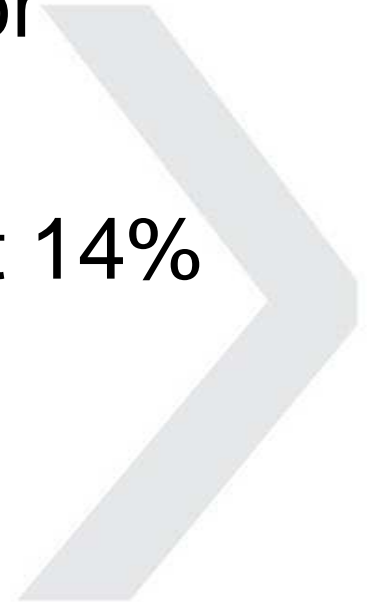


Cognitive Decline and Sex



> Sexual Offenders

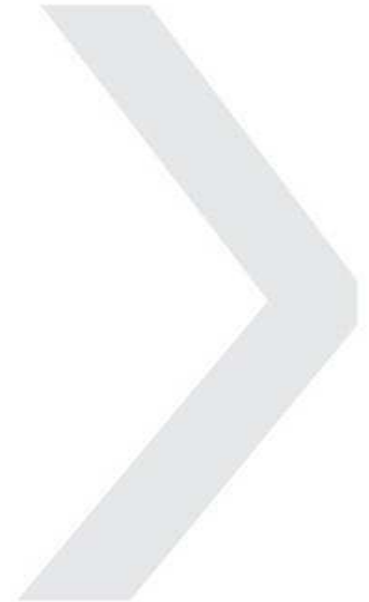
- > Observed increased sexual impulsivity or return to entrenched behaviours
- > An increase in libido is reported in about 14% of those elderly with dementia



User Rights Principles



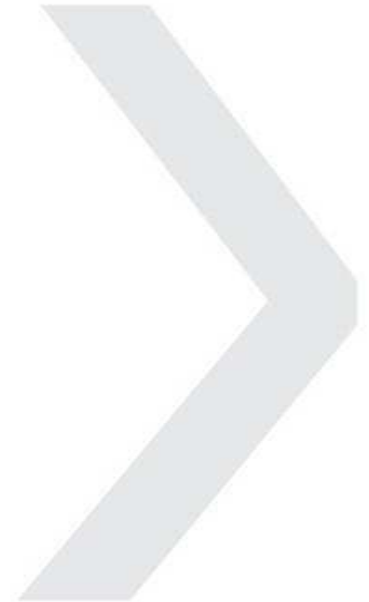
- > An approved provider may ask a resident to leave on specified grounds
- > The resident has intentionally caused serious injury to another resident



Charter of Rights & Responsibilities



- > Residents Rights:
- > to be treated with dignity and respect, and to live without exploitation, abuse or neglect
- > to live in a safe, secure and homelike environment...



Charter of Rights & Responsibilities



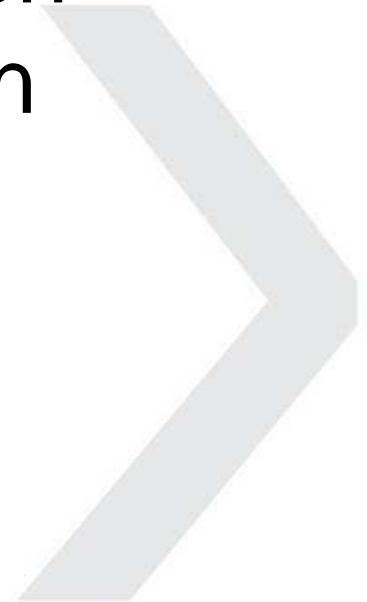
- > Residents' Responsibilities:
- > to respect the rights and needs of other people within the residential care service...
- > to respect the rights of staff and the proprietor to work in an environment free from harassment



Intentionally Causing Serious Injury



- > Indecent assault can result in significant punishment (*Fowles v R* [2011] VSCA 206)
- > Indecent non-consensual contact also gives the victim a right to sue for compensation without the need to prove any more than that the conduct occurred (*R v George* [1956] Crim LR 52).
- > The indignity and humiliation the victim suffers is a damage or injury in itself.



User Rights Principles



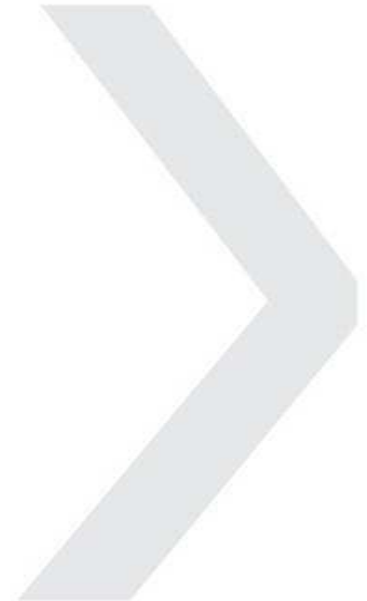
- > The injury in 23.5(3)(c)(iii) is the wrong or injustice suffered or the infringement of the rights of the victim
- > The indecent contact is serious given the nature of the wrong act and infringement of the victim's rights and as recognised by the sentences handed out to perpetrators in similar circumstances.



Risk Management



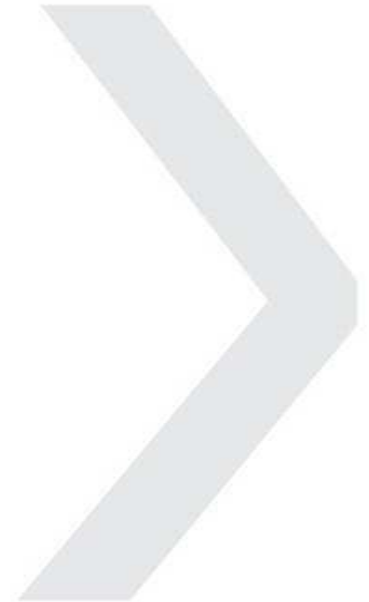
- > Written notice of breach
- > Written warning about the unlawfulness of the conduct and potential consequences
- > Behaviour contract
- > Risk management plan dealing with the risk posed:
 - > Identify the nature and risk posed;
 - > Identify how the risk is to be managed;
 - > State how the actions are to be assessed for effectiveness;
 - > State when the plan is to be reviewed



Resident Agreement



- > Amend the Resident Agreements to expand the grounds for termination
- > For example, indecent contact; numerous breaches of the Agreement and Rules following warnings



Expression of Sexuality Policy



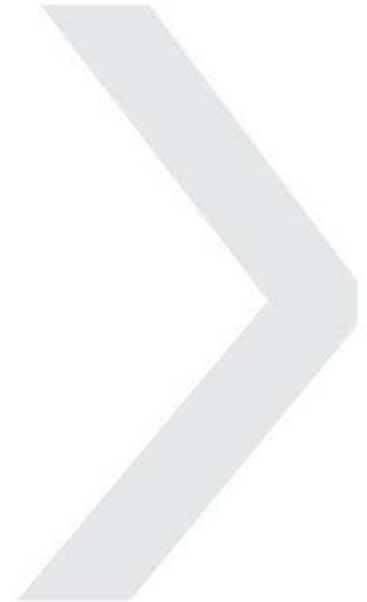
- > Have clear definition of
 - > sexuality, intimacy and sexual behaviour
 - > sexual behaviours to be interpreted as normal
 - > sexual behaviours requiring assessment
 - > sexual behaviours of concern/risk
- > ACEBAC, Sexuality Assessment Tool



Client / Resident Entry Screens



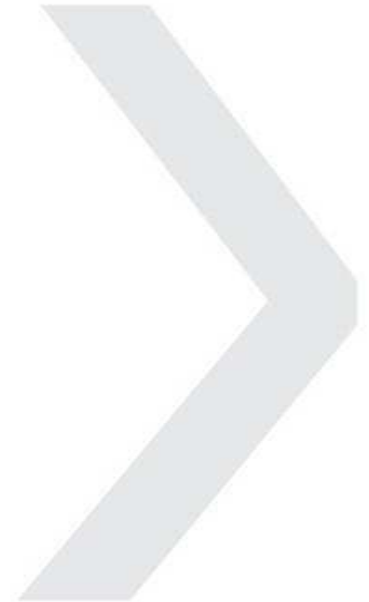
- > Client/ Resident Entry Screens including :
- > criminal record
- > cognitive function / behaviour :
 - > Intimacy/ courtship behaviours
 - > Verbal sexual talk/ language
 - > Self-directed sexual behaviours



Expression of Sexuality Policy



- > Policy about sexuality, relationships and protection
- > Capacity assessment model
- > Education and training
- > Environmental support
- > Communication strategies



Legal issues in aged care

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Disclaimer



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