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STRIKING THE BALANCE: APPLYING A HUMAN RIGHTS APPROACH TO CONSENT FOR PEOPLE WITH DEMENTIA IN RESIDENTIAL AGED CARE

LISE BARRY* & RACHEL PARSONS†

Older people are often stigmatised as sexless individuals. This perception, and the increasing need for care as people age, means that many older people are subjected to prejudices when entering residential aged care facilities, and denied opportunities for sexual expression. This paper considers the often-forgotten human dignity of people with dementia in aged care facilities and the need to provide opportunities for sexual expression. The paper considers the broad capacity spectrum for older people with cognitive impairments and the difficulties of assessing decision-making abilities. Drawing on international human rights instruments, the paper identifies rights to intimacy and sexual expression, and argues that those rights should be recognised in reforms to aged care legislation and policy. The paper examines some of the existing barriers to intimacy and sexual expression in aged care, including staff attitudes, and, taking NSW as an example, the existing criminal legislation which provides a narrow view of consent. Recommendations are made with respect to emphasising the intrinsic benefits of intimacy and sexual expression for all people, regardless of age or cognitive impairment.

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I INTRODUCTION

The final report of the *Royal Commission into Aged Care Quality and Safety* ('ACRC') and the Australian Law Reform Commission's Elder Abuse Report ('ALRC Report'), emphasise the need to treat elderly people with care and respect and ensure that aged care facilities prioritise the rights of their residents.³ The Royal Commission recommendations reflect

³ See generally *Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) vol 1 ('ACRC'); Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report 131, May 2017) ('ALRC Report').

the international push for nations to take a human-rights approach towards aged care.⁴ However, what this should look like is unclear, particularly when it comes to approaches to intimacy and sexual expression.

Whilst international human rights instruments emphasise the need for recognition of the highest levels of health and wellbeing,⁵ and a universal right to dignity and autonomy,⁶ there are no explicit rights to sexual intimacy and sexual expression. A range of broader human rights are at stake here. International human rights instruments emphasise not only rights to the highest levels of health and well-being, dignity and autonomy, but also privacy,⁷ respect for will and preferences,⁸ family and relationships;⁹ as well as support for decision-making and safeguarding against abuse and inhumane, degrading treatment.¹⁰ Recognition and facilitation of a right to sexual expression should be incorporated into best practice in the aged care sector, however, there is no clear guidance for aged care providers on these issues.

There are several practical and ethical considerations in recognising rights to sexual intimacy. Aged care facilities are designed with facilitation of medical care in mind, rather than facilitation of intimacy and sexual expression:¹¹ in part because aged care represents the intersection of a home and care environment for residents, and a workplace for workers.¹² Enduring desire for sexual expression can be undermined by staff attitudes, pathologising of sexual expression in cognitively impaired individuals, and the layouts

⁴ See, eg, Becky Farren et al, *Ensuring a Human Rights Based Approach for People with Dementia*, WHO Doc WHO/MSD/MER/15.4. See also Law Council of Australia, 'International Convention On the Rights Of Older Persons' (Blog Post, 9 October 2020) < <https://www.lawcouncil.asn.au/media/news/international-convention-on-the-rights-of-older-persons>>.

⁵ *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12 (1) ('ICESCR').

⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

⁷ Art 17, *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

⁸ *CRPD* (n 4).

⁹ *ICESCR* (n 3); *Convention on the Elimination of All Forms of Discrimination Against Women* opened for signature 18 December 1979 (entered into force 3 September 1981) ('CEDAW').

¹⁰ *CRPD* (n 4).

¹¹ See, eg, Laura Tarzia, Deidre Fetherstonhaugh and Michael Bauer, 'Dementia, Sexuality and Consent in Residential Aged Care Facilities' (2012) 38(10) *Journal of Medical Ethics* 609. See also Margaret Rowntree and Carole Zuffrey, 'Need Or Right: Sexual Expression and Intimacy in Aged Care' (2015) 35 *Journal of Aging Studies* 20.

¹² See generally Esther Wiskerke and Jill Manthorpe, 'Intimacy Between Care Home Residents With Dementia: Findings from a Review of the Literature' (2019) 18(1) *Dementia* 94.

and lack of privacy of many aged care facilities with residents sometimes only able to have single beds or live in shared rooms.¹³ Further, dynamics of control and misunderstandings about guardianship and powers of attorney in aged care facilities, can mean that sexual interactions are not private and information about residents' sexuality is routinely shared with family members without considering this to be a violation of residents' rights to privacy.¹⁴ In addition to confusion about how to apply a human rights approach, the law of consent may be a complicating factor.

On 1 June 2022, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) came into force, reforming the law of consent in NSW, Australia's most populous state.¹⁵ The amendments introduced to the *Crimes Act 1900* (NSW) ('*Crimes Act NSW*') included new definitions of consent in *Subdivision 1A Consent and Knowledge of Consent*. Under the new s 61HI (1) 'A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.'¹⁶

However, relevantly for older people with a cognitive impairment, s 61HJ (1) outlines the circumstances in which there is no consent:

- (1) A person does not consent to a sexual activity if—
 - (a) the person does not say or do anything to communicate consent, or
 - (b) the person does not have the capacity to consent to the sexual activity, ...¹⁷

Given the amendments to the *Crimes Act*, it is necessary to consider when and in what circumstances an older person with dementia can consent to sexual activity. According to the common law, capacity is decision specific and entails the ability to know, understand, weigh the various options, and communicate a decision. However, there is a lack of NSW case law applying capacity considerations to the question of consent, especially when it comes to aged care. This paper analyses the impact of NSW affirmative consent laws on

¹³ See generally Vanessa Schouten et al, 'Intimacy for Older Adults in Long-Term Care: A Need, a Right, a Privilege – or a Kind of Care?' (2021) *Journal of Medical Ethics*. See, eg, Linda Steele et al, 'Ending Confinement and Segregation: Barriers to Realising Human Rights In the Everyday Lives of People Living with Dementia in Residential Aged Care' (2020) 26 *Australian Journal of Human Rights* 308.

¹⁴ Michael Bauer et al, 'I Always Look Under the Bed For a Man. Needs and Barriers to the Expression Of Sexuality In Residential Aged Care: The Views Of Residents With and Without Dementia' (2013) 4 (3) *Psychology and Sexuality* 296; Rowntree and Zuffrey (n 9).

¹⁵ The long title of the Act is: An Act to amend the Crimes Act 1900 in relation to consent to certain sexual activities that, in the absence of consent, are sexual offences; to amend the Criminal Procedure Act 1986 in relation to directions to juries; and for other purposes. [Assented to 8 December 2021].

¹⁶ *Crimes Act 1900* (NSW) s 61HI(1) ('*Crimes Act*').

¹⁷ *Ibid* s 61HJ(1).

rights to intimacy for people with dementia in residential aged care. Arguments about criminal law in this paper are limited to NSW, because criminal law in Australia is state based, though aged care legislation is national.

Though not binding in Australia, to the extent that case law in the UK may inform courts in NSW, it is useful to note that case law in that jurisdiction regarding older people with dementia is largely focussed on protecting people from domestic abuse in their private homes.¹⁸ In the UK Court of Protection, the test for capacity for sexual activity includes an evaluation of whether the person understands the sexual nature and character of the activity, the health risks, and that both parties need to consent.¹⁹

What is unclear is how aged care workers might assess capacity for sexual intercourse or for a wide range of acts of intimacy in practice, and how and whether they would distinguish between sexual activity and non-sexual intimate touching.²⁰ A number of potential capacity evaluations for use in aged care settings have been proposed, but these are not widely used,²¹ and formal testing may not always encompass the challenges of relationships in aged care settings. As Currie has argued in the UK context, although consent laws may appear to add some required nuance to the assessment of capacity, it may not help:

*in situations of long marriage or partnership where one partner loses capacity for many things due to dementia. The situation where maybe both parties still want to engage in sex but to do so may be deemed unlawful. I think this decision will make those assessments harder by adding another layer of consideration unless this element can be nuanced out, as contraception or sexually transmitted infections can.*²²

¹⁸ Lindsey, Jaime and Rosie Harding, 'Capabilities, Capacity, and Consent: Sexual Intimacy in the Court of Protection' (2021) 48 *Journal of Law and Society* 60, 60-83.

¹⁹ Lindsey and Harding (n 16) 68; *A Local Authority v JB [2020] EWCA Civ 735*; see also Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press and the Australasian Legal Information Institute (AustLII), 3rd ed, 2021) 2.4.1.

²⁰ Cf Lorraine Currie, *Capacity, Consent and Sexual Relations: How Latest Case May Help Social Workers Navigate Challenges* (Blog Post, 17 June 2020) <<https://www.communitycare.co.uk/2020/06/17/capacity-consent-sexual-relations-latest-case-may-help-social-workers-navigate-challenges/>>.

²¹ See, eg, Maggie L Syme and Debora Steele, 'Sexual Consent Capacity Assessment With Older Adults' (2016) 31 *Archives of Clinical Neuropsychology* 495. See also Rosie Harding and Jamie Lindsey, 'How Should Capacity to Consent to Sex be Defined in Law?', *University of Birmingham* (Blog Post, 6 July 2021) <<https://www.birmingham.ac.uk/news/2021/how-should-capacity-to-consent-to-sex-be-defined-in-law>>.

²² Currie (n 18).

Capacity to consent to sexual activity is an elusive concept at law, which may contribute to staff attitudes around preventing sexual expression.²³ In aged care settings staff attitudes may also be influenced by the religious affiliations of aged care providers. As O'Neill and Peisah acknowledge, despite the difficulty of capacity assessment in this realm:

*Rather than working hard to extinguish intimacy-seeking behaviours or disinhibited expression of normal needs, more focus needs to be on the human rights dimension of sexual expression for people with disability, that is, promotion of autonomy and dignity.*²⁴

The concern of this article is that the recent amendments to the *Crimes Act NSW* may make this more difficult.

II RIGHTS-BASED APPROACH IN AGED CARE

As previously discussed, there are broad recommendations to apply a rights-based approach to aged care and the application of the *Aged Care Act*.²⁵ Whilst the Commonwealth Charter of Rights regulates Australian aged care service provision,²⁶ NSW lacks a Bill of Rights as a reference point, and sexuality is not explicitly stated as a human right in any of the international human rights instruments. There is currently no Convention on the rights of older persons, however the *Convention on the Rights of Persons with Disability* ('CRPD') speaks to the rights of older people with dementia,²⁷ and the ratification of the CRPD by the Australian government adds the weight of international

²³ For a comprehensive discussion of the legal requirements for capacity to consent to sexual relationships, see Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press and the Australasian Legal Information Institute (AustLII), 3rd ed, 2021) 2.4.

²⁴ *Ibid* 2.4.2.

²⁵ See generally ACRC (n 1) 76. See also Legislative Council General Purpose Standing Committee No. 2, *Elder Abuse in New South Wales* (Report, 44, June 2016) ('NSW Elder Abuse Report') xiii; *Crimes Act* (n 14); *Aged Care Act 1997* (Cth) ('Aged Care Act'); William Mitchell, Andrew Byrnes, Anneliese Bergman and Carmelle Peisah, 'The Human Right to Justice for Older Persons With Mental Health Conditions' (2021) 29(10) *American Journal of Geriatric Psychiatry* 1027-32.

²⁶ Australian Government, 'Charter of Aged Care Rights', *Australian Government Aged Care Quality and Safety Commission* (Web Page, 5 September 2022)

<<https://www.agedcarequality.gov.au/consumers/consumer-rights>> ('Charter of Rights').

²⁷ CRPD (n 4).

law.²⁸ However, as Pritchard-Jones notes, the applicability of the *CRPD* to people with dementia is largely unexplored in literature.²⁹

There is limited research related to the application of the law of sexual consent in aged care. Sexual rights scholarship and particularly legal scholarship has concentrated on the sexuality and intimacy related needs of younger people and those who are not cognitively impaired.³⁰ This is also the case when considering proposals for law reform. Little consideration was given for older people when drafting the amendments to the *Crimes Act NSW*. There is no reference to older people or people with dementia in the explanatory memoranda to the Sexual Consent Reforms Bill,³¹ and relatively few submissions with respect to the consultation paper and proposals for consent in relation to sexual offences reference individuals with a disability.³² Reference to individuals with dementia or older persons are generally absent.

A Resident, Staff, and Family Attitudes

Research about the need for intimacy among the aged care population is a recent phenomenon.³³ It focuses broadly on barriers to sexual expression,³⁴ whether sexual

²⁸ Ibid. See generally Margaret Campbell, 'Disabilities and Sexual Expression: A Review Of the literature' (2017) 11(9) *Sociology Compass* 1; Kathleen Sitter et al, 'Supporting Positive Sexual Health For Persons with Developmental Disabilities: Stories About the Right To Love' (2019) 47 *British Journal of Learning Disabilities* 255.

²⁹ Laura Pritchard-Jones, 'Exploring the Potential and the Pitfalls of the United Nations Convention on the Rights of Persons with Disabilities and General Comment No. 1 for People with Dementia' (2019) 66 *International Journal of Law & Psychiatry* 101467.

³⁰ See generally Pia Kontos et al, 'Citizenship, Human Rights and Dementia: Towards a New Embodied Relational Ethic of Sexuality' (2016) 15(3) *Dementia* 315. See also Emily Setty, 'A Rights-Based Approach to Youth Sexting: Challenging Risk, Shame, And The Denial of Rights to Bodily and Sexual Expression Within Youth Digital Sexual Culture' (2019) 1 *International Journal of Bullying Prevention* 298.

³¹ Explanatory Memorandum, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 (NSW).

³² See, eg, Michael Coutts-Trotter, Submission No 3 to New South Wales Law Reform Commission, *Consultation Paper 21 Consent in Relation to Sexual Offences*; Sex Workers Outreach Project, Submission 15 to New South Wales Law Reform Commission, *Consultation Paper 21 Consent in Relation to Sexual Offences*; Andrew Dyer, Submission Number 2 to New South Wales Law Reform Commission, *Consultation Paper 21 Consent in Relation to Sexual Offences*; Tim Leach, Submission 73 to New South Wales Law Reform Commission, *Draft Proposals on Consent in Relation to Sexual Offences*; New South Wales Bar Association, Submission 47 to New South Wales Law Reform Commission, *Draft Proposals on Consent in Relation to Sexual Offences*; Janet Loughman, Women's Legal Service NSW, Submission 70 to New South Wales Law Reform Commission, *Draft Proposals on Consent in Relation to Sexual Offences*.

³³ See, eg, Tarzia, Fetherstonhaugh and Bauer (n 9). See also Paul Simpson et al, 'Old(er) Care Home Residents and Sexual/Intimate Citizenship' (2017) 37 *Ageing and Society* 243.

³⁴ See Bauer et al, 'I Always Look Under the Bed For a Man' (n 12). See also Steele et al (n 11).

expression is conceived of as a need or a right,³⁵ and views of workers, families,³⁶ communities and residents about sexual intimacy.³⁷

There are two unique empirical studies conducted in Australia and New Zealand that consider the views of family, carers and residents with respect to intimacy and sexual expression in aged care.³⁸ Bauer et al. sought to answer questions regarding the sexual needs of residents and identify barriers to sexual expression.³⁹ Views of residents were distilled into four categories: 'It still matters', 'Reminiscence and Resignation', 'It's personal', and 'It's an Unconducive Environment.'⁴⁰ Residents felt that to facilitate sexual expression care staff needed to appreciate residents' sexual needs and feel comfortable in responding.⁴¹

Schouten et al. conducted a seminal study in New Zealand in 2021 investigating staff, resident, and family member attitudes towards sex and intimacy in older adults.⁴² Their study focussed on whether sexuality was conceptualised as a right, a privilege or a component of wellbeing.⁴³ 433 staff surveys were taken from 35 facilities across New Zealand with interviews conducted with 75 staff, residents and family members.⁴⁴ 64.9% of participants agreed that intimate relationships with pleasurable touch are a 'lifelong human right'.⁴⁵ Whilst recognising rights to sexuality broadly, participants were divided on the role of residential aged care facilities in facilitating those rights. Both male and female residents expressed a desire or need for intimate touch, but also expressed some frustration and reported not feeling supported in getting needs met.⁴⁶ Many workers who took part in the surveys recognised intimate needs, and asserted that they try to facilitate

³⁵ See, eg, Rowntree and Zuffrey (n 9).

³⁶ See generally Michael Gordon, 'The Difficulty of Defining Consent in Older Adults With Dementia', *Annals of Long-Term Care* (Web Page) <<https://www.hmpgloballearningnetwork.com/site/altc/articles/difficulty-defining-consent-older-adults-dementia>>. See also Tarzia, Fetherstonhaugh and Bauer (n 9).

³⁷ See, eg, Bauer et al, 'I Always Look Under the Bed For a Man' (n 12). See also Schouten et al (n 11).

³⁸ See Schouten et al (n 11). See also Bauer et al, 'I Always Look Under the Bed For a Man' (n 12).

³⁹ Bauer et al, 'I Always Look Under the Bed For a Man' (n 12) 298.

⁴⁰ *Ibid* 299.

⁴¹ See generally Bauer et al, 'I Always Look Under the Bed For a Man' (n 12) .

⁴² Schouten et al (n 11).

⁴³ *Ibid*.

⁴⁴ *Ibid* 1.

⁴⁵ *Ibid* 2.

⁴⁶ *Ibid* 3, 4.

them.⁴⁷ Whilst some workers may recognise and attempt to facilitate intimate needs, where there is no impetus in policy and legislation, those rights may not be prioritised.

The intersection of human rights and sexuality has been a much greater priority in the disability sector than the aged care sector.⁴⁸ In Australia, different regimes of funding, services and assistance apply to people with a disability aged under 65 who are eligible for support through the National Disability Insurance Scheme ('*NDIS*'),⁴⁹ and those aged over 65 who are supported by aged care services. *NDIS* funding may be used by individual recipients to help meet their needs for sexual intimacy in specific cases,⁵⁰ however the Court made clear in *WRMF v National Disability Insurance Agency [2019] AATA 1771* that whether *NDIS* could be used to fund the services of a sex worker has not yet been the subject of judicial determination. A full discussion of the realisation of rights under the *NDIS* is beyond the scope of this paper.

In the aged care sector, the right to intimacy has been defined as, and tied to, dignity, autonomy, and freedom of opinion, and though sometimes considered as a basic human right,⁵¹ facilitating intimacy can be overshadowed by concerns about the potential for abuse. This is particularly the case for women, who are often seen as vulnerable to abuse

⁴⁷ Ibid.

⁴⁸ See, eg, Sonali Shah, "'Disabled People are Sexual Citizens Too": Supporting Sexual Identity, Well-being, and Safety For Disabled Young People' (2017) 2(46) *Frontiers in Education* 1. See also Jan Chrastina and Hana Vecerova, 'Supporting Sexuality in Adults with Intellectual Disability -- A Short Review' (2020) 38 *Sexuality and Disability* 285; Campbell (n 26); Renu Addlakha, Janet Price and Shirin Heidari, 'Disability and Sexuality: Claiming Sexual and Reproductive Rights' (2017) 25(50) *Reproductive Health Matters* 4; Anne Kramers-Olen, 'Sexuality, Intellectual Disability, and Human Rights Legislation' (2016) 46(4) *South African Journal of Psychology* 504; Sitter et al (n 26); Disabled People's Organisations Australia, *Joint Position Statement: A Call For a Rights-Based Framework For Sexuality in the NDIS* (Web Page, 28 August 2019) <<https://dpoa.org.au/joint-position-statement-a-call-for-a-rights-based-framework-for-sexuality-in-the-ndis/>>.

⁴⁹ National Disability Insurance Scheme, 'Am I Eligible', <<https://www.ndis.gov.au/applying-access-ndis/am-i-eligible>>.

⁵⁰ See, eg, *WRMF v National Disability Insurance Agency [2019] AATA 1771*. See also *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415.

⁵¹ Tarzia, Fetherstonhaugh and Bauer (n 9); Carmelle Peisah et al, 'Sexuality and the Human Rights of Persons with Dementia' (2021) 29(10) *The American Journal of Geriatric Psychiatry* 102; World Association For Sexual Health, 'Declaration of Sexual Rights' (26 Aug 1999) <<https://worldsexualhealth.net/wp-content/uploads/2013/08/declaration-of-sexual-rights.pdf>>. Alice Miller, Eszter Kismodi, Jane Cottingham, and Sofia Gruskin, 'Sexual Rights as Human Rights: a Guide to Authoritative Sources and Principles for Applying Human Rights to Sexuality and Sexual Health' (2015) 23(46) *Reproductive Health Matters* 16-30; World Health Organization, 'Defining Sexual Health' (2006) <<https://www.who.int/teams/sexual-and-reproductive-health-and-research/key-areas-of-work/sexual-health/defining-sexual-health>>.

and in need of protection.⁵² Because aged care providers can be focussed on a medical model of care delivery and the sector is alert to recent criticisms of abuse prevalence,⁵³ there is a danger that the pendulum will swing too far away from the right to experience sexual intimacy and towards prohibitions on touching and intimacy for older aged care residents with dementia in deeming them without capacity to consent. As the affirmative consent laws are relatively new, there is little information or case law on the application of those laws for people with a cognitive impairment, especially older people. This paper addresses that gap and considers the intersection of rights to intimacy and the *Crimes Act NSW* amendments in the aged care context, arguing that a right to intimacy and sexual expression should be recognised in any changes to aged care legislation.

B Intimacy and Sexual Expression

In promoting the need for recognition of rights to intimacy and sexual expression, it is important to have a clear understanding of what is meant by those terms. Sexual expression by residents in residential aged care facilities is varied,⁵⁴ and can be seen as lying on a spectrum with everything from daydreaming, touching, hugging, being able to share a bed with another person, kissing and masturbation on one end, to sexual intercourse at the other end.⁵⁵ It is necessary to take a broad approach to sexual expression, as someone with dementia may be able to consent to some activities on the spectrum but not to others.

C The Aged Care Context

Attending to sexual needs is often made more difficult when people enter care, as prior relationships change,⁵⁶ and the views of aged care staff and family members often dictate approaches to intimacy.⁵⁷ Families play a large role in decisions and may be consulted

⁵² See, eg, Australian Research Centre in Sex, Health and Society, *Norma's Project* (Research Study, June 2014).

⁵³ *Ibid.*

⁵⁴ See, eg, Lieslot Mahieu and Chris Gastmans, 'Older Residents' Perspectives On Aged Sexuality in Institutionalised Elderly Care: A Systematic Literature Review' (2015) 52(12) *International Journal of Nursing Studies* 1891.

⁵⁵ Michael L Perlin and Alison Lynch, 'Love is Just a Four Letter Word: Sexuality, International Human Rights, and Therapeutic Jurisprudence' (2015) 1 *The Canadian Journal of Comparative and Contemporary Law* 9; Mahieu and Gastmans (n 52).

⁵⁶ 'Carer Tony Opens Up About Dementia-Friendly, Travel, Sex and Intimacy', *Dementia Australia* (Blog Post, 30 September 2015) <<https://www.dementia.org.au/about-us/news-and-stories/stories/carertony-opens-about-dementia-friendly-travel-sex-and-intimacy>>.

⁵⁷ See generally Stephanie Lindsay et al, 'Collaborative Model For End-Stage Dementia Care' (2010) 13(7) *Mental Health Practice Journal* 18; Tarzia, Fetherstonhaugh and Bauer (n 9).

regarding their family members' intimate activities or sexual partners. As Lipinka argues, 'adult children find it especially challenging and emotionally complex to think about their parent or relative as a sexual being with rights and needs as well as care needs.'⁵⁸ Staff may be encouraged to consult family members due to a fear of complaints, or because of a mistaken belief about the powers of an enduring guardian. The aged care environment is also seen by many as uncondusive to sexual expression. Absence of large beds, lack of privacy and perceptions that staff could just knock and walk in have been cited by people with dementia as barriers to sexual expression.⁵⁹

On My Aged Care, a website designed to be a one-stop shop for aged care information in Australia, intimacy and sexuality do not appear to be a priority for policies in the aged care sector.⁶⁰ Sexual expression is not referenced, and sexuality is only referenced in relation to minority rights, with no discussion of broad rights to intimacy.⁶¹ The challenges of managing sexual interests and needs of people with dementia are further complicated by differing understandings about capacity, and a lack of clarity about what is required for a person with dementia to consent to sexual activities.

D Capacity

Discussion about a person's capacity to consent to sexual intimacy is inextricably linked to any discussion of sexual expression in older age. Capacity is decision-specific however dementia diagnoses are often conflated with a loss of consent entirely,⁶² contributing to the neglect of discussion around rights to intimacy for people in residential aged care facilities. This is made more difficult as people with dementia may not always be able to verbalise their choices, making determining consent, refusal or decisional capacity less straightforward.⁶³ Whilst someone with dementia may not have capacity to consent to an operation, or sign a transactional contract, some have argued that the decision to engage

⁵⁸ Danuta Lipinska, Sally Knocker and Caroline Baker, *Dementia, Sex and Wellbeing: A Person-centred Guide for People with Dementia, Their Partners, Caregivers and Professionals* (Jessica Kings Publishers, 2018) 20.

⁵⁹ Bauer et al, 'I Always Look Under the Bed For a Man' (n 12).

⁶⁰ Australian Government, 'Sexuality', *My Aged Care* (Web Page, undated) <https://www.myagedcare.gov.au/search?keys=sexuality&sort_by=score+desc>.

⁶¹ Ibid.

⁶² Migita D'Cruz, Chittaranjan Andrade and T S Sathyanarayana Rao, 'The Expression of Intimacy and Sexuality in Persons with Dementia' (2020) 2(3) *Journal of Psychosexual Health* 215.

⁶³ Tarzia, Fetherstonhaugh and Bauer (n 9).

in sex is simpler, and the test for threshold capacity should be lower.⁶⁴ Consent is decision-specific, so a person might not be able to consent to sexual intercourse, but may be able to consent to other activities on that spectrum. Consistent with Australia's obligations under article 12 of the *CRPD*, people should be provided with support to exercise their capacity.⁶⁵ However, a lack of training and guidelines on supported decision making in the sector means that rights are not always supported.⁶⁶

It is important not to set the bar too high, so that voluntary sexual expression can be permitted and encouraged.⁶⁷ There have been a number of proposals for approaches to capacity assessments for the decision to consent to sex, however none broadly adopted.⁶⁸ Hillman's approach includes an interdisciplinary assessment of cognitive functioning, knowledge, reasoning and voluntariness,⁶⁹ and a similar approach is discussed by other academics.⁷⁰ The use of an interdisciplinary team means that information regarding underlying considerations including medical, social, familial, financial, and religious issues that contribute to a resident's sexual behaviour can be understood.⁷¹ Ultimately, whilst determining capacity may be difficult, these proposed models demonstrate that assessment is possible with the right tools, attitude, and training.

⁶⁴ James P Richardson and Ann Lazur, 'Sexuality in the Nursing Home Patient' (1995) 51(1) *American Family Physician* 121.

⁶⁵ *CRPD* (n 4) art 12.

⁶⁶ See, eg, Older Persons Advocacy Network, 'Supported Decision-Making Must Be Embedded Across Aged Care' (Position Statement, November 2022). See also Craig Sinclair, Sue Field and Meredith Blake, *Supported decision-making in aged care: A policy development guideline for aged care providers in Australia* (Sydney: Cognitive Decline Partnership Centre, 2nd Edition, 2018).

⁶⁷ Alisa Grigorovich and Pia Kontos, 'Advancing an Ethic of Embodied Relational Sexuality to Guide Decision-Making in Dementia Care' (2018) 58(2) *Gerontologist* 219.

⁶⁸ See, eg, Syme and Steele (n 19). See also Harding and Lindsey (n 16).

⁶⁹ Jennifer Hillman, 'Sexual Consent Capacity: Ethical Issues and Challenges in Long-Term Care' (2017) 40(1) *Clinical Gerontologist* 43.

⁷⁰ Shilpa Srinivasan, et al, 'Sexuality and the Older Adult'; (2019) 21(10) *Current Psychiatry Reports* 97.

⁷¹ Hillman (n 67).

III LEGAL FRAMEWORK

A International Human Rights Instruments

There is not yet a Convention on the Rights of Older Persons,⁷² despite the establishment in 2011 of The Open-Ended Working Group on Ageing.⁷³ Recently there have been calls from the Secretary-General to accelerate efforts to create proposals for a Convention developing and adopting a coherent, comprehensive, and integrated human rights framework for older persons whilst integrating concerns into existing frameworks.⁷⁴

Article 12 of the *ICESCR* details the right of everyone to enjoyment of the highest attainable standard of physical and mental health.⁷⁵ Though not expressly stated in any existing instruments, a right to intimacy and sexual expression can be derived from this right, as medical ethicist Jacob Appel has done in relation to sex rights for the disabled.⁷⁶ Experience of intimacy for people with dementia is demonstrated to improve physical and mental health,⁷⁷ and whilst safeguards need to be in place to protect people from harm, this does not detract from their need for intimacy and the benefits derived from sexual expression.

A core premise of this paper is that older people have a fundamental need for intimacy and a right to express that need. A rights-based approach to aged care has been defined as one in which human rights norms and principles are integrated into planning and provision of aged care services.⁷⁸ Therefore, human rights standards and principles need to be embedded in all aspects of service planning, policy, and practice. In its submission

⁷² See generally 12th Open-Ended Working Group on Ageing, 11 to 14 April 2022', *United Nations* (Blog Post, 8 April 2022) <<https://www.un.org/development/desa/dspd/2022/04/oewg12-ageing/#:~:text=The%2012th%20Session%20of,at%20the%20General%20Assembly%20Hall>>. See also INPEA et al, 'Strengthening Older People's Rights: Towards a UN Convention', ID9382 (June, 2010).

⁷³ *Follow Up To The Second World Assembly on Ageing*, GA Res 65/182, UN Doc A/RES/65/182 (21 December 2010, adopted 4 February 2011); *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons*, GA Res 67/139, UN Doc A/RES/67/139 (20 December 2012, adopted 13 February 2013).

⁷⁴ See United Nations, 'Message From Michelle Bachelet, United Nations High Commissioner for Human Rights', *11th Session of The Open - Ended Working Group on Ageing* (Web Page, 30 March 2021) <<https://www.ohchr.org/en/2021/03/11th-session-open-ended-working-group-ageing>>.

⁷⁵ See, eg, *Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/49/70 (28 January 2022).

⁷⁶ Jacob Appel, 'Sex Rights for the Disabled?' (2010) 36(3) *Journal of Medical Ethics* 152.

⁷⁷ See generally Grigorovich and Kontos (n 65).

⁷⁸ See Australian Human Rights Commission, Submission to the Royal Commission into Aged Care Quality and Safety, *A Human Rights Perspective on Aged Care* (18 July 2019).

to the *ACRC*, the Human Rights Commission recommended that international human rights instruments relevant to older persons be considered and that the Royal Commission ensure that recommendations align with Australia's obligations under these instruments.⁷⁹ While the Royal Commission emphasised the need for a rights-based approach to a revised *Aged Care Act*,⁸⁰ it is difficult to find concrete examples of how rights to sexual expression might be codified.

B National Legislation and Aged Care Guidelines

All providers of Aged Care are required to comply with the Aged Care Quality Standards,⁸¹ as assessed by the Aged Care Quality and Safety Commission.⁸² Providers commit to upholding these standards for residents through the *Charter of Aged Care Rights*.⁸³

The *Charter of Aged Care Rights*, established in 2019 includes: rights 'to be treated with dignity and respect, and to live without abuse and neglect'; to have control over and make choices about care, personal and social life, including where those choices involve personal risk; and the right to privacy.⁸⁴ However, there continues to be concerns over the translation of those rights into practice.⁸⁵ As it stands today, we lack legislation and policies regarding rights to intimacy for people with dementia, with flow on effects for attitudes towards the importance placed on creating opportunities for intimacy in residential aged care settings.

A lack of guidelines about how aged care providers should create opportunities for intimacy is further complicated by the amendments to the under discussion. Under reforms to the *Crimes Act NSW*, staff or families might seek to prevent sexual relationships where one or both parties have a cognitive impairment.⁸⁶ While aged care workers are unlikely to prevent intimacy between married couples irrespective of a diagnosis of dementia, decisions about intimacy should not rely on people conforming to particular

⁷⁹ Ibid.

⁸⁰ *ACRC* (n 1) 79.

⁸¹ *Aged Care Act* (n 23) s 54.2.

⁸² 'Quality Standards', *Australian Government Aged Care Quality and Safety Commission* (Web Page, 29 November 2022) <<https://www.agedcarequality.gov.au/providers/standards>>.

⁸³ *Charter of Rights* (n 24).

⁸⁴ Ibid.

⁸⁵ Australian Human Rights Commission (n 76).

⁸⁶ See for instance the US case of Henry Rayhones, who was charged with sexually assaulting his wife in a nursing home: Sarah Kaplan, "Former Iowa Legislator Henry Rayhones, 78, Found Not Guilty of Sexually Abusing Wife with Alzheimer's" (April 23, 2015) *Washington Post*.

relationship norms. Aged Care providers need to provide clear guidance for staff and families to protect resident's sexual rights.

One helpful example can be found in the recently released, "Ready to Listen Charter of Sexual Rights and Responsibilities".⁸⁷ This resource arose from the important work of the Ready to Listen project of the Older Person's Advocacy Network. Being "Ready to Listen" in this context:

Refers to aged care service providers knowing the risk of sexual assault, understanding indicators, believing those who disclose, acknowledging impacts, providing support and taking proactive steps to protect residents.⁸⁸

The "#Ready to Listen Charter" of Residents' Rights and Responsibilities spells out 7 sexual rights and two related responsibilities for aged care residents:

1. the right to engage in sexual activity;
2. the right to sexual consent;
3. the right to continue existing sexual relationships;
4. the right to form new sexual relationships;
5. the right to change the way you express your sexuality;
6. the right to sexual privacy;⁸⁹

These positive rights are balanced with:

7. the right to be free from sexual assault;

and two responsibilities:

8. the responsibility to respect other residents;
9. the responsibility to respect staff.⁹⁰

Whilst the "#ReadyToListen Charter" is a good starting point, there is no obligation for providers to adopt the Charter. Furthermore, despite being foregrounded with positive

⁸⁷ Catherine Barrett, Kate Swaffer and Yumi Lee, *The #ReadyToListen Dementia MAP. Guidelines for preventing sexual assault of people living with dementia in residential aged care* (2022) Older Person's Advocacy Network.

⁸⁸ Ibid 4.

⁸⁹ Ibid 7.

⁹⁰ Ibid 7-9.

rights, the Charter is largely promoted as an abuse prevention tool, rather than promoting rights to sexual expression.⁹¹

C NSW Consent Laws

As discussed, aged care staff may be concerned that sexual contact or intimacy involving residents with a cognitive impairment is unlawful. The *Crimes Act NSW* details what is required for someone to consent to sexual intercourse at s 61HI.⁹²

1. Consent generally

(a) A person “consents” to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.⁹³

This might signal that any older person with dementia can voluntarily agree to sexual activity, given that the rights of all people to choose to participate in sexual activity are recognised in s 61HF.⁹⁴ However, s 61HJ makes it clear that there is no consent where:

(b) the person does not have the capacity to consent to the sexual activity.⁹⁵

The Act is silent around the requirements for “capacity to consent”.⁹⁶ Submissions to the NSW Law Reform Commission highlighted this deficiency and the potential problems it creates.⁹⁷ Decision-making capacity at law is not well understood, and in aged care facilities, where many residents have appointed enduring powers of attorney or enduring guardians, staff may not distinguish the capacity for different legal decisions that the law requires. Worse still, staff may believe that someone with an enduring guardian is incapable of making “any” decisions, rather than applying the legal situational test for decision-making.

The definition and case law regarding capacity to consent to sexual activity provide little guidance on how these laws might be applied to people with dementia. *R v Morgan*⁹⁸ (‘*Morgan case*’), the leading Australian case from the 1970s involves a 19-year-old girl

⁹¹ Australian Government, Aged Care Quality Commission, “*World Elder Abuse Awareness Day*”, (15 June 2022), <https://www.agedcarequality.gov.au/news/media/world-elder-abuse-awareness-day>.

⁹² *Crimes Act* (n 14) s 61HI.

⁹³ *Ibid* s 61 HI sub-div 1A.

⁹⁴ *Ibid* s 61HF.

⁹⁵ *Ibid* s 61 HJ.

⁹⁶ *Ibid* s 61HJ (1)(b).

⁹⁷ Cf The Law Society of New South Wales Young Lawyers, Submission to the NSW Law Reform Commission *Draft Proposals of the NSW Law Reform Commission’s Inquiry into Consent in relation to Sexual Offences* (29 November 2019) 7.

⁹⁸ [1970] VR 337.

with a developmental disability.⁹⁹ The Court held that the required capacity meant having sufficient knowledge or understanding to comprehend the nature of the sexual act and to appreciate the difference between that act and an act of a different character, such as a medical examination.¹⁰⁰ Very different considerations about the circumstances of situational consent may arise where they involve a person with dementia, and that person has fluctuating capacity and may be able to consent to sexual activity at some times but not others.¹⁰¹ Similarly, different questions arise about decisions to engage in sexual acts or intimacy with a long-term spouse, as compared to the facts in the *Morgan* case which involved comparative strangers¹⁰². For residential aged care facilities, where there is an established risk averse culture and tendency to revert to family wishes, the new consent laws may legitimise the default practice of restricting sexual expression of people with dementia based on the belief that it is not consensual and thus harmful and illegal. As Syme and Steele write, the assessment of sexual consent capacity is ‘one of the least-developed capacity domains in terms of assessment and diagnostic strategies.’¹⁰³

IV RIGHTS TO INTIMACY IN THE DISABILITY SECTOR

The need to balance protection and sexual autonomy has a richer history of discussion and debate in the disability sector as compared to aged care. Disability advocacy networks have argued that protection from abuse should not prevent realisation of rights to intimacy.¹⁰⁴ Since the early 1980s and 1990s, scholars have pioneered a nuanced understanding of the sexual lives of people with disabilities,¹⁰⁵ and it is widely recognised in academic literature that people with intellectual disabilities have the same needs for intimacy as adults without a cognitive impairment.¹⁰⁶ In Australia, there has been progress for the disability sector in facilitating rights to intimacy. For example, the

⁹⁹ *R v Morgan* [1970] VR 337 (*‘Morgan’*).

¹⁰⁰ *Ibid.*

¹⁰¹ New South Wales Law Reform Commission, *Consent in relation to sexual offences* (Report No 148, September 2020)[6.60].

¹⁰² *Morgan* (n 98).

¹⁰³ Syme and Steele (n 19) 496.

¹⁰⁴ Shah (n 46); Addlakha, Price and Heidari (n 46).

¹⁰⁵ See generally Kramers-Olen (n 46).

¹⁰⁶ Elizabeth Rushbrooke, Craig Murray and Samantha Townsend, ‘The Experiences of Intimate Relationships by People with Intellectual Disabilities: A Qualitative Study’ (2014) 27(6) *Journal of Applied Research in Intellectual Disabilities* 531; Remigiusz J Kijak, ‘A Desire for Love: Considerations on Sexuality and Sexual Education of People With Intellectual Disability in Poland’ (2010) 29(1) *Sexuality and Disability* 65.

organisation 'Touching Base' was created to connect people with disabilities to sex workers.¹⁰⁷ There is also a push for greater access to sexual education for people with disabilities.¹⁰⁸

The UN Standard Rules on the Equalisation of Persons with Disabilities provide that people with disabilities have a right to 'experience sexuality, have sexual relationships' and have 'information in accessible form on the sexual functioning of their bodies'.¹⁰⁹ The Courts in the United Kingdom have addressed these rights in several cases before the Court of Protection and on appeal, including for people with dementia. In the 2019 case *London Borough of Tower Hamlets v NB* [2019] EWCOP 17, Hayden J, neatly summarising the dilemma in these cases opined:

The omnipresent danger in the Court of Protection is that of emphasising the obligation to protect the incapacious, whilst losing sight of the fundamental principle that the promotion of autonomous decision making is itself a facet of protection. In this sphere i.e., capacity to consent to sexual relations, this presents as a tension between the potential for exploitation of the vulnerable on the one hand and P's right to a sexual life on the other.

The *CRPD* makes reference to rights that relate to sexual expression: recognising the importance of persons with disabilities' 'individual autonomy and independence, including the freedom to make their own choices;'¹¹⁰ respect for inherent dignity; and independence of persons.¹¹¹ Obligations flowing from those rights include taking measures to modify existing legislation or regulations that discriminate against persons with disabilities,¹¹² and promoting the training of professionals and staff working with persons with disabilities in the rights recognised in the Convention.¹¹³ Article 25 of the *CRPD* requires the provision of healthcare 'in the area of sexual and reproductive health' and 'the promulgation of ethical standards for public and private health care.'¹¹⁴

¹⁰⁷ 'Joint Position Statement: A Call For A Rights-Based Framework For Sexuality in NDIS', *Disabled People's Organisations Australia* (Web Page, 28 August 2019) <<https://dpoa.org.au/joint-position-statement-a-call-for-a-rights-based-framework-for-sexuality-in-the-ndis/>>.

¹⁰⁸ See generally Kramers-Olen (n 46).

¹⁰⁹ *UN Standard Rules On The Equalisation of Persons With Disabilities*, GA Res 48/96, UN Doc A/RES/48/96 (4 March 1994) rule 9.2.

¹¹⁰ *Ibid* Preamble para 14.

¹¹¹ *Ibid* Preamble paras 1, 7, 14.

¹¹² *Ibid* art 4(b).

¹¹³ *Ibid* art 4(i).

¹¹⁴ *CRPD* (n 4) art 25.

In Australia, the separation of the disability and aged care sectors may explain in part why rights under the *CRPD* that apply to people with a cognitive impairment, may not be seen as applicable to older people with dementia. Human rights training for staff in the aged care sector working with older people with a cognitive impairment is an imperative. As the Australian Human Rights Commission submission to the Royal Commission into Aged Care opined, it is also vital that attention is given to the most marginal groups and that the needs of the most marginal groups are protected, irrespective of disability, sexual orientation or gender identity.¹¹⁵

V FACILITATING RIGHTS

Australian aged care providers might draw on approaches to facilitating intimacy in other jurisdictions. The Dutch Association for Residential and Home Care providers has petitioned Parliament asking that the subject of intimacy in care homes be given greater attention and that it should be incorporated into healthcare professionals' training courses.¹¹⁶ The incorporation of intimacy and sexual expression as part of training courses for healthcare professionals may influence their attitudes towards intimacy in a residential aged care setting, increasing opportunities for healthy intimate relationships. In Denmark and Switzerland, sexual surrogacy services exist which support the facilitation of shared sexual expression.¹¹⁷ One example is when trained sex therapists that provide sexual advice are also allowed to do 'limited touching' of clients.¹¹⁸ In the Australian context, Bauer et al. have developed a 'sexuality assessment tool (SexAT) for residential aged care facilities' which they describe as allowing service providers to identify 'where enhancements to the environment, policies, procedures and practices, information and education/training are required' and to monitor the implementation of initiatives over time.¹¹⁹ In a similar vein, the Mosaic app has been developed to assist aged care teams to understand LGBTI residents and to plan and deliver inclusive care.¹²⁰ However it is important to note that these approaches address social aspects of the right

¹¹⁵ Australian Human Rights Commission, (n 76) 14.

¹¹⁶ See generally Wiskerke and Manthorpe (n 10).

¹¹⁷ Grigorovich et al (n 65).

¹¹⁸ *Ibid.*

¹¹⁹ Bauer et al, 'Supporting Residents' Expression of Sexuality: the Initial Construction of a Sexuality Assessment Tool for Residential Aged Care Facilities' (2014) 14(82) *BMC Geriatrics*.

¹²⁰ palliAGED, 'Intimacy and Sexuality: What We Know', <https://www.palliaged.com.au/tabid/5734/Default.aspx>

to intimacy, but not the legal aspects, including the intersection with the new consent laws discussed in this paper.

VI ADVANCE DIRECTIVES

Another possible approach to ascertaining consent to sexual intimacy for people with dementia is the proposal for Advance Directives on Intimacy, also known as Sexual Advance Directives.¹²¹ Sorinmade, Ruck, Keene and Peisah argue that such directives may respect precedent autonomy, allowing people to outline the relationships they wish to consent to if they lose capacity at a future time,¹²² while Boni-Saenz suggests that advance directives can also protect sexual partners from prosecution for sexual assault should their partner lose the ability to consent to sex in the future.¹²³ This would be of particular relevance in light of the consent laws in NSW. Astle et al. examined public opinions toward sexual advance directives and found that there was general support for them, but highlighted that determining how such directives would be upheld in aged care facilities and within the legal system is an essential step to any future implementation.¹²⁴ Joy and Weiss raise particular concerns about the application of advance directives for people with hypersexual behaviours related to frontotemporal dementia behavioural variant, arguing that advance directives could be used to justify exploitative behaviours.¹²⁵

VII RECOMMENDATIONS

As intimacy and sexual expression enriches the lives of people with dementia, opportunities for sexual expression should be prioritised and facilitated. In order to do so, it is necessary to address the attitudes of staff and families. The *Charter of Rights* referred to in the *Aged Care Act* could be amended to include rights to intimacy and sexual expression. The introduction of these rights may alleviate concerns from care providers and their staff about duties of care and intrusive family views. It may also facilitate

¹²¹ Boni-Saenz, Alexander, 'Sexual Advance Directives' (2017) 1(68) *Alabama Law Review* 1.

¹²² Oluqatoyin Sorinmade, Alex Ruck Keene, and Carmelle Peisah, 'Dementia, Sexuality, and the Law: The Case for Advance Decisions on Intimacy' (2021) 61 (7) *The Gerontologist* 1001, 1001.

¹²³ Boni-Saenz, (n 120).

¹²⁴ Shelby Astle et al, 'Assessing Public Opinions of Sexual Advance Directives Among Older Adults With Dementia' (2022) 41 (11) *Applied Journal of Gerontology*. See also Michelle Joy and Kenneth Weiss, 'Consent for Intimacy Among Persons With Neurocognitive Impairment' (2018) 46 *Journal American Academy Psychiatry Law*, 286-94.

¹²⁵ Michelle Joy and Kenneth Weiss, 'Consent for Intimacy Among Persons With Neurocognitive Impairment' (2018) 46 *Journal American Academy Psychiatry Law* 286-94.

recognition of the broad spectrum of capacity to consent across different sexual and intimate activities. Further research should be conducted on the ways that sexual expression can be facilitated in residential aged care facilities, and the kinds of sexual activity that someone with dementia might be able to consent to. Consideration should be given to the introduction of advance directives, and their potential impact on consent laws should be examined in detail. Widespread recognition of the importance of intimacy and sexual expression for people is required across all age groups, irrespective of cognitive impairment.

To address existing barriers in aged care, organisational practices such as open-door policies should be amended so as to facilitate sexual expression. Further, prohibitions against use of sexual materials and the lack of double beds in facilities are areas that could be changed to improve opportunities for sexual expression. Opportunities for facilitation of sexual expression are very broad.¹²⁶ Facilitation of sexual expression in aged care facilities might include both autonomous (e.g. masturbation) and shared sexual expression.¹²⁷ Facilitated sexual expression is varied and might include procurement of erotic aids (e.g. vibrators, pornography), creating more environments for socialising for people with dementia or allowing sex workers to enter facilities. In considering what opportunities there are for facilitating sexual expression, NSW is a unique jurisdiction in that it is one of the few where sex work is legal.

To improve opportunities for sexual expression in residential aged care, training programs should be provided to teach staff how they might contribute to the sexual expression of residents. Training may have a dual purpose in changing attitudes of staff towards the prioritisation of opportunities for sexual expression and discussion of ways to implement opportunities for that sexual expression. A combination of policy, legislation, and training has the potential to make the balancing act clearer, so that the balance is not skewed towards protection from harm. Operational changes to aged care facilities are also required to address existing barriers to sexual expression, including addressing resident concerns that their privacy is not protected. Questions about desire

¹²⁶ See generally Mahieu and Gastmans (n 52); Hillman (n 67); Tarzia, Fetherstonhaugh and Bauer (n 9); Rowntree and Zuffrey (n 9).

¹²⁷ See, eg, Perlin and Lynch (n 53).

for intimacy could be included in the 'Residents Experience' rating which makes up part of the recently introduced star ratings for aged care facilities.¹²⁸

This paper does not argue that sexual intimacy should be valued above protection against risk, but rather, that the balance should not be unnecessarily skewed towards protection. To bring about a rights-based approach which recognises the importance of intimacy, funding and resources are required. Staff to resident ratios and layouts of facilities, which are currently designed to facilitate quick care, would need to change to be conducive to allow for intimacy. The source of that funding and how it is utilised is beyond the scope of this paper.

VIII CONCLUSION

Older aged care residents have rights to intimacy and sexual expression which lie on a spectrum, ranging from hand holding and hugging to sexual intercourse. These rights need to be further articulated and included in Aged Care legislation and Charters of Rights. As demonstrated in this paper, criminal laws may represent a barrier to recognition of rights to consent to intimacy in aged care and need to be amended to help realise those rights for cognitively impaired individuals.

There has been progress towards recognition of rights to intimacy in both the disability sector and in aged care in other jurisdictions which can inform an approach to rights-based care in Australia. Whilst there are several ethical and legal considerations at play, safeguarding from harm can be balanced with providing opportunities for sexual expression. In order to enact a rights-based approach to care, amendments to policy and legislation governing aged care facilities are needed to enable prioritisation of these rights and to challenge the views of workers, residents' family members and people broadly about rights to intimacy and sexual expression.

¹²⁸ 'How are Star Ratings Calculated?', *My Aged Care* (Web Page, undated) <<https://www.myagedcare.gov.au/quality/how-are-star-ratings-calculated>>.

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