



NUI Galway

CENTRE *for* DISABILITY
LAW & POLICY

Centre for Disability Law and Policy NUI Galway

Submission on Law Reform Commission Consultant Paper: Sexual Offences and Capacity to Consent (2011)

The Centre for Disability Law and Policy (CDLP) welcomes the opportunity to make this submission on the future of sexual offences and capacity to consent for people with disabilities. The CDLP was formally established in 2008 at the National University of Ireland Galway. Its work is dedicated to producing research that informs national and international disability law reform. Since its establishment, the CDLP has organised and participated in a number of key events regarding disability law reform and legal capacity. These include a national conference held in conjunction with Amnesty International, called 'Getting It Right: Capacity Law and the Convention on the Rights of People with Disabilities' which explored how Irish legislation can reflect Article 12 of the Convention on the Rights of Persons with Disabilities. The CDLP also participated in a Canadian conference titled 'Taking Personhood Seriously: Legal Capacity Law Reform and the UN Disability Convention' in 2011. The Centre is also a regular contributor of legislative and policy submissions on issues regarding legal capacity and made a submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality (2011).

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EXECUTIVE SUMMARY

The Centre for Disability Law and Policy welcomes this opportunity to provide a submission to the Law Reform Commission on the issue of consent to sexual activity in the context of people with disabilities. The issue of informed consent is closely connected to a broader debate on legal capacity and decision-making, currently underway in many countries following the entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD). As Ireland prepares to ratify the CRPD, the pressing need for general legislative reform in the area of legal capacity has been brought to the fore. It is therefore fitting and timely for the Law Reform Commission to consider this issue, building upon its previous consultation paper and report on Vulnerable Adults and the Law,¹ as well as its broader recommendations in criminal law and sexual offences.² This submission welcomes the Commission's commitment to seek a solution which respects the rights and freedoms of people with disabilities, while also providing a legal response where people experience violence, exploitation or abuse.

The underlying principle of this submission is the need to balance the information, advice and support which individuals require to make informed decisions, with the freedom to make the same decisions as others, without discrimination on the basis of disability. The recommendations in this submission are primarily concerned with reform of sexual offences legislation in light of the human rights principles articulated in the CRPD. In this respect, this submission suggests a two-pronged approach. First, in order to respect the freedom, rights and dignity accorded to people with disabilities, all sexual offences legislation should be made disability-neutral. This would require the repeal of any disability-specific offence (including section 5 of the *Criminal Law (Sexual Offences) Act 1993*) which sets out a different standard of consent for people with disabilities when compared to other adults. Secondly, disability-specific offences should be replaced with more neutrally-worded offences which capture the abuse of power people with disabilities, and other adults, may be subjected to. These two core recommendations reflect the balance of the right of adults with disabilities to engage in consensual sexual activity with the right to freedom from violence, exploitation and abuse.

However, at the level of policy and practice, any legal reform of sexual offences should also be accompanied by the implementation of various programmes to ensure that appropriate sexual education is provided, and that people with disabilities are supported in the decisions they choose to make (including the provision of advocacy support). The implementation of a national adult protection programme which could take positive steps to prevent abuse,

¹ Law Reform Commission, *Report on Vulnerable Adults and the Law*, (LRC 83 - 2006). Available at: <http://www.lawreform.ie/fileupload/Reports/Report%20Vulnerable%20Adults.pdf> (last accessed 12 January 2012).

² Law Reform Commission, *Consultation Paper: Sexual Offences and Capacity to Consent* (LRC CP 63 - 2011).

exploitation or violence against adults would also be a core element of any holistic approach to ensure informed consent.³ While such recommendations may not lie within the remit of the Law Reform Commission, they remain vital elements of any human rights-based approach to reform in this area, and should be considered as part of any broader discussion on ensuring the rights of people with disabilities are recognised, respected and protected.

INTRODUCTION

This submission aims to consider the issue of consent to engage in sexual activity as it applies to people with disabilities from three key perspectives: international human rights law (with a particular focus on the Convention on the Rights of Persons with Disabilities), the broader criminal law on sexual offences in Ireland and comparative law reform on sexual offences and disability from other jurisdictions. Section One will explore the insights on consent which can be gained from the CRPD – in particular, the rights to legal capacity, freedom from abuse, respect for physical and mental integrity, the right to live independently and be included in the community, privacy, and respect for home and family life. Section Two will use these insights to examine current sexual offences law in Ireland as it relates to people with disabilities, with a focus on consent to engage in sexual relationships. Although few jurisdictions have implemented a disability-neutral approach to sexual offences legislation, Section Three will explore the key recommendations from comparative countries in terms of law reform on this issue. Finally, Section Four will draw together all of the principles from international human rights law and comparative legal systems to provide recommendations for reforming sexual offences law in Ireland.

SECTION ONE: INTERNATIONAL HUMAN RIGHTS LAW, DISABILITY, AND CONSENT TO SEXUAL RELATIONSHIPS

The issue of decision-making and the right to consent to sexual relationships goes to the core of the rights and freedoms protected by the UN Convention on the Rights of Persons with Disabilities (CRPD). The purpose of the Convention was to codify existing international human rights law and apply these norms to the specific situation of people with disabilities. A core theme of the CRPD is

³ Association of Directors of Adult Social Services, *Safeguarding Adults' A National Framework of Standards for good practice and outcomes in adult protection work* (ADSS; 2005). Available at: <http://www.adass.org.uk/old/publications/guidance/safeguarding.pdf> (last accessed on 12 January 2012). Any such programme in Ireland should be developed and implemented by the HSE, and clearly set out the responsibilities of various actors to safeguard adults (including social workers, disability service providers, etc.).

non-discrimination – the notion that no distinction on the basis of disability which results in a denial of equal rights should be permitted. Therefore, with regard to consent to sexual relationships, the general approach of the Convention is to ensure that people with disabilities have equal rights to consent to sexual activity – and are not held to a higher standard than others when it comes to informed consent.

The existence of a specific offence which explicitly or implicitly requires people with disabilities to meet a higher standard of consent before engaging in sexual activity therefore runs contrary to the underlying principles of the Convention. In general, the Convention's focus on non-discrimination requires a disability-neutral approach to such legal provisions. This means that if the purpose of such a criminal offence is to protect vulnerable adults from abuse, then a general offence of 'abuse of a position of power' relating to another adult (whether by an employer, carer, or other person) should be introduced, rather than a specific offence which singles out people with disabilities.

The most relevant provisions of the CRPD for exploring the issue of capacity to consent are Articles 12 (legal capacity), 16 (freedom from exploitation, violence and abuse), 17 (physical and mental integrity), 19 (independent living), 22 (privacy) and 23 (respect for home and family life). This section will address each of the articles in turn; in order to understand how the rights contained therein should apply to sexual offences legislation. Since the CRPD is a relatively new Convention, little commentary has emerged from the Committee on the Rights of Persons with Disabilities which could shed light on how these rights apply to sexual offences law – however, this submission will draw on existing sources, including the CRPD negotiation archives and academic literature, to interpret the application of these rights.

Equal Recognition Before the Law: Legal Capacity to Consent to Sexual Relations

The right to equal recognition before the law, and respect for legal capacity, as enshrined in Article 12 of the CRPD, applies to people with disabilities 'on an equal basis with others' and in 'all aspects of life.'⁴ This article establishes that all individuals, including those with disabilities, have a right to exercise their legal capacity; meaning that each individual has the right to be an actor in law as well as a holder of rights.⁵ It is important to establish that the term 'legal capacity' refers to an individual's legal right to be recognised as a person before the law and, as such, to have her will and preferences respected. The term 'legal capacity' does not refer to an individual's decision-making capabilities –

⁴ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report*, A/63/175, 28 July 2008, para 44. Available at: <http://www.unhcr.org/refworld/pdfid/48db99e82.pdf> (last accessed 11 January 2012).

⁵ UN. Office of the High Commissioner for Human Rights, *Legal capacity: background conference document* (UN; 2005).

this is more commonly referred to as ‘mental capacity.’ However, the recognition of the right to legal capacity dictates that appropriate supports are put in place to allow all individuals, regardless of decision-making ability, or ‘mental capacity’, to *exercise* their legal capacity.

In the context of legal capacity to consent to sexual relations, Article 12 establishes⁶ that all people with disabilities must be recognised as having legal capacity to consent to sexual relations on *an equal basis with others*.⁷ The phrase ‘on an equal basis with others’ reaffirms the non-discrimination principle set out in Article 5 of the CRPD, which requires states to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”. By definition, this precludes the use of a separate standard or test of capacity for people with disabilities, for assessing consent to sexual relations.

However, this does not preclude the application of a general test for consent to sexual relations from being individualised in any given case, and taking into account the personal circumstances of the individual in assessing whether consent was free and informed – it merely requires the same standard for consent to be available to those with and without disabilities. Therefore, while a *prima facie* test of capacity should not be applied in the case of an alleged sexual offence, numerous factors, including the absence of mental capacity, can be considered when assessing the existence of consent. This approach complies with the principle contained in Article 12(1) that all persons possess legal capacity while acknowledging that numerous factors⁸ can remove a person’s mental capacity to consent to sexual activity.

An example of factors which can be taken in to account in assessing the existence of consent has been outlined by McCarthy and Thompson.

- For valid consent to sex, [an individual] ... must know that sex, especially when initiated by a more powerful person, is not required and compulsory.
- People must have sufficient communication skills to be able to make their choice (to engage in sexual activity or not) known to the other party. This means that either verbally or through an alternative communication system known to both parties they must be able to give/deny/withdraw consent at any stage in the activity. Silence or non-communication must not be interpreted as consent.⁹

⁶ Article 12, United Nations Convention on the Rights of Persons with Disabilities; Report of Special Rapporteur on Torture, A/63/175, para 44 (28 July 2008).

⁷ Article 12(2), United Nations Convention on the Rights of Persons with Disabilities.

⁸ The factors which may remove mental capacity are not limited to disability – and include persons who are in a coma or other non-responsive state, and those under the influence of alcohol or drugs.

⁹ McCarthy and Thompson “People with learning disabilities: Sex, the law and consent” in M. Cowling and P. Reynolds, *Making Sense of Sexual Conduct* (Ashgate Publishers; 2004)

- There needs to be a reasonable degree of equality between the parties, so that both parties have sufficient power to make the choice to engage or not engage in sex, without fear of adverse consequences.

Article 12(3) requires the creation of a system of supports for the exercise of legal capacity.¹⁰ This includes not only the provision of supports in decision-making, but also the provision of supports aimed at augmenting decision-making capabilities to lead to self-determination. While support at the actual moment of decision-making in sexual relations is impractical and would likely be a violation of privacy rights, on-going support in how to make decisions of a sexual nature can allow an individual to be prepared to make informed decisions regarding consent to sexual relations. The issue of the support measures which should accompany any legislative reform is dealt with further in Section Four below.

Right to Freedom from Exploitation, Violence and Abuse

Article 16 of the CRPD requires States to take all appropriate measures (legislative and otherwise) to prevent ‘all forms of exploitation, violence and abuse of people with disabilities.’ While legislation prohibiting or criminalising exploitation, violence and abuse is one element of the necessary protection, arguably, the implementation of an effective adult safeguarding policy and programmes is the key to realising this right for people with disabilities, as this will lead to abuse being ‘identified, investigated, and, where appropriate, prosecuted.’¹¹ The introduction of a higher standard or more rigorous test for capacity to consent to sexual relationships is arguably not the most effective form of protection from abuse. Brown argues that legislative protections for people with disabilities should focus on specific definitions of ‘abuse’, rather than placing higher standards for capacity to consent on people with disabilities. She argues that the appropriate standard for consent should be that the person is able to indicate consent (through whatever means), is adequately informed about the act, and is free from undue pressure.¹²

However, the issue of consent and the appropriate standard to apply in relation to consent to sexual activity, is simply one of a myriad of elements which should form part of a legislative, policy and programmatic framework to prevent violence, exploitation and abuse. Other elements of this framework should include education and training on sexual health and relationships, standards and

¹⁰ Committee on the Rights of Persons with Disabilities (CRPD) Spain, *Concluding observations of the Sixth Session*, CRPD/C/ESP/CO/1, paras 33 & 34 (19-23 September 2011); Committee on the Rights of Persons with Disabilities (CRPD) Tunisia, *Concluding observations of the Fifth Session*, CRPD/C/TUN/CO/1, paras 22 & 23 (11-15 April 2011).

¹¹ Article 16(5), United Nations Convention on the Rights of Persons with Disabilities.

¹² Brown, *Safeguarding adults and children with disabilities against abuse*, (Council of Europe; 2003) Available at:

http://www.coe.int/t/e/social_cohesion/soc-sp/Abuse%20_E%20in%20color.pdf (last accessed 11 January 2012).

policies for in-home carers and residential services, facilitating access to justice and redress for survivors of abuse, and independent monitoring to ensure compliance with the relevant standards and safeguards.

The Right to Physical and Mental Integrity

The right of persons with disabilities to physical and mental integrity is contained in Article 17 of the CRPD which states that:

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Minkowitz suggests that:

It may be fitting that the first recognition of the right to respect for integrity at the international level comes in connection with disability, reaffirming that disability is not a loss of physical or mental integrity, but a situation in which people possess their own physical and mental integrity that deserves respect equally with others.¹³

She goes on to note that the '[r]espect for difference and acceptance of persons with disabilities as part of human diversity and humanity' contained in Article 3(d) of the Convention complements the legal recognition of individual autonomy and self determination contained in Article 12 of the CPRD.¹⁴

The Committee on the Rights of Persons with Disabilities, in their Concluding Observations regarding the State Party Report of Spain, touched on the issue of the sexual rights of persons with disabilities in the context of Article 17 by expressing concern about the possibility of non-consensual sterilisation of people with disabilities.¹⁵ While not directly relevant to sexual offences legislation, the Committee's comment reinforced the notion that the right to integrity includes rights to engage in sexual activity and reproductive rights.

The right of persons with disabilities to physical and mental integrity under the CRPD is based on the concepts of equality and non-discrimination which provide the philosophical basis for the Convention. It seeks to ensure that persons with disabilities are entitled to the same level of respect for their integrity as persons who do not have a disability. It is not unreasonable to extrapolate, therefore, that the right contained in Article 17 should result in a

¹³ Minkowitz, "The United Nations Convention of the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions" (2007) 34 *Syracuse J. Int'l L. & Com.* 405, 412.

¹⁴ *Ibid.*

¹⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations*, Spain CRPD/C/ESP/CO/1 (19 October 2011), p. 6. Available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx> - (last accessed 1 January 2012).

requirement on the part of states parties to the CRPD that their criminal law in relation to sexual offences should not differentiate between persons with disabilities and those without such disabilities in so far as the existence or perpetration of an offence is concerned. In other words, persons with disabilities should be entitled to not only the same level of protection but also to the same level of freedom as persons without disabilities in the vindication of their rights to sexual expression.

The Right to Live Independently and to be Included in the Community

Quinn and Stein argue that given that one of the central motivations for the adoption of the CRPD was the ‘invisibility’ of persons with disabilities from both international law and their communities, the achievement of independent living is ‘critically important to the intellectual and political structure of the CRPD and forms a crucible through which to judge what effect the treaty has on the daily lives of persons with disabilities.’¹⁶ Article 19 seeks to protect the right to independent living in the following ways:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

The right to develop intimate relationships and to sexual expression can be considered a key element of the right to independent living. The text of Article 19 reinforces the commitment made in Article 12 to respect the choices of people with disabilities, including ‘where and with whom to live’ – an issue closely connected with personal relationships. Article 21 also recognises the right to freedom of expression – which should include sexual expression. In order to facilitate true participation and inclusion in the community, people with disabilities must be given the same freedom as others to interact with their

¹⁶ ECCL, Bulic, Evans, Parker, Quinn, Stein, *Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities*, (2009) p 27.

peers, as well as the supports required to develop and communicate their decisions, as discussed above.

Article 4(2) is relevant to understanding the nature of states parties' obligations with respect to Article 19. It states that '[w]ith regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.' States are therefore required to take all possible steps, using the resources available to them to their maximum ability, to fully realise the rights of persons with disabilities to live independently and be included in the community.¹⁷

This right must also be read in a holistic context alongside Article 9, which requires that states parties ensure that the right to live independently is supported by adequate accessibility requirements being met, Article 14(1), which states that persons with disabilities should enjoy the right to liberty and security of the person on an equal basis with others, and Article 26, which requires states parties to take 'effective and appropriate measures ... to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.'

Central to any understanding of Article 19 and its implications for domestic laws which criminalise the right to sexual expression of persons with disabilities is Article 8 of the CRPD. Subsection 1 of this provision states that States Parties are required to adopt 'immediate, effective and appropriate measures' to raise awareness throughout society regarding persons with disabilities, to foster respect for the rights and dignity of persons with disabilities, to combat stereotypes, prejudices and other harmful practices relating to persons with disabilities and to promote awareness of the capabilities and contributions of persons with disabilities. Such measures should include states parties' promotion of awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities¹⁸, as well as the initiation and maintenance of effective public awareness campaigns designed to nurture receptiveness to the rights of persons with disabilities.¹⁹ When read in conjunction with Article 19, Article 8 places an onus on states parties to actively promote policies and practices which recognise the right of persons with

¹⁷ *International Association of Autisme Europe v France*, Collective Complaint 13, decision 4 November 2003. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC13Merits_en.pdf (last accessed 11 January 2012).

¹⁸ Article 8(2)(d), United Nations Convention of Rights of Persons with Disabilities.

¹⁹ Article 8(2)(a)(i), United Nations Convention of Rights of Persons with Disabilities.

disabilities to fully vindicate their sexual rights as equal members of the community who have the right to live independently.

The Right to Privacy and to Respect for Home and Family Life

The right to privacy and to respect for home and family life, protected in Articles 22 and 23 of the CRPD also finds expression in many other human rights treaties, including the European Convention on Human Rights, and in domestic Bills of Rights, including the Irish Constitution. The CRPD provides the most detailed explanation of how the right to privacy should apply in the context of disability and is worth re-stating here:

Article 22

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy

Article 23

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

These provisions support the contention that people with disabilities have equal rights to relationships as do others who have reached the age of consent. The Convention prohibits any 'arbitrary or unlawful interference' with privacy, including privacy in connection with sexual relationships, and arguably, the existence of a specific offence which criminalises sexual activity engaged in by people with disabilities, violates the right to privacy which people with disabilities should enjoy. Similarly, such an offence constitutes discrimination regarding relationships entered into by people with disabilities, which is specifically prohibited in Article 23.

Article 8 of the European Convention of Human Rights (ECHR) also protects the right to private and family life, home and correspondence. This has been interpreted to prohibit the criminalisation of consensual adult homosexual

activity,²⁰ as well as reproductive rights of women²¹ and the right to engage in family planning.²² If applied to the current context, where the consent of people with disabilities to sexual relationships could be subject to more rigorous scrutiny than that of other adults, it is arguable that such an approach could also be in violation of the right to privacy in the ECHR.

The unenumerated right to privacy in the Irish Constitution which originated as a right to marital privacy,²³ has also been extended to confer a broader right to privacy.²⁴ For both the ECHR and the Constitution, the right to privacy can only be restricted in the interests of the common good, public order or morality – however, none of these mitigating factors apply in the context of sexual relationships between people with disabilities. The only basis on which a more rigorous test for capacity to consent is proposed in the context of disability is on the basis of the need for protection – and the right of people with disabilities to be free from abuse, violence, and exploitation. However, it has been argued above that the most effective forms of protection from violence, exploitation and abuse are the introduction of positive programmes to safeguard adults, provide appropriate sexual education, and support to augment decision-making capability, including advocacy and other forms of support.

SECTION TWO: CURRENT SEXUAL OFFENCES LAW IN IRELAND

Sexual offences under current Irish law include rape²⁵, section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*²⁶, sexual assault²⁷, aggravated sexual assault²⁸, and section 5 of the *Criminal Law (Sexual Offences) Act 1993*. The pivotal aspect of the *actus reus* of rape and other general sexual offences referred to here is the lack of consent. However, there is no statutory definition of consent as regards any of the sexual offences. The Law Reform Commission recommended that consent should be statutorily defined;²⁹ however, the current legal position allows the jury to decide on the issue of consent in individual cases. While there is no statutory definition we must turn to existing case law to

²⁰ *Norris v Ireland*, Application no. 10581/83, European Court of Human Rights, (1988) *Dudgeon v United Kingdom*, Application no. 7525/76, European Court of Human Rights (1981).

²¹ *V.C. v. Slovakia*, Application no. 18968/07, European Court of Human Rights (2011); *K.H. and Others v. Slovakia*, Application no. 32881/04, European Court of Human Rights (2009).

²² *A.B. and C. v. Ireland*, Application no. 25579/05 European Court of Human Rights 2011; *Tysi c v. Poland* Application no. 5410/03 European Court of Human Rights 2007.

²³ *McGee v. The Attorney General and the Revenue Commissioners*, [1974] 1 I.R.

²⁴ *Kennedy & Arnold v Ireland* (1987) IR 587; *Hanahoe v. Hussey* [1997] IEHC 173; *Gray & Ors v Minister for Justice & Ors* (2007) IEHC 52.

²⁵ s.48, *Offences Against the Person Act 1861*; s.2, *Criminal Law (Rape) Act 1981*.

²⁶ s.4, *Criminal Law (Rape) (Amendment) Act, 1990*.

²⁷ s.2, *Criminal Law (Rape) (Amendment) Act, 1990*.

²⁸ s.3, *Criminal Law (Rape) (Amendment) Act, 1990*.

²⁹ Law Reform Commission, *Report on Rape and Allied Offences*, LRC 24-1988.

discover the meaning of and the necessary capacity to consent. In the C case, Murray J defined consent as ‘voluntary agreement or acquiescence to sexual inter-course by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of the facts material to the act being consented to is necessary to be voluntary or constitute acquiescence’.³⁰ Campbell, Kilcommins and O’Sullivan state that this concept of consent is in which the person consenting must be competent and capable and must appreciate and understand relevant facts to make a voluntary choice.³¹ This definition and interpretation suggests that it would be more difficult for people who have impaired decision-making capabilities to lawfully consent to sexual activity, if they are required to reach a certain standard of ‘competence’ or ‘mental capacity’ in order to do so. It is interesting to note therefore, that the offence provided for in section 5 of the 1993 Act is silent on the issue of whether or not the consent of the victim can be used as a defence.

Section 5 of the *Criminal Law (Sexual Offences) Act 1993* is a specific provision for sexual offences against persons who are ‘mentally impaired’. The only defences set out in section 5 are if the parties are married and where the accused shows that at the time of the alleged offence they did not know and had no reason to suspect that the person in respect of whom they is charged was “mentally impaired” or if the person who engages in the activity is capable of living independently, and can protect themselves against abuse. ‘Mentally impaired’ is defined in subsection 5 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.’ The definition of the ability to live independently has to date not been explored in the case law regarding this offence.

This offence places a burden on defendants to prove the non-existence of a mental disability in order for their sexual activity to be found lawful. Thus section 5 limits the rights to sexual expression and freedom of persons with mental disabilities.³² By placing this burden of proof on defendants, the provision discriminates against persons with mental disabilities, and places a higher standard for consent to sexual activity on people with disabilities than that which exists for other consenting adults.

Section 5.03 of the Irish Law Reform Commission’s Consultation Paper on Sexual Offences and Capacity to Consent, identifies the arguments presented against the need to provide specific offences based on the idea that this would ‘limit the sexual freedom of people with limited decision-making capacity and

³⁰ *People (DPP) v C* [2001] 3 IR 345,360.

³¹ Campbell, Kilcommins, O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press; 2010) p 553.

³² Law Reform Commission, *Consultation Paper: Sexual Offences and Capacity to Consent* (LRC CP 63 - 2011), p 13.

that it may be discriminatory to target a group in a manner which differs from the 'non-disabled' population.'³³ However, ultimately, the Consultation Paper does not propose taking a disability-neutral approach, as it suggests the introduction of a specific offence of abuse of power or position of trust relating to a person with a disability, in addition to the imposition of a functional test for capacity to consent to sexual activity.

SECTION THREE: COMPARATIVE LEGISLATION ON SEXUAL OFFENCES

As noted in the introduction, few countries have introduced disability-neutral legislation on sexual offences which would be compliant with the CRPD, although there has been some commentary on the need for such an approach in various jurisdictions. This section highlights some examples which substantiate the argument for a disability-neutral approach to sexual offence law.

England and Wales

The United Kingdom does not have disability-neutral legislation due to the enactment of the *Sexual Offences Act 2003* which has a range of offences specific to victims with a mental disorder or a 'learning disability'³⁴. However this provision has been criticised. For example, Maher is critical of section 30 as he states that the offence under that provision is having sex with a person who is unable to refuse because of a mental disorder and knowing of that mental disorder. This does not involve any issue of lack of consent by the complainant or of the accused knowing of the lack of consent. Having sex with someone who does not consent to it is wrong, no matter the cause of the lack of consent, and whether or not the lack of consent is due to a mental disorder.³⁵

Scotland

The Milan Committee in 2001 discussed disability neutral legislation as an alternative to making provision for a separate offence relating to intellectual disability and sexual offences, stating that the purpose of such an approach 'would be to redefine consent generally in relation to sexual behaviour to something closer to "free agreement"'.³⁶ The Committee found that this approach

³³ Law Reform Commission, *Consultation Paper: Sexual Offences and Capacity to Consent* (LRC CP 63 - 2011) p 63.

³⁴ ss30-33, *Sexual Offences Act 2003*. Available at: <http://www.legislation.gov.uk/ukpga/2003/42/contents> (last accessed 11 January 2012).

³⁵ Maher, "Rape and Other Things: Sexual Offences and People with Mental Disorder" (2010) 14 *Edinburgh Law Review* p 131.

³⁶ Milan Committee, *New Directions: Report on the Review of the Mental Health Scotland Act 1984*, (2001) SE/2001/56. Available at: <http://www.scotland.gov.uk/health/mentalhealthlaw/millan/Report/rnhs-00.asp> (last accessed 11 January 2012).

could avoid the need for special offences to protect people with mental disorder, by bringing abuse of this group within the definition of generally applicable crimes such as rape'.³⁷ It was felt that redefining consent to free agreement would be more consistent with the principle of non-discrimination in that people with 'mental disorders' would not be treated differently when it came to sexual activity from the non-disabled population.³⁸

Australia

In 1991, Australian Model Criminal Code Officers Committee (MCOCC) presented a brief Issues Paper highlighting the need for a more comprehensive review of the area.³⁹ The Victorian Law Reform Commission is cited to have expressed views that reject a broader test determining the lack of capacity to consent based on the incapability of 'appreciating the nature and significance of sexual intercourse, as unduly restricting peoples' sexual rights'.⁴⁰ The Victorian Law Reform Commission then recommends that the existing capacity to consent should be applied in all cases of sexual offence. This capacity test is based on an understanding of the nature of the act and not the consequences.

On the issue of specific sexual offences in cases where persons with disabilities are involved the Victorian Law Reform Commission questions the appropriateness of creating a specific offence in cases where people with an intellectual disability are involved and identify some controversy. The arguments against specific offences for persons with an intellectual disability, gathered by the New South Wales Law Reform Commission and the Victorian Law Reform Commission read:

- there is sufficient protection provided by the general law, for example if the person lacks capacity to consent, then the intercourse is without consent;
- specific offences limit the sexual freedoms of people with an intellectual disability; and
- people with an intellectual disability should not be singled out in this way from, for instance, people with some other form of impaired mental functioning.⁴¹

In 1999 the MCOCC prepared a report on the Sexual Offences Against the Person. The report deals with the area of the criminal law which criminalises sexual offences against the person. In their review the MCOCC cite the Victorian Law Reform Commission to have expressed views against altering the existing test as to capacity to consent (towards a deeper understanding of the

³⁷ *Ibid.* at paragraph 21.55.

³⁸ Law Reform Commission, *Sexual Offences and Capacity to Consent* (LRC CP 63 - 2011), p 151.

³⁹ New South Wales Attorney General's Department, *The Intellectually Disabled in the Criminal Justice System*, (Criminal Law Review Division, Issues Paper; 1991).

⁴⁰ *Ibid.*

⁴¹ Law Reform Commission, *Consultation Paper: Sexual Offences and Capacity to Consent* (LRC CP 63 - 2011) p 63.9.12.

nature of the act). The Victorian Commission concluded that the purpose of the law is to protect against sexual violence or exploitation, rather than assessing their knowledge of the consequences of the act. It contends therefore that the emphasis should be on education as a means to protect from sexual exploitation of every person, disabled or not. MCOCC concur that 'enabling those with impaired mental functioning to understand completely the consequences of their actions is a wider social responsibility that needs to be met through education.'

⁴²

The above discussion of comparative jurisdictions highlights the benefits of introducing disability-neutral legislation. Although few countries have taken this approach, it should be noted that the vast majority of sexual offences legislation in the countries examined was introduced prior to the entry into force of the CRPD. It is hoped that the Committee on the Rights of Persons with Disabilities, will, in time, clarify that a disability-neutral approach to sexual offences legislation is the most appropriate to ensure compliance with the Convention.

SECTION FOUR: APPLYING INTERNATIONAL HUMAN RIGHTS STANDARDS TO CONSENT TO SEXUAL RELATIONSHIPS

The requirement for disability-neutral sexual offences legislation under the CRPD

It is clear from the above exposition on the general principles and specific rights contained in the CRPD that all legislation enacted by states parties must be, at the very least, non-discriminatory and based on the principles of equality and autonomy i.e. disability-neutral. The criminalisation of sexual activity involving persons with mental disabilities in section 5 *Criminal Law (Sexual Offences) Act 1993* is therefore contrary to the provisions of the CRPD.

The Law Reform Commission (LRC) has provisionally recommended that section 5 of the *Criminal Law (Sexual Offences) Act 1993* should be replaced by a law that provides that the test for assessing capacity to consent to sexual relations should reflect the functional test of capacity to be taken in the proposed mental capacity legislation, that is, the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made. The application of this test would mean that a person lacks capacity to consent to sexual relations, if he or she is unable:

- (a) to understand the information relevant to engaging in the sexual act;
- (b) to retain that information;

⁴² Model Criminal Code Officers Committee of the Standing Committee off Attorneys-General, *Model Criminal Code*, (1999) p 183.

- (c) to use or weigh up that information as part of the process of deciding to engage in the sexual act; or
- (d) to communicate his or her decision (whether by talking, using sign language or any other means).⁴³

The functional approach to the assessment of capacity which is advocated by the LRC is outlined in their Consultation Paper as follows:

The functional, issue-specific, approach requires that capacity is assessed in the setting in which the issue arises. It thus rejects the approach that once capacity has been established in one area it is seen as conclusive proof of capacity in other areas regardless of the circumstances. Equally importantly, the functional approach does not accept the view that merely because a person lacks capacity in one aspect of decision-making they must lack capacity in another area. In other words, the functional test rejects a “status” approach under which capacity could be determined on an “all or nothing” basis, in which a single test could deprive a person of their legal capacity. ... The functional approach defines capacity as the ability, with assistance if needed, to understand the nature and consequences of a decision within the context of the available range of choices; and to communicate that decision, with assistance as needed.⁴⁴

While the functional approach represents an improvement on previous status-based approaches to determining an individual’s mental capacity, the international debate on legal capacity has progressed beyond the functional approach since the entry into force of the CRPD. In particular, the imposition of a test of capacity for persons who are deemed to possess an intellectual or psycho-social disability is, on its face, contrary to the requirements of Article 12 of the CRPD which, as outlined in more detail earlier, establishes⁴⁵ that all people with disabilities must be recognised as having legal capacity to consent to sexual relations on *an equal basis with others*.⁴⁶ By definition, this precludes the use of a separate standard for people with disabilities for assessing consent to sexual relations. It also precludes the imposition of the burden of proof on persons with such disabilities where that burden is not placed on persons without such a disability. While *prima facie*, a functional test for capacity to consent might appear to be disability-neutral, it is disproportionately more likely to be applied where a person has an existing diagnosis of intellectual disability or mental health difficulty. In addition, the criteria to fulfil the functional test also make it disproportionately more difficult for people with mental disability to be deemed to have capacity.

As a result, the existence of sexual offences legislation which:

⁴³ Law Reform Commission, *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63 - 2011), p 177-178.

⁴⁴ *Ibid.*, p 31-32.

⁴⁵ Article 12, United Nations Convention on the Rights of Persons with Disabilities; Report of Special Rapporteur on Torture, A/63/175, para 44 (28 July 2008).

⁴⁶ Article 12(2), United Nations Convention on the Rights of Persons with Disabilities.

- i. applies disproportionately to persons with mental disabilities, and
- ii. applies a *prima facie* burden of proof on persons with mental disabilities to establish the existence of their capacity,

is inconsistent with the requirements of the CRPD.

A disability-neutral sexual offence act in Ireland

It is submitted that in order for Irish criminal law to be compatible with the CRPD, particularly Article 12 of the Convention, legislation which applies equally both to persons with and without mental disabilities is required. Such legislation should therefore be based on:

1. The recognition of the legal capacity of all persons to consent to sexual relations, and
2. The assessment of the existence of consent to sexual activity by applying disability-neutral criteria.

A statutory test for the existence of consent could contain criteria which are identical to those which the Law Reform Commission recommended in its report on *Rape and Allied Offences*⁴⁷ where it suggested that legislation should be enacted which defines consent as follows:

“Consent” means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to these words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.⁴⁸

Such a statutory test for the existence of consent should be applied both to persons with and without mental disabilities. The consequence of this is that the existing Irish sexual offences legislation which define rape and sexual assault need not be amended, merely applied in a disability-neutral manner.

Such an approach to the establishment of the perpetration of a sexual offence complies with the requirements of Article 12 of the CRPD in that it acknowledges the existence of legal capacity in all persons without ignoring the need for adequate and appropriate education and supports to be put in place in order for persons with disabilities to exercise their legal capacity in the area of sexual expression on an equal basis with others. This approach to the assessment of the existence of consent also permits the consideration of the existence of mental (as opposed to legal) capacity in all sexual offence cases, not just in cases involving persons diagnosed with disabilities. Although few jurisdictions have introduced disability-neutral legislation to date, this provides

⁴⁷ Law Reform Commission, *Rape and Allied Offences* (LRC 24-1988).

⁴⁸ *Ibid.*, p 9.

an opportunity for Ireland to lead in addressing the complex issue of how to balance the right of people with disabilities to make their own decisions with the need to ensure protection from abuse. Further research on the possible ways of framing disability-neutral legislation on sexual offences could perhaps be considered further prior to the publication of the Law Reform Commission's final report on this issue.

Sexual Offences committed by those in a position of trust or authority

While it is to be acknowledged that a specific offence of rape or sexual assault committed by a person in a position of trust or authority is necessary, such an offence should not be limited in its application to persons with disabilities. This would be inconsistent with the disability-neutral requirements of the CRPD.

It is therefore suggested that while such an offence should exist, it must apply to persons in a position of trust or authority generally, i.e. those found to have committed a sexual offence against a member of any 'at risk' group. This would include older persons, persons who suffer from addiction, refugees, undocumented persons, as well as persons with disabilities. It should therefore form part of the general criminal law on sexual offences which applies to the entire community.

One example of legislative language which could be used for such an offence can be taken from the Norwegian penal code, which criminalises activity whereby "any person engages in or aids and abets another person to engage in sexual activity by misuse of a position, or a relationship of dependence or trust."⁴⁹

Supports

As established above, Article 12(3) of the CRPD requires that supports be put in place to enable and enhance an individual's decision-making capabilities and to allow her to exercise her legal capacity. While this probably cannot be done at the moment an individual is deciding to engage in sexual relations, it can be done throughout an individual's life with proper and tailored sexual education. Additionally, the functional assessment of consent to sexual relations, which is applicable to everyone and is established in case law, requires that an individual have 'knowledge or understanding of the facts material to the act being consented.'⁵⁰ In order for any individual to reach this standard, she or he must be provided with the requisite knowledge related to the nature and

⁴⁹ The Norwegian Penal Code, Ch. 19 Sexual Offences § 193. Available at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf

⁵⁰ *People (DPP) v C* (2001) 3 IR p 345,360.

consequences of sexual relations. This requires sexual education that is accessible to all individuals, those with and without disabilities.

A full analysis of the most effective forms of sexual education should be thoroughly undertaken beyond the bounds of this submission. Although the area is in need of more attention, there has been some very important work done. One example is a handbook that was published in 2010 in the United Kingdom, titled *Sexuality and Learning Disabilities*, and edited by McCarthy and Thompson.⁵¹ The book is aimed at people who are supporting people with learning disabilities, including service providers, family members, and others. It contains excellent examples of how to provide support on the issue of sexuality; including supporting safe sexual expression in the form of masturbation, as well as describing how to provide education on having safe sexual relationships with others. There is a clear theme throughout the book that illustrates that sexual expression is equally important for people with disabilities as it is for the rest of the world. For our legal system to recognise people with disabilities' right to sexual expression it is critical that people with disabilities have the capacity to consent to sexual relations recognised on an equal basis with others, and are not subject to a separate standard.

While it is important to have information for support people regarding how to provide support in decision-making regarding sex, it is also crucial to ensure that information is available and accessible for people with learning disabilities themselves. An important piece of work in the area is the final report of the sexuality project by CHANGE, published in the UK in 2010.⁵² The report is titled, *Talking about sex and relationships: the views of young people with learning disabilities*, and was inclusive of people with intellectual disabilities throughout its creation. It is also published in an accessible format so people with intellectual disabilities can read and learn from the report. The findings of the report demonstrate that, although many people with intellectual disabilities are in healthy sexual relationships, there are many who would like to be in relationships, but are physically and socially isolated from others and do not have the opportunity to develop relationships. Additionally, the report notes that sexual education for people with disabilities is seriously lacking and more attention needs to be given to this area. In Ireland and the UK, people supporting people with intellectual disabilities are reluctant to encourage sexual relationships because they are fearful of legal liability and/or they are not informed regarding the rights of individuals with disabilities regarding sexual expression. These barriers cannot be overcome without the recognition of the right to legal capacity to consent to sexual relations for people with intellectual disabilities. Irish researchers with intellectual disabilities have also completed a

⁵¹ McCarthy and Thompson, *Sexuality and Learning Disabilities*, (Pavilion Publishing Ltd; 2010).

⁵² CHANGE, *Talking about sex and relationships: the views of young people with learning disabilities*, (2007-2010) (the final report of the sexuality project). Available at: <http://www.changepeople.co.uk/freebies-download.php?id=22> (last accessed 11 January 2012).

report on Relationships and Supports, published in March 2011.⁵³ The findings display barriers which people with intellectual disabilities experience in forming relationships, including sexual relationships, and the researchers and research participants discussed forms of support (from families and staff) they would like to facilitate them in their relationships.

More reports such as those described above are much needed, particularly in the Irish context. These reports provide examples of how support can be provided for people with intellectual disabilities in making decisions regarding consenting to sexual relations. They also show that support in this area is much desired by people with intellectual disabilities and people who support them.

CONCLUSION

Effective sexual offences legislation which protects both the sexual expression of people with disabilities and ensures freedom from violence, exploitation and abuse is a vital aspect of our criminal law. The proposal for disability-neutral legislation put forward in this submission aims to achieve this goal, by replacing a front-end functional test of capacity to consent with a general test of consent which can take into account an individual's decision-making capability, and introducing a general offence of abuse of position or power, which applies to all adults who could be in a vulnerable situation, including people with disabilities. This proposal can achieve the appropriate balance between freedom and protection, where it is combined with an effective adult protection system and adequate supports to enable people with disabilities to express their will and preferences. It also reflects the underlying philosophy of the UN Convention on the Rights of Persons with Disabilities, ensuring respect for the inherent dignity of people with disabilities, and upholding the principle of non-discrimination at the core of the Convention.

⁵³ Inclusive Research Network with Intellectual Disabilities, National Federation of Voluntary Bodies, National Institute for Intellectual Disability, *Relationships and Supports Study: People with Intellectual Disabilities in Ireland*, (2010). Available at: <http://www.fedvol.ie/fileupload/Relationships%20and%20Supports%20Report%202010.pdf> (last accessed 13 January 2012).