

Sexual Offences and Capacity to Consent

In 2013, the Commission published a [Report on Sexual Offences and Capacity to Consent \(LRC 109-2013\)](#) (3rd Programme of Law Reform, Projects 12 and 14) which followed the publication of its [Consultation Paper on Sexual Offences and Capacity to Consent \(LRC CP 63-2011\)](#). The Report complements the ongoing (2013) general review of the law on sexual offences law being undertaken by the Department of Justice and Equality. It also builds on the Commission's previous work on the civil law of capacity culminating in the 2006 Report on Vulnerable Adults and the Law (LRC 83-2006), which recommended the enactment of new adult capacity legislation, which is now envisaged in the Government's Assisted Decision-Making (Capacity) Bill 2013. The Commission's general approach in the 2013 Report is that the law should recognise both the right of persons whose capacity to consent may be at issue (because of, for example, intellectual disability) to express their sexuality and also that they may be at risk of sexual exploitation or abuse. The Commission also recommends that any reform in this area must be accompanied by appropriate inter-agency co-ordination and supports, in particular to provide for national standards of sex education in this area. The main recommendations in the Report are:

1. Section 5 of the Criminal Law (Sexual Offences) Act 1993 should be repealed and replaced because it fails to respect the right to sexual expression of persons whose capacity may be at issue and does not deal with all situations in which exploitation or abuse may arise;
2. Legislation should be enacted to replace section 5 of the 1993 Act that would be based on a functional test of capacity, which is a rights-based approach that is in line with the UN's 2006 Convention on the Rights of Persons with Disabilities and also with the Government's Assisted Decision-Making (Capacity) Bill 2013;
3. The legislation to replace section 5 of the 1993 Act should provide that a person has capacity to consent to any sexual act where he or she is able to choose to agree to the specific sexual act involved (including where he or she has been given suitable decision-making assistance) because he or she: (a) understands the nature and reasonably foreseeable consequences of the act; (b) can use or weigh up relevant information in deciding whether to engage in the sexual act; and (c) is able to communicate his or her decision (whether by talking, using sign language or any other means);
4. The new legislation should make clear that no offence is involved where two persons whose capacity to consent may be at issue (such as because of an intellectual disability) engage in a sexual act and where no exploitation or abuse of either person is involved;
5. The new legislation should cover all forms of sexual assault (including sexual assault and rape) and also any other acts that involve exploitation or abuse (such as unwillingly having to watch others involved in sexual acts);
6. The accused should, in general, have a defence of reasonable belief that the person has capacity to consent, but this defence should not be available to persons in a position of trust or authority (which should include close family members and professional carers) in relation to

whom there should be a rebuttable presumption that he or she knew that the person did not have capacity to consent;

7. Guidelines should be developed for those working in the criminal justice system to identify current obstacles and examine methods by which the participation in court proceedings of persons covered by the proposed legislation could be enhanced;

National standards should be developed by all relevant agencies to ensure a consistent approach to sex education, which should include the risks of exploitation or abuse, for all persons affected by the reforms proposed in the Report.