Sexual Offences and Capacity to Consent: Key Issues

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This paper explores some key issues with regard to sexual offences and capacity to consent. The paper critically considers law reform relating to capacity, engaging with important matters such as protection and empowerment, the contents of the Criminal Law (Sexual Offences) Act 1993, the proposed replacement of Part 5 of said legislation, criminal procedure issues and parenting.

Chair, distinguished guests, ladies and gentlemen, as you know I am here as a substitute for Patricia Rickard-Clarke, who sends her apologies and greetings for the success of this important conference.

I - Introduction and terminology

In October 2011, the Law Reform Commission published a Consultation Paper on Sexual Offences and Capacity to Consent. The Consultation Paper forms part of the Commission’s Third Programme of Law Reform 2008-2014. It contains a review of how the law deals with the issue of capacity of persons to consent to sexual relations and identifies ways in which the criminal law could be updated. The Commission made a number of provisional recommendations and invited submissions relating to the repeal and replacement of section 5 of the Criminal Law (Sexual Offences) Act 1993 (1993 Act), which contains the current substantive law in this area. The Commission also made provisional recommendations for reform of procedural issues concerning participants in the criminal trial process. This address outlines what I hope are the key issues relating to sexual offences and capacity to consent, including in the context of the general reform of the law on capacity, on which the Oireachtas Committee on Justice, Equality and Defence published its pre-legislative scrutiny Report on Tuesday (1 May 2012).
A few words first on a preliminary point: terminology and the euphemism treadmill. The Commission discussed the problem of terminology in the Consultation Paper, and it has rightly been highlighted again in the Oireachtas Committee’s Report on the *Mental Capacity Bill 2012*. We are really talking about how to use language appropriately when we legislate around personhood. The literature on this indicates that terms we use today that we think are appropriate may, in time, be seen to be pejorative and insulting. Considering, however, that the two main pieces of legislation in Ireland concerning capacity date from 1811 and 1871, and use the word “lunatic” and “lunacy” in their short titles and “idiot” and “person of unsound mind” in their text, we can at least skip a few generations of the pejorative treadmill on that front. In the specific area of sexual offences, we have an Act from 1993 that uses the phrases “mentally impaired” and “mental handicap.” In the meantime, in 2010, the federal US Congress enacted Rosa’s Law in order to remove “mental retardation” from all federal legislation and replace it with “intellectual disability.” This is a phrase now in common use internationally – and nationally, in connection for example with the National Intellectual Disability Database (N.I.D.D.) – and the Commission concluded that it should use this term. There are other terms: “mentally challenged,” “learning difficulties”, “special needs,” “vulnerable adult”, “developmental delayed adult”, “at risk adult”, “differently abled.” There is always the possibility that we might just say “person” and leave the specifics to whoever has to draft the “Adults with Incapacity Act”, “Mental Incapacity Act”, “Mental Capacity Act”, “Legal Capacity Act,” “Capacity Act” or “Capacity and Supported Decision Making Act.”

**II - Empowerment and protection; and changing public policy and public attitudes**

In the Consultation Paper, the Commission’s approach was that the law should recognise the right of persons with intellectual disability to sexual fulfilment. While respecting that right, the Commission also considered that the law should recognise that such persons are at a higher risk of sexual exploitation and abuse.

Before turning to examine in detail the *1993 Act*, here is a brief overview of some of the context. The last couple of decades of the 20th century were marked by a move from institutional and diagnostic models towards community and rights-based approaches to persons with intellectual disability. A result of this transition is that society began the slow process of recognising the equal status of persons with intellectual disability: from hidden
behind walls, and invisible, to “being”. The most recent statistics from Ireland indicate that, between 1996 and 2010, there was an increase of 71 per cent in the number of people with intellectual disability living full time in community group homes and a 75 per cent reduction in the number of people with intellectual disability accommodated in psychiatric hospitals. This move from an institutional to a community setting represents a tangible but slow indication of policy changes in Ireland and a reflection, at least to some extent, of the rights-based and equal treatment approach found in the 2006 United Nations Convention on the Rights of Persons with Disabilities (U.N.C.R.P.D.). The advent of a rights-based approach was also evident in the case law of the Irish courts concerning the constitutional rights of persons with intellectual disability. This includes the landmark 1993 High Court decision in O’Donoghue v. Minister for Health in which O’Hanlon J. recognised the convergence between the rights-based approach of the Constitution of Ireland and relevant international law (including the 1975 U.N. Declaration that was a precursor of the 2006 U.N. Convention). The Oireachtas also took action through important legislation such as the Education for Persons with Special Educational Needs Act 2004 and the Disability Act 2005.

The 2011 Health Service Executive Report Time to Move on from Congregated Settings identified that about 4,000 people with disabilities continue to live in congregated settings in Ireland (a residential setting where they live with ten 10 or more people). The Report noted that most residents had been living in an institution for 15 years or more and just 15 per cent had been involved in a community activity on their own within the previous month. The Report recommended the closure of these institutions within seven years. The Government has given a commitment to implement the Report and this emphasises that, while it is important to note the changes in most of our lifetimes, we have some way to go yet.

Apart from the policy changes since the end of the 20th century already noted, how do we stand on empowerment? A 2011 survey of public attitudes to disability published by the National Disability Authority brought the issues of sexual freedom, parental rights and protection into sharp focus. The N.D.A.’s 2011 study revealed that only 51 per cent of respondents felt that people with intellectual disability or autism should have the same right

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to fulfilment through sexual relationships as everyone else. The main reason offered by the 49 per cent of respondents who did not support this right was that people with intellectual disability or autism would not be able to make informed decisions or be in a position to consent (62 per cent of this group of respondents). Vulnerability of adults with intellectual disability to abuse was also offered as another reason (38 per cent). Only 37 per cent of respondents agreed that adults with intellectual disability or autism should have children if they wish. This figure represents a significant fall from the 64 per cent figure recorded in the N.D.A.’s 2006 survey. Concern about the child’s emotional well-being (36 per cent) was the main reason given by respondents. Some of these findings indicate that this is, quite simply, not an easy area to navigate. We must not underestimate what lies behind these views.

Indeed, the focus of these respondents on risk and vulnerability may be connected to the realities of other findings and studies, which suggest that people with disabilities are at increased risk of sexual abuse. The N.D.A. noted, in its 2011 Review of the Literature and Qualitative Studies on Sexual Abuse and People with Disabilities, that there is a growing body of literature that identifies people with a disability as being at increased risk of sexual abuse. For example, one U.K. study indicated that the incidence of sexual abuse involving people with a disability can be as much as four times higher than the population as a whole; and that people with an intellectual disability are at the highest risk of abuse. The same study revealed that many of these cases are not reported. In Ireland, the 2002 Sexual Abuse and Violence in Ireland Report (the “SAVI Report”) estimated that sexual abuse of people with disabilities ranged from 8 to 58 per cent. This stark variation in estimates and the dearth of research carried out in this area have been attributed to the difficulties in gathering evidence-based data. Nonetheless, statistics from the Rape Crisis Network Ireland for

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8. *Public Attitudes to Disability in Ireland* (Dublin: National Disability Authority, 2006) at 33. A possible explanation for this fall is the inclusion of autism in the question response category in the 2011 survey, which was not included in the 2006 survey.
2006\textsuperscript{13} and 2009\textsuperscript{14} confirmed the findings of the SAVI Report that people with disabilities are at a higher risk of sexual abuse, both in terms of being targets of sexual violence and in terms of disclosure and verification of that abuse.\textsuperscript{15} In legislating in this area, this evidence base must be taken into account.

III - The 1993 Act: what it says and some problems

Coming back again to the focus of this paper, section 5 of the \textit{Criminal Law (Sexual Offences) Act 1993} implemented some of the recommendations made by the Commission in its 1990 \textit{Report on Sexual Offences Against the Mentally Handicapped}, but in many respects it retains an overly paternalistic approach that was also present in section 4 of the \textit{Criminal Law Amendment Act 1935 (1935 Act)}, which section 5 of the 1993 Act replaced.

Section 5 of the 1993 Act creates three offences: (a) for any person to have, or attempt to have, sexual intercourse with another person who is “mentally impaired”; (b) for any person to commit or attempt to commit an act of buggery with another person who is “mentally impaired”; and (c) for a male person to commit or attempt to commit an act of gross indecency with another male person who is “mentally impaired”. The term “mentally impaired” is defined in the 1993 Act as “suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation.”

Section 5 of the 1993 Act prescribes a maximum penalty of 10 years imprisonment in cases involving sexual intercourse or acts of buggery. The section provides for two defences: (a) marriage or a reasonable belief in marriage; and (b) where the accused shows that at the time of the alleged offence he or she did not know and had no reason to suspect that the complainant was “mentally impaired”. The Director of Public Prosecutions must give her consent to any prosecution under section 5 of the 1993 Act.

The Commission’s Consultation Paper noted that section 5 of the 1993 Act is deficient in a number of important respects. In particular, given that there is no provision

\textsuperscript{13} Rape Crisis Network Ireland \textit{National Rape Crisis Statistics} (Galway: R.C.N.I., 2007).
\textsuperscript{14} Rape Crisis Network Ireland \textit{National Rape Crisis Statistics} (Galway, R.C.N.I., 2009).
under section 5 for consent as a defence in situations where both parties to a sexual act are capable of giving real consent to sexual intercourse; section 5 has the effect of precluding a mutually consensual sexual relationship between persons with an intellectual disability. In its 2005 Consultation Paper on Capacity,\(^{16}\) the Commission had explored the possibility of amending section 5 in order to ensure that relationships between adults with an intellectual disability would be lawful where consent is present. Section 5 fails to empower people with limited capacity to realise their right to sexual expression. A fear of prosecution may prevent development of relationships where there is real consent and no element of exploitation. Such a paternalistic approach is at variance with the relatively recent shift in policy towards a rights-based and functional analysis of capacity of persons with intellectual disability. In the subsequent 2006 Report on Vulnerable Adults and the Law, the Commission focused on reform of the civil law of capacity and concluded that the issues in section 5 of the 1993 Act required and deserved separate analysis. The Commission has now returned to this area of capacity in the 2011 Consultation Paper.

Another regrettable effect of section 5 is that its application is limited to sexual intercourse only and does not deal with sexual abuse or exploitation generally. Thus, it fails to provide adequate protection to people with an intellectual disability from unwanted sexual contact generally.

Section 5 also uses outdated terminology, such as “mental handicap”, to describe those affected by its provisions. As already mentioned, in the Consultation Paper, the Commission concluded that having regard to the development of language and terminology used in this area, the term “intellectual disability” should be adopted as a general term to include persons whose decision-making or cognitive capacity may be limited.\(^{17}\)

IV - Consent and Capacity to Consent

Proving absence of consent in cases involving victims of sexual violence has, we know, led to difficulties in criminal trials and no doubt the general review of the law on


\(^{17}\) Law Reform Commission, supra note 1 at para.15. The same conclusion was reached in Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy (Dublin: National Disability Authority and Crisis Pregnancy Programme, 2011) at 29–30.
sexual offences being undertaken by the Department of Justice and Equality will consider these. Other difficulties may arise where the victim is a person with an intellectual disability, notably the question of capacity to consent to a sexual relationship. Despite the significance of the concept of capacity to consent, it has never been defined in Ireland in legislation. In 1970, the Supreme Court of Victoria in *R v Morgan*[^18] decided that a person does not have capacity to consent to a sexual act if they do not have sufficient knowledge or understanding to understand either that sex may involve physical penetration of the body or that penetration is an act of sexual connection, as distinct from being an act of different character.

Two differing approaches to determining capacity to consent for the purposes of the criminal law of sexual offences currently exist in Irish law.[^19] The subjective, functional approach of the common law has its roots in 19th century decisions such as *R v. Camplin*[^20] and *R v. Fletcher*.[^21] Under the rule in *Fletcher*, a person cannot give a valid consent if he or she is incapable of understanding the nature of the act to which the consent is apparently given. Section 5 of the *Criminal Law (Sexual Offences) Act 1993*, and its predecessor, section 4 of the *Criminal Law Amendment Act 1935*, constituted a departure from the established common law rule in the *Fletcher* case by incorporating a “status based” assessment of capacity to consent to sexual relations in respect of persons with an intellectual disability.

The “status” approach is evident in section 5 of the 1993 Act because, rather than determining capacity to consent by reference to whether a specific individual understands the nature and consequences of the sexual act, section 5 bypasses this completely. Section 5 provides, simply, that an offence is committed where sexual intercourse occurs with any “person who is mentally impaired.” “Mentally impaired” is defined as meaning:

- a person who is “suffering from a disorder of the mind, whether through mental handicap or mental illness” (a “traditional” lumping together of disability and illness);
- and where the “disorder of the mind” is “of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious

[^19]: This was recognised by the Criminal Law Codification Advisory Committee in its Draft Criminal Code and Commentary: see Commentary on Head 1105 (Consent), at para. 34. Available online at <www.criminalcode.ie> and <www.justice.ie> (date accessed: 19 May 2015).
[^20]: *R v. Camplin* (1845) 1 Den 89.
[^21]: *R v. Fletcher* (1886) L.R. 1 C.C.R. 39 [*hereinafter Fletcher*].
exploitation” (which, within the language and “logic” of section 5 appears to be a specific sub-set of “mentally impaired”).

It is clear that this is a “status” based approach in which section 5 appears to objectify the persons in respect of whom an offence occurs. The test of “incapable of living an independent life” was, arguably, an improvement on section 4 of the 1935 Act, which referred to an offence with “any woman or girl who is an idiot, or an imbecile, or is feeble-minded.” Nonetheless, section 5 is far from a rights-based approach and for that reason alone, the Commission concluded it should be repealed and replaced.

In England and Wales, the courts have found it necessary to re-examine their approach to assessing capacity to consent to sexual relations, following the enactment of the Sexual Offences Act 2003 (2003 Act) and the Mental Capacity Act 2005. The English courts have decided that, given the nature of marriage, capacity to consent to marriage will normally require the capacity to consent to sexual relations. The English courts have concluded that the same functional approach to capacity should be taken in respect of assessing capacity to marry in the civil law and capacity to consent to sexual relations in the criminal law. The common law test for assessing capacity to marry was set out by Munby J. in Sheffield City Council v. E and S [2004] E.W.H.C. 2808 (Fam.); [2005] All E.R. (D) 192 at para. 141 and requires that the person (a) understands the nature of the marriage contract; and (b) understands the duties and responsibilities that normally attach to marriage.

In its Consultation Paper, the Commission considered that a functional test of capacity is one way in which an individual’s self-determination can be realised in the context of their personal social setting. A functional approach to capacity assesses a person’s capacity to consent on the basis of their ability to understand information relevant to the matter at hand. This should also be seen in the context of the 2006 United Nations Convention on the Rights of Persons with Disabilities, and in particular Article 12, which assumes that in order to achieve the key objective of equal treatment, appropriate supports will be in place. A functional approach faces the challenge that, assuming appropriate supports are in place, there may be some instances where – and this presentation is limited to the specific context of consent to sexual relationships – it may not be possible for a

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particular individual to consent to sexual activity. This will be one of the biggest challenges faced by the Commission in preparing its final recommendations in this area.

V - Key issues regarding a proposed replacement of section 5 of the 1993 Act

A. Functional test to determine capacity

In the Consultation Paper, the Commission provisionally recommended that since section 5 of the Criminal Law (Sexual Offences) Act 1993 is not consistent with a functional test of capacity, it should be repealed and replaced. In proposing a test for capacity to consent to sexual relations, the Commission drew on its 2006 Report on Vulnerable Adults and the Law, in which it recommended a definition of capacity adapted from the definition in section 3 of the English Mental Capacity Act 2005. The definition of capacity contains four elements: the ability to understand relevant information, the ability to retain that information, the ability to use that information in the decision-making process and the ability to communicate a decision. This definition of capacity has been incorporated into Head 2 of the Scheme of the Mental Capacity Bill published by the Department of Justice and Equality in 2008.

We await of course, the publication of the Government’s formal Bill in this area, which we all hope will be influenced by the detailed presentations made on the 2008 Scheme to the Oireachtas Committee on Justice, Defence and Equality; and by the Committee’s Report, published on Tuesday. The Oireachtas Committee’s Report has firmly agreed with the many submissions it received on the need for a rights-based law on capacity; and which would fully reflect the requirements of the 2006 U.N.C.R.P.D. As to section 5 of the 1993 Act, the Committee’s Report referred to the submissions which had noted that section 5 of the 1993 Act “denies people with intellectual disabilities their human rights, in denying them the right to have a fulfilling emotional and sexual relationship.” The Committee’s Report then states: “The 1993 Act needs to be reformed in order for Ireland to comply with Article 12 of the UN Convention on the Rights of Persons With Disabilities.”

B. Specific offence where accused is in a position of trust or authority

A further issue in this area is the need to address the level of implicit trust and dependency present in particular relationships of care, and the resulting risk of abuse and exploitation and inhibition of the ability to seek help in an abusive situation. Irish research in this area is limited. A limited three-year survey published in 1990 concerning sexual violence involving adults with an intellectual disability reported that, in 5 of the 13 cases, the abuse was intra-familial.\textsuperscript{24} A 1990 Canadian study maintained that the risk of sexual violence was two to four times higher for persons with an intellectual disability who were living in institutional settings.\textsuperscript{25} A large-scale study carried out across the south east of England in the early 1990s of sexual abuse of people with learning disabilities found that about one sixth of these cases were perpetrated by family members, a sixth by service workers or volunteers and the other sixth by known and trusted people within the community, often occupying “pillar of the community” roles.\textsuperscript{26} Very few cases of abuse by strangers were reported. The remaining cases were perpetrated by other service users. In Ireland, a preliminary scoping study carried out by Women’s Aid in 2011 found that women with disabilities are particularly vulnerable to intra-familial abuse.\textsuperscript{27} In terms of the professional care setting, it has also been suggested in a 2001 English study that abusers may deliberately seek employment within the care sector in order to be in a position to abuse persons with an intellectual disability or otherwise at risk persons.\textsuperscript{28} 

Against the background of studies such as these, many countries have also created a specific offence prohibiting certain relationships between persons with an intellectual disability and persons in a position of trust or authority over them. For example, sections 38 to 41 of the English \textit{Sexual Offences Act 2003} and the comparable Articles 51 to 54 of the \textit{Sexual Offences (Northern Ireland) Order 2008} create specific offences of sexual activity with a person who has a “mental disorder” where the offender is involved in that person’s care.\textsuperscript{29}

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\textsuperscript{27} N. Wilson, \textit{Violence Against Disabled Women. Report on a Consultation by Women’s Aid of the Feasibility of Carrying out Research} (Dublin: Women’s Aid, 2001).


\textsuperscript{29} In \textit{R v. Bradford} [2006] E.W.C.A. Crim 2629, the defendant, a social worker, was convicted under section 38 of the English \textit{Sexual Offences Act 2003} where he had had sexual intercourse with the complainant when she
The position of trust and responsibility occupied by a care worker is a feature of the offence, as opposed to simply an aggravating factor.\textsuperscript{30} The offences in sections 38 to 41 of the English 2003 Act (and in Articles 51 to 54 of the Northern Ireland 2008 Order) have been described as necessary to protect those who have a “mental disorder,” regardless of their ability to choose whether or not to take part in sexual activity, because their decision-making may be influenced by their familiarity with, or dependence on, a care worker.\textsuperscript{31} In Scotland, the comparable offence is contained in section 46 of the Sexual Offences (Scotland) Act 2009, which is framed in terms of the sexual abuse of trust of a “mentally disordered” person and applies to persons who provide care services to the complainant. A number of Australian jurisdictions have also introduced offences that apply to an accused who engages in sexual activity with a person with a “cognitive impairment” while responsible for their care.\textsuperscript{32}

Most common law countries have legislated for a defence of reasonable mistake which applies where the accused did not know or could not have reasonably been expected to know that the complainant’s capacity made their consent ineffective. However, some countries or jurisdictions have not included a defence of reasonable mistake in the offences involving a position of trust or authority. An example is section 52 of the Crimes Act 1958 (Victoria, as amended in 2006).\textsuperscript{33}

Having regard to these developments in other countries and the increased risk of abuse in the context of care-giving relationships, the Commission provisionally recommended in the Consultation Paper the enactment of a specific offence concerning sexual acts involving a person who is in a position of trust or authority with another person who has an intellectual disability. The Commission was of the view that a position of trust or authority should be defined in similar terms to section 1 of the Criminal Law (Sexual Offences) Act 2006 which defines a “person in authority” as a parent, stepparent, guardian, grandparent, uncle or aunt of the victim; any person who is in \textit{loco parentis} to the victim; or

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\item\textsuperscript{30} P. Rook, Q.C. and R. Ward, \textit{Sexual Offences: Law and Practice}, 4\textsuperscript{th} ed. (London: Sweet and Maxwell, 2010) at 7.165.
\item\textsuperscript{32} For example, s. 66F(2) and (6) of the Crimes Act 1900 (N.S.W.) as amended by s. 3 of the Crimes Amendment (Cognitive Impairment – Sexual Offences) Act 2008 (N.S.W.); ss. 51 - 52 of the Crimes Act 1958 (Vic.) as amended by s. 16 of the Crimes (Sexual Offences) Act 2006 (Vic.); and s. 126 of the Criminal Code Act 1924 (Tas.).
\item\textsuperscript{33} Crimes Act 1958 (Vic.), s. 52, as amended by s. 17 of the Crimes (Sexual Offences) Act 2006 (Vic.).
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any person who is, even temporarily, responsible for the education, supervision or welfare of the victim.

C. Sexual acts to be covered

As I mentioned already, section 5 of the Criminal Law (Sexual Offences) Act 1993 is limited to offences involving attempted or actual penetrative acts of sexual intercourse, buggery and acts of gross indecency between males. In addition to all the other faults and failures of section 5 already discussed, it simply fails to deal with the range of sexual activity and sexual exploitation that the general law on sexual offences has already addressed. This was highlighted by White J. in *The People (DPP) v. YT,* in *The People (DPP) v. XY.* In that case, the accused was alleged to have forced a female with an intellectual disability into performing oral sex. As this sexual act does not come within the scope of section 5 of the 1993 Act (which deals with sexual intercourse and buggery only), the accused was charged under section 4 of the Criminal Law (Rape) (Amendment) Act 1990 (1990 Act). It is notable that section 4 of the 1990 Act is a generally applicable provision and does not contain specific provisions that may arise where a complainant has an intellectual disability. On this issue, White J. noted that “[i]t seems to me that the Oireachtas when they introduced the 1993 Act did not fully appreciate the range of offences needed to give protection to the vulnerable.” Having regard to case law, he concluded that there had not been an assault involving a person being actually forced to do something or threatened so that they must submit. He noted in his direction to the jury that the jurors had heard the complainant use the word “force” in her evidence (given via recorded DVD) and that she kept saying “no” when the accused said “go on”, but that she had not expanded on that and there was no suggestion of threat or menace. In directing the jury to acquit the defendant, he stated that the judiciary could not fill “a lacuna in the law”. White J. therefore directed “with great reluctance” that the accused be acquitted on the basis that there was no evidence of assault or hostile act on his part. Accordingly, the jury returned a verdict of not guilty.

The provisions of the English Sexual Offences Act 2003 are particularly instructive in this regard. The 2003 Act prohibits a wide range of sexually exploitative acts involving “mentally disordered” persons. They extend beyond sexual intercourse and indecent assault to include sexual touching, causing or inciting a person to engage in sexual activity, engaging in sexual activity in the presence of a person and causing a person to watch sexual

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34 “Jury directed to find man not guilty of sex assault on mentally disabled woman” *The Irish Times* (16 November 2010).
activity. The Commission therefore provisionally recommended in the Consultation Paper that any replacement of section 5 should cover all forms of sexual acts including sexual offences which are non-penetrative, as well as other forms of sexual abuse and exploitation.

C. Specific offence involving threats or deception

Many countries have created an offence where the sexual contact involves inducements, threats or deception. Such offences are aimed at individuals who deliberately and repeatedly target people with an intellectual disability. Such an offence recognises that threats that would probably be ignored by others can assume a greater significance for a person with intellectual disability. This kind of offence also addresses the practice of “grooming” by sex offenders.

Sections 34 to 37 of the English Sexual Offences Act 2003 (and Articles 47 to 50 of the Sexual Offences (Northern Ireland) Order 2008) cover sexual activity where agreement is obtained by inducement, threat or deception. The offences are designed to protect persons who are able to make a choice, but who are nevertheless vulnerable to relatively low levels of inducement, threats or deception. The Explanatory Notes to the Sexual Offences Act 2003 give the following examples: an inducement might involve promising presents of anything from sweets to a holiday; a threat might involve stating that the perpetrator will hurt a family member; and a deception might involve stating that the other person will get into trouble if he or she does not engage in sexual activity, or persuading them that it is expected that “friends” should engage in sexual activity.

Under the Sexual Offences (Scotland) Act 2009, the offences based on lack of consent similarly provide protection where a person is vulnerable to threats or deceptions. Similarly, in New South Wales, consent is vitiated where the victim engages in a sexual act as a result of intimidatory or coercive conduct or other threats which need not involve threats of force. New Zealand has legislated for an offence of inducing sexual connection.

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38 Sexual Offences (Scotland) Act 2009, s. 13.
39 Crimes Act 1900 (N.S.W.) (as amended), s. 611HA(6).
by coercion which is committed where the victim was induced to consent as a result of an express or implied threat in a set of given circumstances.\footnote{New Zealand Crimes Act 1961, s. 129A.}

In its Consultation Paper, the Commission invited submissions as to whether any replacement of section 5 of the Criminal Law (Sexual Offences) Act 1993 should provide for a specific offence of engaging in sexual activity with a person with intellectual disability by threats or deception.

VI - Criminal Procedure Issues

Apart from the urgent need to update the substantive law on sexual offences, the Commission noted in its Consultation Paper that specific procedural supports should be in place to achieve the equality standard in Article 12 of the 2006 U.N.C.R.P.D., while at the same time recognising the accused’s right to a fair trial. It has been observed that court users with disabilities may experience particular difficulties when giving evidence in court. As a result, bearing in mind the adversarial nature of court proceedings, their competence as witnesses and their credibility can be called into question and convictions in cases involving complainants with intellectual disability become more difficult to secure.

A. Pre-trial recording of evidence

Some efforts have already been made in this regard. Section 16 of the Criminal Evidence Act 1992, which came into force in 2008 (yes, a mere 16 years after enactment), enables a complainant with a “mental handicap” to have their statement video recorded, close in time to the alleged sexual offence. This pre-recorded statement is admissible in evidence at the trial, as occurred in The People (DPP) v. XT,\footnote{“Jury directed to find man not guilty of sex assault on mentally disabled woman” The Irish Times (16 November 2010).} provided its admission will not risk any unfairness to the accused and is in the interests of justice. The accused may view the video prior to the hearing, and the witness must be available in court for cross-examination. While this specific measure allows greater detail to be recorded and may also serve to minimise trauma for the witness in the trial process, it is open to criticism on two grounds. First, its application is restricted to complainants and does not extend to accused persons. Secondly, it arguably creates further difficulties for a witness with a disability by
splitting their testimony in two and requiring the witness to be available for cross-examination at trial after a sometimes lengthy period of time has elapsed.\textsuperscript{42}

In its Consultation Paper, the Commission considered that it might be desirable to allow cross-examination of the complainant at the same time as the giving of evidence-in-chief. Section 28 of the \textit{Youth Justice and Criminal Evidence Act 1999} provides for pre-recording of examination and cross-examination in England and Wales. However, strong opposition to the introduction of such a measure, based on the defendant’s right to a fair trial, remains. Full pre-recording of evidence has received support in Australia and has, it appears, been successful in Western Australia where it has been in place since 1992.\textsuperscript{43} Having regard to these issues, the Commission invited submissions on whether the \textit{Criminal Evidence Act 1992} should be amended to allow for pre-trial cross-examination of complainants and witnesses.

\section*{B. Use of intermediaries}

A second measure, the use of intermediaries, is provided for in section 14 of the \textit{Criminal Evidence Act 1992}, under which the prosecution or an accused may apply to court for a direction that, having regard to the condition of a witness who has a ”mental handicap” and is giving evidence through live television link, the interests of justice require that questions be put to the witness through an intermediary.\textsuperscript{44} The use of intermediaries can clearly make the court system more accessible, but their use must be set against the defendant’s right to a fair trial under the Constitution and Article 6 of the European Convention on Human Rights, and of the equality standard in Article 12 of the 2006 U.N.C.R.P.D. The intermediary service in England and Wales, which was established under the \textit{Youth Justice and Criminal Evidence Act 1999}, has been well-received and it is felt that it delivers significant benefits for vulnerable witnesses, the courts and professionals. The role of intermediaries in England and Wales extends to communicating answers given by the witness in reply to questions asked and explaining questions or answers so far as necessary to enable them to be understood by the witness or person in question.\textsuperscript{45}


\textsuperscript{43} \textit{Evidence Act 1906} (W.A.), s. 106.

\textsuperscript{44} \textit{Criminal Justice Act 1993}, s. 6B as inserted by s. 6 of the \textit{Criminal Procedure Act 2010} makes provision for any questioning of a child or a person with a mental disorder in relation to his or her victim impact statement to be done via an intermediary.

C. Specific Measures for Defendants

In Ireland, defendants who may require specific supports and assistance to ensure their full and equal participation in the criminal trial process do not have a statutory entitlement to the type of measures for complainants already mentioned. This failure to address the needs of defendants with an intellectual disability could also be in breach of the rights already mentioned in the Constitution, the E.C.H.R. and the U.N.C.R.P.D.

In England and Wales, section 16 of the Youth Justice and Criminal Evidence Act 1999 as originally enacted excluded defendants from the specific measures for witnesses. However, further amendments to the 1999 Act in the Police and Justice Act 2006 will, when implemented, enable a court to direct the use of a live link\(^{46}\) and the assistance of an intermediary\(^{47}\) in respect of defendants who have a “mental disorder” or a significant impairment of intelligence and social function and for that reason are unable to participate effectively in the proceedings.\(^ {48}\) Even without these changes, the courts in England and Wales may use their general, inherent, jurisdiction\(^ {49}\) to appoint intermediaries. Scottish legislation also offers an affirmation of the accused’s right to a fair trial. Under section 271F\(^ {50}\) of the Criminal Procedure (Scotland) Act 1995, the accused is entitled to make an application for specific measures which include giving evidence through the use of a live television link, the use of a screen, the presence of a supporter and giving evidence in chief in the form of a prior statement.

D. Development of Guidelines for those working in criminal justice process

Ireland is obliged under Article 13(2) of the 2006 United Nations Convention on the Rights of Persons with Disabilities to promote appropriate training for those working in the administration of justice in order to ensure effective access to justice for persons with disabilities. To this end, Gardaí currently receive training about engaging with people with

\(^{46}\) Youth Justice and Criminal Evidence Act 1999, ss. 33A-C as inserted by s. 47 of the Police and Justice Act 2006.

\(^{47}\) Youth Justice and Criminal Evidence Act 1999 ss. 33BA and BB as inserted by s. 104 of the Coroners and Justice Act 2009.

\(^{48}\) English Youth Justice and Criminal Evidence Act 1999, s. 16.

\(^{49}\) English Youth Justice and Criminal Evidence Act 1999, s. 19(6) allows the court to exercise its inherent jurisdiction to make an order or give leave of any description in relation to any witness. In C v. Sevenoaks [2009] E.W.H.C. 3008; [2010] 1 All E.R. 735 the English High Court held that it could appoint an intermediary to support a defendant to follow the proceedings and to give evidence, where without such assistance he would not be able to have a fair trial.

\(^{50}\) Section 271F was inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004.
intellectual disability or mental health difficulties as part of their overall training. In its 2004 *Report on Sexual Offences*, the Victorian Law Reform Commission noted that the criminal justice system can only operate fairly if judges and magistrates have an understanding of and sensitivity to the needs of people with a cognitive impairment. In its 2011 Consultation Paper, the Commission provisionally recommended the development of guidelines for those working in the criminal justice process in order to identify current obstacles and examine methods by which the participation of eligible adults in court proceedings could be enhanced. The Commission was of the view that this could be done in consultation with the National Disability Authority (N.D.A.) and the proposed Office of Public Guardian, to be established under the proposed capacity legislation.

**VII - Parenting**

The principle of sexual empowerment must be considered in the context of the wider policy issue of reproductive freedom and constitutional and international standards. Parents with disabilities are confronted with countless barriers including negative attitudes to pregnancy and parenthood among some service providers and some in the wider community, lack of adequate support services and education programmes and over-use of the *Child Care Act 1991* as a response to persons with intellectual disability having children. The forthcoming capacity legislation should provide for a general presumption of capacity, which would include a presumption of capacity to parent. The Commission addressed this wider issue in its Consultation Paper and provisionally recommended that, consistently with a presumption of capacity to parent, there should be a positive obligation to make an assessment of the needs of parents with disabilities under the *Disability Act 2005*. Moreover, an inter-agency protocol is needed between child protection and family support services which would provide that, before any application for a care order is made under the *Child Care Act 1991*, an assessment is made of parenting skills and the necessary supports that would assist parents with disabilities in their role.

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VIII - Conclusion

It is clear that this is a complex area where law and society’s views are not settled. The large number of extensive submissions already received by the Commission is testament to this. There is a tension between the current unnecessary restriction of the sexual freedom of persons with an intellectually disability and the issue of protection from sexual abuse and exploitation. In legislating in this context, there is a very delicate balance to be struck between undue state interference in an individual’s sexual life and the state’s responsibility to protect from sexual exploitation and abuse. As it works towards making final recommendations in this area, the Commission is committed to achieve an outcome that is consistent with national constitutional standards and international human rights standards, notably those in the 2006 U.N.C.R.P.D.