

Sex, Care & the Law

Managing the 'Ménage à Trois'
(in Aged Care)



Brian Herd
P: 07 3236 2900
E: bherd@crhlaw.com.au

The Cleavage in Aged Care

SEX

“I always look for a man under the bed at night...just the thought that there might be makes me feel better”

SEX (cont)

“I can remember it and sometimes even think about it but now I am managed”

Care

“If it gave us trouble, we just gave it a whack with a cold spoon - that usually did the trick and deflated the bugger”

(then we bathed it in kerosene)

Care (cont)

“Seriously, you would think in their twilight years these people would have better things to do than shag, like writing their histories...”

The Law

“Unfortunately, we have to treat sex in high care as just another form of assault and we have to report it...”

Who Disagrees?

Any adult at any age at any time
in any private place has the right
to safe consensual sexual
expression

Who Disagrees?

Older people may*:

- Think sex is important
- Be sexually active
- Have more than one partner
- Masturbate
- Have same sex partners
- Use Viagra
- Hide their sexuality
- Want to express their sexuality
- Become depressed if can't express it

*Vic Health Dep't Help Sheet

Who Disagrees?

All older people are*:

- Asexual
- Can't get it up
- Uninterested
- Heterosexual
- Monogamous
- Don't want to discuss their sexual health
- Perverted if think about sex

* Vic Health Dep't Health Sheet

What is Sex in Aged Care?

- It is ***Sexual Expression*** (not just copulation)
- Sex is more than sex
- It can be:
 - Cuddling
 - Canoodling
 - Intimacy
 - Whispering sweet nothings
 - Kissing
 - Eye fluttering
 - Fondling
 - Holding hands
 - Hanging out with
 - Sex (& attempts)
 - Massaging
 - Masturbating
 - Sex toys
 - Pornography
 - A paid service

What we know to be true

Sexual expression

- and old age are not mutually exclusive

Sexual needs

- do not decline with age

Sexual intimacy

- provides many physical and psycho-social benefits

Sexual care

- is a foreign phrase in aged care

Enter Passion Killer #1

- CARE -

The Problem with Care

- **Resident sexuality:**
 - is taboo
 - so is weight loss apparently
 - is too private to be discussed
 - rarely features in care plans
 - no strategies for loneliness
 - is more managed than facilitated
 - doesn't fall neatly into clinical care
 - all webster packs no condom packs
 - is counter-intuitive to the thrust of aged care
 - comforting your decline not satisfying your desires
 - all flaccid no fluorescence

The Problem with Care (cont)

- The 'built environment' discourages
 - No quiet time rooms
 - No resident lockable rooms
 - No knock and wait
 - No physical privacy
 - Single beds
 - 4 bed rooms
- Use lazy language or euphemisms
 - 'Challenging behaviour' or 'acting out'
 - 'a resident to resident altercation'
 - 'he's just a lothario'

The Problem with Care (cont)

- No staff or resident education on sexual expression
- No care courage
 - Staff bravery in the face of family moral indignation
- ‘Creative care’ poo pooed
 - use of prostitutes or masseurs
 - ‘robotic’ masseurs
 - tenders for comfort services

The Problem with Care (cont)

Government

- finds it delicate & difficult
- On one hand
 - Accreditation standards do not require ACF's to develop policies on resident sexuality
 - Accreditation audits avoid any assessment or mention
- On other hand
 - Gov't funded the *Sexuality Assessment Tool (SexAt)* for residential ACF's (published 2013)
 - Who knew about it?
 - Who's using it?

The Problem with Care (cont)

- **Providers (and staff)**
 - Just downright uncomfortable about it
 - Seldom addressed in care assessments and plans
- Evidence?*
- 2009 survey of 826 ACF's in Victoria
- How do you deal with intimacy & sexuality needs in information to residents?
 - 20% responded to say they had policies
 - but were directed at 'problem' or 'disruptive' behaviour
 - 64% said 'had no information available'
 - 7 ACF's retorted that the research was inappropriate and intrusive
 - 7 ACF's said sexuality and intimacy are 'NA' or not important to older people in residential care

* Bauer, Nay, McAuliffe

Enter Passion Killer #2

- THE LAW -

The Problem with the Law

- Law on sexuality in aged care
 - paradox
 - paranoid
 - psychosis

The Problem with the Law

- Law is seen as a threat!
- Legal 'Push/Pull' factors:
 - Capacity and consent
 - Substitute Decision makers
 - Charter of Rights & Responsibilities
 - Privacy
 - Mandatory Reporting
 - Duty of Care (Social control)
 - Contract (Policies and Procedures)
 - 'Hoverers' (family moral police!)

The Law (cont)

- The Biggest Law
 - Capacity (consent)
- Legal Presumption
 - Everyone is legally capable of anything until there is evidence to the contrary
- Capacity is decision specific
 - Sexual consent is not a big legal hurdle
- If a resident with dementia is capable of deciding what to wear & what to eat
 - could they not also decide who they want to be with?

Brian Brian Brian!

It's so easy from up there for you to
prance and pout like Dr Feelgood

Why don't you come to our ACF one
day and see the reality!

What to Think?

- If resident sexual expression is not harmful, abusive or illegal
 - It's good care!
(But how do you know when it's not harmful abusive or illegal?)

How to Know

Make a commitment to:

- confront
- courage
- conquer

How to Know (cont)

1. Crucial to properly assess residents for their capacity
 - Not one off
2. Policy on sexual expression
 - I know policies are boring
 - Particularly if your policy is “no sex please – we’re an ACF”
 - Policies lay the foundation for everyone knowing what the ground rules are in your facility and where everyone stands, sits and lies
 - See *Hebrew Home Riverdale* policy (www.hebrewhome.org)
3. Make sexuality and expression part of the care plan
 - Use the ‘*Sexuality Assessment Tool*’ (SexAT)

How to Know (cont)

4. Staff Education and Training

- Staff often the biggest hurdle to resident sexual expression
- Understanding
 - Sexual needs of older people
 - The benefits of sexual expression to good care
 - The law
 - Get them to watch “*Scarlet Road*”

5. Resident education!?

- STD's
- Family?

Now for Something Completely Different

- From 1 July 2014 aged care:
 - has become more competitive
 - marketing your service will be crucial
 - differentiation will be the buzz word
- Try this in your advertising:

“Why choose us for your aged care?

We respect your right to sexual expression

We uphold your right to personal and sexual choices

We can facilitate male and female comfort companions

Interested? Contact us on Ph.....”

Finally – What Would You Do?

At handover, a female staff member reported that high care resident Alan masturbated when she assisted him in shower. She was embarrassed and tearful. Others said he had also done it with them and they didn't know what to do & said nothing. One staff member said she had asked him to stop but he refused.

His brain injury prevented him from knowing when appropriate to masturbate. He also wore large incontinence pad most of the time preventing him from touching his genitals and was not capable of removing it by himself.

Showering was the only time he could masturbate

And your next move is?

That's It Sweet Dreams



Brian Herd

P: 07 3236 2900 E: bherd@crhlaw.com.au
Level 10, 193 North Quay Brisbane Qld 4000