



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

SEXUAL OFFENCES AND CAPACITY TO CONSENT

(LRC CP 63 – 2011)



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Law Reform Commission

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 160 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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INTRODUCTION

A Background to this Project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ which proposes a general review of the law on sexual offences with a view to its consolidation. Since the *Third Programme* was formulated, the Commission has become aware that the Department of Justice and Equality is engaged in a general consolidation of the law on sexual offences. The Department has indicated that this consolidation process, while comprehensive, would benefit from analysis of specific aspects which the Commission has previously examined, notably the civil law aspects of capacity to consent in the specific context of persons with intellectual disability or limited capacity.² The Commission has therefore concluded that, to complement the Department's consolidation process and to avoid any duplication of work, it should confine this project to a review of how the law deals with the issue of the capacity of persons with limited capacity to consent to sexual relations.³ At a wider level, this Consultation Paper also complements the codification of the criminal law currently being undertaken by the Criminal Law Codification Advisory Committee.⁴

¹ Law Reform Commission *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 12.

² The Commission has previously examined the law on capacity in its: *Consultation Paper on Law and the Elderly* (LRC CP 23-2003); *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005); *Report on Vulnerable Adults and the Law* (LRC 83-2006), *Report on Bioethics: Advance Care Directives* (LRC 94-2009) and *Report on Children and the Law: Medical Treatment* (LRC 103-2011).

³ The Commission engaged in a comparable co-operative exercise in Project 20 of its *Second Programme of Law Reform 2000-2007*, which formed part of the general review of the law of charities (currently the responsibility of the Department of Justice and Equality). The Commission contributed an analysis of the duties of charitable trustees and of charitable structures in its *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006). The general review of the law ultimately led to the enactment of the *Charities Act 2009*, which incorporated a number of the Commission's proposals on charitable trustees.

⁴ The Criminal Law Codification Advisory Committee was established under Part 14 of the *Criminal Justice Act 2006*. In 2011, the Department of Justice and Equality published the Advisory Committee's inaugural *Draft Criminal Code Bill and Commentary*, available at www.justice.ie.

B Problems with current law on sexual offences concerning capacity to consent: section 5 of *Criminal Law (Sexual Offences) Act 1993*

2. The current legislation on sexual offences in the specific context of persons with intellectual disability or limited capacity is contained in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. Section 5 of the 1993 Act implemented some of the recommendations made by the Commission in its 1990 *Report on Sexual Offences against the Mentally Handicapped*,⁵ but it retains what might be described as a paternalistic or protective approach to the specific aspect of the law under discussion in this Consultation Paper. As discussed in detail in Chapter 1, section 5 of the 1993 Act reflects the legitimate aim of protecting from sexual exploitation or abuse persons who are at risk or are otherwise vulnerable to such exploitation or abuse because of their intellectual disability or limited capacity. Section 5 of the 1993 Act fails, however, to provide sufficient clarity that it recognises the rights of persons with intellectual disability or limited capacity to have a fully-expressed consensual sexual life.

C The Commission's general approach: empowerment and protection

3. The Commission's general approach in this Consultation Paper is that the law should recognise both the right of persons with intellectual disability to express their sexuality and also that they may be at risk or are otherwise vulnerable to sexual exploitation or abuse. The Commission acknowledges in this respect that a rights-based approach to the sexuality of persons with intellectual disability has only become a real concern in relatively recent times.

4. Indeed, as shown in the discussion in this Consultation Paper, overall policy concerning persons with intellectual disability has gone through enormous changes in a relatively short period in the second half of the 20th century and the beginning of the 21st century. The eugenics movement of the late 19th century and early 20th century, now discredited, was an extreme instance of where poor understanding of intellectual disability led to gross violation of rights, including forced sterilisation. Even when these aspects of eugenics were ended, largely from the middle of the 20th century, a continuing major feature of policy that continued until the late 20th century was overwhelmingly based on taking persons with intellectual disability out of their family and community setting, detaining them in large institutions with relatively limited developmental support structures where, often, persons with mental illness were also detained. While some improvements were evident in the

⁵ LRC 33-1990.

second half of the 20th century, notably in terms of providing some level of vocational training in the institutional setting, the predominant policy approach continued to be based on separation.

5. Towards the end of the 20th century, developed countries such as Ireland recognised the need to close these large institutions and move towards a community-based approach or social model of policy development. As a result, persons with intellectual disability were integrated more fully into, for example, the mainstream educational and employment setting. This reflected a better understanding of the capacity of persons with intellectual disability, as well as the need to recognise their rights. Internationally, from the 1970s onwards the member states of global bodies such as the United Nations laid the foundation for the recognition of the rights of persons with intellectual disability, culminating in the 2006 UN Convention on the Rights of Persons with Disabilities (which, of course, applies to persons with physical disability as well as persons with intellectual disability). This rights-based analysis is also seen in the case law of the Irish courts concerning the rights under the Constitution of Ireland of persons with intellectual disability, beginning with the 1993 High Court decision in *O'Donoghue v Minister for Health*,⁶ discussed in Chapter 1, below.

6. The Commission also notes that, with the advent of a rights-based approach to persons with intellectual disability, and a move from large institutions to a community setting, there has also been a corresponding increase in research into the risks associated with the exploitation of their rights. The Commission is conscious from its previous work on the civil law aspects of intellectual capacity that the risk of abuse, whether financial, sexual or physical, is a matter that requires an appropriate response, both in terms of policy and, where relevant, legislation. In the context of the criminal law, the Commission recognises that any reform proposals must take account of the need to ensure that suitable protections from the risk of abuse remain a feature of the law. The Commission is especially conscious in this regard that any reformed law on sexual offences must contain a rights-based analysis and also contains robust references to standards of consent. As the discussion in the Consultation Paper makes clear, consent to sexual relations is one of the most personal of matters for all individuals, and the criminal law should reflect this, whether dealing with consent in general or in the context of persons with an intellectual disability. In preparing this Consultation Paper, the Commission has also taken into account the importance of court procedure and related issues of evidence. In this respect, any reforms must have regard to constitutional and international human rights standards concerning fair trial procedures, both for any person with intellectual disability who appears as a witness and also any person with intellectual disability who is charged with a sexual offence.

⁶ [1993] IEHC 2, [1996] 2 IR 20.

D Terminology and intellectual disability

7. Complementing the general development of policy in this area, the terminology and language used in this area has also undergone, and continues to undergo, considerable development. In this Consultation Paper, the Commission is conscious of the need to use suitable terminology that indicates respect and does not insult or demean. Equally, the Commission is aware that the terminology used in this area is prone to the “euphemism treadmill.”⁷ This means that, while we all attempt to ensure that respectful terminology is used, any language runs the risk that, over time, it eventually comes to have a derogatory or insulting meaning.

8. From the perspective of the early 21st century, it is difficult to judge whether the language used in 19th century medical practice and legislation concerning persons with intellectual disability would have been regarded at the time as insulting or demeaning. With the passage of time, it is clear that, to a contemporary reader, legislation from the 19th century that remains in force contains objectionable language. Thus, the *Lunacy Regulation (Ireland) Act 1871* – which contains terms such as “lunatic,” “idiot” and “person of unsound mind” – remains on the Irish statute book in 2011 as the principal legislation regulating the care and protection of persons with intellectual disability. The Commission’s 2006 *Report on Vulnerable Adults and the Law*⁸ recommended the repeal of the 1871 Act and the enactment of modern mental capacity legislation that would be comparable to legislation enacted in many other states in recent decades, and which would be consistent with relevant international human rights standards, including the 2006 UN Convention on the Rights of Persons with Disabilities. The Commission is aware that the Government is committed to publishing, in early 2012, a *Mental Capacity Bill* that is consistent with the 2006 UN Convention.⁹

⁷ This is also reflected in the comparable literature on the identification of persons based on ethnicity, race, religion, sex and sexual orientation.

⁸ LRC 83-2006.

⁹ The *Programme for Government 2011-2016* contains a commitment to “introduce a Mental Capacity Bill that is in line with the UN Convention on the Rights of Persons with Disabilities”. The *Government Legislation Programme, Autumn Session 2011*, available at www.taoiseach.ie, states that the *Mental Capacity Bill*, which is to take account of the Commission’s 2006 Report, is scheduled for publication in early 2012. In September 2011, the Oireachtas Committee on Justice, Defence and Equality requested interested parties to make submissions to the Committee on the proposed mental capacity legislation.

9. Even relatively recent legislation, such as section 5 of the *Criminal Law (Sexual Offences) Act 1993*, contains terminology such as “mentally impaired” that is, to a lesser extent, outdated. Indeed, the Commission’s 1990 Report on which the 1993 Act was based used the term “mentally handicapped” in its title.¹⁰ Again, it is of little consolation that the 1990 Report had recommended the repeal and replacement of section 4 of the *Criminal Law Amendment Act 1935*, which had referred to “any woman or girl who is an idiot, or an imbecile, or is feeble-minded.”

10. The language used in the 1935 Act is clearly objectionable in today’s setting, although it is notable that each term in the 1935 Act has or had a specific meaning that was related to the extent of intellectual ability or disability. Thus, the term “idiot” was used in the past to describe the highest degree of intellectual disability. This would now be described, adapting the WHO classification system,¹¹ as “profound intellectual disability”, indicating an IQ of under 20, in adults a mental age below 3 years, and which would also mean that the person would have severe limits to their capacity for self-care or to guard themselves against common physical dangers. The term “imbecile” indicated an intellectual disability less extreme than “idiot,” and would now often be divided into two WHO-based categories, “severe intellectual disability” and “moderate intellectual disability.” The term “severe intellectual disability” is used to indicate an approximate IQ range of 20 to 34, in adults a mental age from 3 to under 6 years, and likely to mean the person would be in continuous need of support. The term “moderate intellectual disability” is used to indicate an approximate IQ range of 35 to 49, in adults a mental age from 6 to under 9 years. The WHO classification system indicates that this “is likely to result in marked developmental delays in childhood but most can learn to develop some degree of independence in self-care and acquire adequate communication and academic skills. Adults will need varying degrees of support to live and work in the community, and likely to mean the person would be in continuous need of support.”

¹⁰ *Report on Sexual Offences against the Mentally Handicapped* (LRC 33-1990).

¹¹ The discussion here is based on the World Health Organization’s (current) 10th Revised Version of the *International Statistical Classification of Diseases and Related Health Problems* (ICD-10), available at www.who.org. As discussed in Chapter 1, below, the WHO classification system retains the general term “mental retardation”, which is no longer in general use in many countries, including Ireland. The Health Research Board’s National Intellectual Disability Database (NIDD), available at www.hrb.ie, also discussed in Chapter 1, below, uses the WHO classification system but employs the term “intellectual disability” rather than “mental retardation.”

11. The term “feeble-minded” (in some countries the term “moron” was also used) was used to describe the smallest degree of intellectual disability. This would now be described, adapting the WHO classification system, as “mild intellectual disability”, indicating an approximate IQ range of 50 to 69, in adults a mental age from 9 to under 12 years. The WHO classification system indicates that, while this is likely to result in some learning difficulties in school, many adults “will be able to work and maintain good social relationships and contribute to society.” In general, individuals with an IQ of 70 or over may also have a diagnosed intellectual disability, but this could more accurately be described as a learning disability, or that the person has developmental delay. This may often be identified in the educational setting.

12. In Ireland, the 2006 National Disability Survey (NDS) carried out by the Central Statistics Office indicates that 50,400 people in Ireland have a diagnosed intellectual disability. The NDS figure includes 14,000 individuals whose main disability was classified as dyslexia or a specific learning difficulty and 2,500 individuals whose disability was classified as attention deficit disorder. Many of these 16,500 individuals are unlikely to require specific supports outside their specific educational needs. The Health Research Board, which has adapted the WHO classification system in the development of its National Intellectual Disability Database (NIDD), has noted that, in 2009, there were 26,066 people registered on the NIDD.¹² The NIDD registers data only on individuals with an intellectual disability for whom specialised health services are being provided or who, following a needs assessment, are considered to require specialised services in the next 5 years.

13. The Commission acknowledges that, reflecting the “euphemism treadmill,” many other terms commonly used in the past (and which continue to be used) have come to have pejorative meanings, such as “mental handicap” and “mental retardation.” Indeed, the use of “vulnerable adult” in the Commission’s 2006 *Report on Vulnerable Adults and the Law* could, arguably, also be seen as emphasising disability rather than empowerment. For this reason, the Law Commission for England and Wales suggested in 2010 that the term “adult at risk” might be more suitable in some contexts, in particular where there is a real potential that a person with intellectual disability is open to exploitation or abuse.¹³

¹² *Annual Report of the National Intellectual Disability Database Committee 2009* (Health Research Board, 2010), p.15, available at www.hrb.ie. See also the discussion in Chapter 1, below.

¹³ Law Commission for England and Wales *Consultation Paper on Adult Social Care* (No. 193 2010) at paragraph 12.28 fn 26, citing Association of Directors of Adult

14. In the wider context of everyday speech, terms such as “cretin”, “handicapped”, “mongol”, “moron,” “retard,” “retarded” and “spastic” – many of which also have, or had at one time, specific legal or medical meanings – are also often used pejoratively, whether consciously or unconsciously. The Commission also notes that, on the other hand, huge efforts have rightly been made both in the literature and in policy formation to restrict the use of derogatory terms¹⁴ and to encourage the use of positive language such as “ability” (not disability), “developmental delay” (to indicate the individual’s potential) and “capacity” (not incapacity).

15. The terminology used in this area is clearly subject to ongoing development and change, and the Commission accepts that any proposals to replace existing legislation, whether the *Lunacy Regulation (Ireland) Act 1871* or section 5 of the *Criminal Law (Sexual Offences) Act 1993*, must take account of this reality while ensuring that any chosen terminology indicates appropriate respect for those addressed or affected by any resulting legislation. The Commission notes that the leading international human rights instrument in this area, the 2006 UN Convention on the Rights of Persons With Disabilities, uses the term “disability” while clearly promoting a rights-based approach to persons with disability. Similarly worthy of note is “Rosa’s Law,”¹⁵ enacted in 2010 by the US Federal Congress, which replaces the term “mental retardation” with the term “intellectual disability” in all US federal legislation. The term “intellectual disability” (or ID) is also commonly used in Ireland in this respect.¹⁶ While there is, therefore, no universal agreement on appropriate terminology, and bearing in mind the risks connected with the “euphemism treadmill,” the Commission has concluded that it should use “intellectual disability” in this Consultation Paper as

Social Services *Safeguarding Adults: A National Framework of Standards* (2005) at 5, discussed in Chapter 6, below.

¹⁴ The Commission accepts, of course, that many individuals and groups may seek to use or “reclaim” pejorative terms to promote greater awareness. In the context of disability generally, the English song writer, rock artist and disability campaigner Ian Dury (who had contracted polio as a child) wrote the song *Spasticus Autisticus* in 1981. This was in reaction to his perception that the 1981 International Year of the Disabled was based on a paternalistic and patronising view of disability.

¹⁵ Public Law 111-256, enacted on 5 October 2010. Section 1 of the 2010 Act provides that it is to be cited as “Rosa’s Law”, which refers to Rosa Marcellino, a Special Olympics athlete: see www.specialolympics.org/rosas-law.aspx.

¹⁶ See the discussion in Chapter 1, below, of the Health Research Board’s National Intellectual Disability Database (NIDD), available at www.hrb.ie.

a general term to include persons whose decision-making or cognitive capacity may be limited.¹⁷

E Connection between reform of the law and the policy setting

16. The Commission has already noted briefly the important development of policy in this area, in particular the move from an institutional approach to a community and rights-based approach to persons with intellectual disability. In developing this Consultation Paper, the Commission is extremely grateful to the many groups and individuals (listed in the Acknowledgements page) who assisted the Commission with insights into the reality of sexual lives for persons with intellectual disability, in particular the challenges that remain to achieve a full expression of their sexuality. The Commission is especially conscious in this respect that reform of section 5 of the *Criminal Law (Sexual Offences) Act 1993* will not, by itself, lead to change but that it may at least remove a barrier to change.

17. For that reason, the Commission discusses in the Consultation Paper some aspects of the policy setting that are in ongoing transition; and that these will require further adjustment to reflect any replacement of section 5 of the 1993 Act. In this respect, it is important to note the combined effect of the WHO classification system and the development of the National Intellectual Disability Database. The WHO classification system is, as noted in the Consultation Paper, based on a functional test of capacity, which determines decision-making ability by reference to the specific decision a person is making and its consequences. In practice, this can be one way in which the individual's self-determination can be realised in the context of their personal social setting. In Ireland where a community-based approach has been in place for many years, for most people with an intellectual disability, this is the same social setting for the rest of the population, their family home, their school, college or workplace (as opposed to the large institutional setting of the past).

18. The challenge identified by the WHO classification and the National Intellectual Disability Database is to ensure that the potential for self-determination can be realised in practice. The Commission is conscious in this respect that the National Disability Authority and the Crisis Pregnancy

¹⁷ 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* (National Disability Authority and Crisis Pregnancy Programme, 2011), pp.29-30, available at www.nda.ie. See the discussion in Chapter 3, below.

Programme has engaged in a significant review of the policy developments required to achieve this.¹⁸

F Outline of this Consultation Paper

19. The Commission now turns to outline briefly the main contents of the Consultation Paper.

20. In Chapter 1, the Commission begins with a detailed examination of section 5 of the *Criminal Law (Sexual Offences) Act 1993*. The Commission notes that section 5 of the 1993 Act is deficient in a number of important respects. In particular, section 5 of the 1993 Act (a) fails to protect people with intellectual disability from unwanted sexual contact generally (in that it is limited to sexual intercourse only) and (b) fails to empower people with limited capacity to realise their right to sexual expression (in that it does not clearly provide for situations of consensual sex between two persons with intellectual disability). Section 5 of the 1993 Act is also deficient in terms of the outdated language used to describe those affected by its provisions.

21. The Commission then discusses briefly the current internationally-recognised classification of intellectual disability, adapted from the World Health Organization (WHO). The Commission also discusses the related meaning of capacity in its legal setting and in particular the prevalence of the functional text of capacity, that is, a decision-specific assessment of capacity. This includes how the functional test is used in the criminal law generally, although not in section 5 of the 1993 Act. The Commission then considers the changing perceptions of intellectual disability in Ireland, which reflect a global shift in thinking away from a medical model towards a social understanding and a rights-based approach. The Commission also places capacity issues in the context of relevant constitutional and international human rights.

22. In Chapter 2, the Commission discusses the convergence of the civil and criminal law in assessing capacity to consent to sexual relationships. This includes discussion of this convergence in the case law developed in England and Wales in the wake of the enactment of reforms of the law on sexual offences in 2003 and the enactment of modern mental capacity legislation in 2005. In the context of civil law determinations as to capacity, which in general concern cases on the capacity to marry, there is no uniform approach in determining capacity to consent to sexual relations, but there is an implicit right

¹⁸ *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme, 2011), available at www.nda.ie, discussed in Chapter 3, below.

that individuals with limited capacity can lawfully engage in sexual relationships. This right may be compromised, however, by the criminal law which, as for example under section 5 of the *Criminal Law (Sexual Offences) Act 1993*, creates offences that may have the effect of limiting the exercise of any perceived rights granted by virtue of the civil law approach while aiming to protect people from sexual exploitation.

23. In Chapter 3, the Commission discusses the general approach to reproductive freedom for people with intellectual disability. This Consultation Paper is concerned primarily with reform proposals in the context of capacity to consent to sexual relations by persons with limited decision-making ability. Nonetheless, the Commission considers it is important to briefly highlight the related issues of reproductive and parental rights of persons with limited decision-making ability. The Commission therefore examines the historical approach which has framed section 5 of the *Criminal Law (Sexual Offences) Act 1993*. The Commission also considers the related policy issue of parental rights in the context of constitutional and international standards. The Commission then concludes the chapter by discussing the range of supports for parents with disabilities.

24. In Chapter 4, the Commission discusses the literature on sexual abuse which suggests that people with disabilities are at a greater risk of sexual abuse and assault than the 'non-disabled' population. In doing so, the Commission sets out the reasons why this may be so, the prevalence of sexual abuse involving people with disabilities and the barriers confronting disclosing of sexual abuse for people with disabilities.

25. In Chapter 5, the Commission examines options for repeal and replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993*, taking into account reform of comparable laws in other countries in recent years. Internationally, there has been considerable reform in this area, which has seen the introduction of legislation in the criminal law context aimed at empowerment of persons with intellectual disability while at the same time achieving protection from harm and exploitation. In this respect, reform of the criminal law has complemented reform of mental capacity and adult guardianship laws, including a rights-based functional approach to assessing capacity.

26. The Commission begins Chapter 5 by examining the challenges posed by the assessment of capacity in the criminal law. This includes situations in which, for a variety of reasons (such as age), consent may not be regarded as legally valid. In the remainder of Chapter 5, the Commission examines how a number of different countries have sought to balance the line between the legitimate right of all adult persons to engage in sexual relationships and the need to protect vulnerable adults from exploitation and abuse. The Commission

examines recent legislative change in England and Wales in the *Sexual Offences Act 1993*, largely replicated in Northern Ireland in the *Sexual Offences (Northern Ireland) Order 2008*, and comparable developments in Scotland, culminating in the *Sexual Offences (Scotland) Act 2009*. The Commission discusses developments in this area in Australia, New Zealand, Canada and the United States.

27. The Commission concludes Chapter 5 by setting out its conclusions and preliminary recommendations. This includes the need to repeal and replace section 5 of the *Criminal Law (Sexual Offences) Act 1993*. The Commission provisionally recommends that section 5 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. Consistently with this, therefore, 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; (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).

28. The Commission also provisionally recommends that there should be a strict liability offence for sexual acts committed by a person who is in a position of trust or authority with another person who has an intellectual disability. 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 loco parentis* to the victim; or any person who is, even temporarily, responsible for the education, supervision or welfare of the victim. The Commission also provisionally recommends that a defence of reasonable mistake should apply, which would mirror that applied to sexual offences against children but that the defence should not be available to persons in positions of trust or authority.

29. In Chapter 6, the Commission examines a number of related procedural issues concerning persons with disabilities and the criminal justice system. The Commission examines the range of special measures which are currently available to eligible witnesses and complainants in Ireland. The Commission also explores what measures are available to witnesses and complainants in other countries. The Commission then discusses the position of defendants who may require assistance and support to enhance their participation in the criminal trial process.

30. Chapter 7 contains a summary of the provisional recommendations made by the Commission in this Consultation Paper.

31. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations are provisional in nature. The Commission will make its final recommendations on sexual offences and capacity to consent following further consideration of the issues and consultation. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of the Report, which will contain the Commission's final recommendations in this area, those who wish to do so are requested to make their submissions in writing to the Commission or by email to info@lawreform.ie by **31 December 2011**.

CHAPTER 1 DEFICIENCIES IN THE CURRENT LAW WITHIN THE POLICY AND RIGHTS-BASED CONTEXT

A Introduction

1.01 In this Chapter, the Commission begins in Part B with a detailed examination of section 5 of the *Criminal Law (Sexual Offences) Act 1993*. The Commission notes that section 5 of the 1993 Act is deficient in a number of important respects. In particular, section 5 of the 1993 Act (a) fails to protect people with intellectual disability or limited capacity from unwanted sexual contact generally (in that it is limited to sexual intercourse only) and (b) fails to empower people with limited capacity to realise their right to sexual expression (in that it does not clearly provide for situations of consensual sex between two persons with intellectual disability). Section 5 of the 1993 Act is also deficient in terms of the outdated language used to describe those affected by its provisions. The Commission then discusses briefly in Part C the current internationally-recognised classification of intellectual disability, adapted from the World Health Organization (WHO). The Commission also discusses the related meaning of capacity in its legal setting and in particular the prevalence of the functional text of capacity, that is, a decision-specific assessment of capacity. This includes how the functional test is used in the criminal law generally, although not in section 5 of the 1993 Act. In Part D, the Commission considers the changing perceptions of intellectual disability in Ireland, which reflect a global shift in thinking away from a medical model towards a social understanding and a rights-based approach. In Part E, the Commission places capacity issues in the context of relevant constitutional and international human rights.

B Detailed analysis of section 5 of *Criminal Law (Sexual Offences) Act 1993*

1.02 The current legislation on sexual offences in the specific context of persons with intellectual disability or limited capacity is contained in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. Section 5 of the 1993 Act implemented some of the recommendations made by the Commission in its 1990 *Report on Sexual Offences against the Mentally Handicapped*,¹ but it

¹ LRC 33-1990.

retains what might be described as a paternalistic or protective approach to the specific aspect of the law under discussion in this Consultation Paper. In general terms, section 5 of the 1993 Act reflects the legitimate aim of protecting from sexual exploitation or abuse persons who are at risk or are otherwise vulnerable to such exploitation or abuse because of their intellectual disability or limited capacity. Section 5 of the 1993 Act fails, however, to provide sufficient clarity that it recognises the rights of persons with intellectual disability or limited capacity to have a fully-expressed consensual sexual life.

(1) Before 1993: section 4 of the Criminal Law Amendment Act 1935

1.03 At the time of the Commission's 1990 *Report on Sexual Offences against the Mentally Handicapped* the only explicit statutory prohibition against sexual exploitation of people whose capacity may be impaired by intellectual disability was in section 4 of the *Criminal Law Amendment Act 1935*. Section 4 of the 1935 Act stated:

“(1) Any person who, in circumstances which do not amount to rape, unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any woman or girl who is an idiot, or an imbecile, or is feeble-minded shall, if the circumstances prove that such person knew at the time of such knowledge or attempt that such woman or girl was then an idiot or an imbecile or feeble-minded (as the case may be), be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for any term not exceeding two years.

(2) No prosecution for an offence which is declared by this section to be a misdemeanour shall be commenced more than twelve months after the date on which such offence is alleged to have been committed.”

1.04 The Commission has already noted in the Introduction to this Consultation Paper the out-dated (and now offensive) wording used in the 1935 Act. In particular, the 1935 Act referred to “any woman or girl who is an idiot, or an imbecile, or is feeble-minded.” It is clear that this would, in today's terms, more properly refer to the different levels of intellectual disability, ranging from “profound intellectual disability” (“idiot”), through “severe intellectual disability” and “moderate intellectual disability” (“imbecile”), and to “mild intellectual disability” (“feeble-minded”).

1.05 In addition section 4 of the 1935 Act was limited in its scope of protection in that it only provided protection to females from vaginal sexual intercourse or attempted intercourse. It did not provide any protection for “mentally handicapped” males (except to the extent that all homosexual sexual acts, whether consensual or non-consensual, constituted criminal offences

under the relevant provisions in the *Offences Against the Person Act 1861* prior to their repeal by the *Criminal Law (Sexual Offences) Act 1993*. It is also notable that section 4(1) of the 1935 Act contained a form of ‘honest mistake’ defence or at least required ‘knowledge’ by the accused of the victim’s limited mental capacity.

1.06 Section 254 of the *Mental Treatment Act 1945* increased the term of imprisonment up to a maximum of 5 years where persons convicted under section 4 of the 1935 Act were in two, quite different, positions of trust: first, a carer of the woman; and, second, a person in the management or employment of a psychiatric institution where the victim was either a patient or prisoner.² The first category, carer, reflected an awareness of the general “at risk” context or vulnerability of persons with disability, and this clearly remains a legitimate concern today (in respect of men and women). The second category reflected the use of institutional settings as the main context in which persons with intellectual disability actually lived in the first half of the 20th century in Ireland.

1.07 Section 4 of the 1935 Act can be described as an example of the paternalistic and gendered approach taken by the law throughout the 20th century regarding persons whose decision-making capacity may be limited. As O’Malley notes its sole concern was the protection of “mentally impaired women” against sexual intercourse and the consequent prevention of pregnancy.³ This approach was consistent with the, now discredited, eugenics movement of the early to mid 20th century.

(2) *The Commission’s 1990 Report on Sexual Offences against the Mentally Handicapped*

1.08 The reform of the law in this area was addressed in the Commission’s 1990 *Report on Sexual Offences against the Mentally Handicapped*.⁴ The 1990 Report followed on from related recommendations made by the Commission concerning the law on sexual offences generally in the 1987 *Consultation Paper on Rape*⁵ and 1988 *Report on Rape and Allied*

² Section 254 of the 1945 Act was repealed when the *Mental Health Act 2001* was brought fully into force: see the Schedule to the 2001 Act and the *Mental Health Act 2001 (Commencement) Order 2006* (SI No.411 of 2006).

³ O’Malley *Sexual Offences: Law, Policy and Punishment* (Round Hall Sweet & Maxwell 1996) at 125.

⁴ LRC 33-1990.

⁵ Law Reform Commission *Consultation Paper on Rape* (LRC CP 1-1987). Prior to 1987, the Commission’s Consultation Papers were described as Working Papers, of which 11 were published between 1977 and 1984.

Offences.⁶ In the 1987 *Consultation Paper on Rape*, the Commission described section 4 of the 1935 Act as being “expressed in the language of a former age”⁷ and the Commission’s subsequent 1988 *Report on Rape and Allied Offences* recommended that the offensive wording in section 4 of the 1935 Act, notably the references to “any woman or girl who is an idiot, or an imbecile, or is feeble-minded” should be replaced with provisions which reflected then-contemporary knowledge of “mental impairment,” such as “mental incapacity” or “mental handicap.”⁸ In its 2005 *Consultation Paper on Vulnerable Adults and the Law: Capacity*,⁹ the Commission noted that contemporary terminology would now favour the use of the term “intellectual disability” in preference to “mental handicap”.¹⁰

1.09 The Commission’s 1990 *Report on Sexual Offences against the Mentally Handicapped*¹¹ sought to strike a balance between protecting persons with intellectual disability from sexual exploitation while at the same time respecting the right of such persons to sexual fulfilment. The Commission recommended that the law should recognise that those whose capacity to make decisions may be limited are capable of giving consent in certain circumstances. The 1990 Report emphasised two distinct principles in relation to the law’s function regarding sexual behaviour and persons with limited capacity:

- (a) the law should respect the right to sexual fulfilment, and
- (b) the law should, so far as practicable, protect persons with limited capacity from sexual exploitation and abuse.¹²

⁶ Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988).

⁷ *Consultation Paper on Rape* (LRC CP 1-1987) at paragraphs 39 and 126. See also Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at paragraph 8.24.

⁸ Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988) paragraph 51. See also Law Reform Commission *Consultation Paper on Rape* (LRC CP 1-1987) at paragraph 126.

⁹ LRC CP 37-2005. In the remainder of this Consultation Paper, this is referred to as the Consultation Paper on Capacity.

¹⁰ LRC CP 37-2005 at paragraph 1.06.

¹¹ Law Reform Commission *Report on Sexual Offences against the Mentally Handicapped* (LRC 33-1990).

¹² LRC 33-1990 at paragraph 27.

1.10 As to respecting the right of persons to sexual fulfilment, the Commission noted there was considerable room for debate as to the extent of the role of the criminal law in protecting persons whose capacity may be limited from sexual exploitation and abuse.¹³ With respect to the limitations on the scope of the criminal law, the Commission considered it essential to be clear as to what is meant by “exploitation” if protection from such exploitation is to be the basis for the involvement of the criminal law in this area.¹⁴

1.11 As the Commission has previously noted, the language used in section 4 of the *Criminal Law Amendment Act 1935* was, even by 1990, “both offensive and out of date” and this alone would have justified its repeal and replacement with a more appropriately worded provision.¹⁵ In its 1990 Report, the Commission went further than the recommendation in the 1988 Report that the section should be reformulated with more acceptable terminology. The Commission acknowledged however that the categorisation of persons who should be protected was “a question of considerable difficulty”.¹⁶ Ultimately, the Commission recommended that section 4 of the 1935 Act be repealed and replaced with an indictable offence of sexual intercourse with “another person who is at the time of the offence a person with mental handicap, or suffering from mental illness, which is of such a nature or degree that the person is incapable of guarding himself or herself against exploitation.”¹⁷ The Commission also recommended the enactment of a parallel offence in respect of anal penetration and other acts of sexual exploitation.¹⁸ Of particular importance to this Consultation Paper, the Commission recommended that a sexual relationship between persons with limited mental capacity or mental illness should not *in itself* constitute an offence. The Commission noted:

“[i]t is possible that a sexual relationship between two people suffering from mental handicap or mental illness could result in the conviction of either or both...This would clearly be contrary to the underlying principles which, in our view, should inform the proposed legislation.

¹³ LRC 33-1990 at paragraph 28.

¹⁴ LRC 33-1990 at paragraph 29.

¹⁵ LRC 33-1990 at paragraph 18.

¹⁶ LRC 33-1990 at paragraph 18.

¹⁷ LRC 33-1990 at paragraph 32.

¹⁸ LRC 33-1990 at paragraph 33. The question of how such acts should be described was not addressed in the Report.

We accordingly recommend that no act of vaginal sexual intercourse, or anal penetration or other proscribed sexual activity should constitute an offence where both participants are suffering from mental handicap or mental illness as defined, unless the acts in question constitute a criminal offence by virtue of some other provision of the law.”¹⁹

1.12 The Commission notes here that the 1990 Report equated, for this purpose, intellectual disability and mental illness. For the purposes of this Consultation Paper, the Commission treats these separately with a view to determining whether different conclusions should be drawn on the question of criminal liability. The Commission emphasises the need to treat mental capacity quite separately from mental illness. In general, they are completely separate matters, both in terms of literature on health care and also in terms of how they are dealt with, or ought to be dealt with, in the law.

(3) *Issues arising from section 5 of the Criminal Law (Sexual Offences) Act 1993*

1.13 As already noted section 5 of the *Criminal Law (Sexual Offences) Act 1993* reflects some of the recommendations made by the Commission in its 1990 *Report on Sexual Offences against the Mentally Handicapped*.²⁰ Section 5 of the *Criminal Law (Sexual Offences) Act 1993* states:

“(1) A person who—

(a) has or attempts to have sexual intercourse, or

(b) commits or attempts to commit an act of buggery,

with a person who is mentally impaired (other than a person to whom he is married or to whom he believes with reasonable cause he is married) shall be guilty of an offence and shall be liable on conviction on indictment to—

(i) in the case of having sexual intercourse or committing an act of buggery, imprisonment for a term not exceeding 10 years, and

(ii) in the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery, imprisonment for a term not exceeding 3 years in the case of a first conviction, and in the case of a second

¹⁹ LRC 33-1990 at paragraph 35. A similar recommendation was given by Australia’s Model Criminal Code Officers Committee of Attorneys-General *Report on Sexual Offences Against the Person* (1999) at 177.

²⁰ LRC 33-1990.

or any subsequent conviction imprisonment for a term not exceeding 5 years.

(2) A male person who commits or attempts to commit an act of gross indecency with another male person who is mentally impaired shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 2 years.

(3) In any proceedings under this section it shall be a defence for the accused to show that at the time of the alleged commission of the offence he did not know and had no reason to suspect that the person in respect of whom he is charged was mentally impaired.

(4) Proceedings against a person charged with an offence under this section shall not be taken except by or with the consent of the Director of Public Prosecutions.

(5) In this section “mentally impaired” means 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.”

1.14 Section 5 of the 1993 may, therefore, be broken down into the following 5 elements. First, it 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.”

1.15 Second, section 5 of the 1993 Act defines “mentally impaired” to mean “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.”²¹

1.16 Third, in terms of penalties: (a) in the case of having sexual intercourse or committing an act of buggery a person is liable on conviction on indictment to a term of imprisonment not exceeding 10 years; (b) in the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery a person is liable on conviction on indictment to a term of imprisonment not exceeding 3 years in the case of a first conviction and in the case of a second or any subsequent convictions to a term of imprisonment not exceeding

²¹

Section 5(5) of the *Criminal Law (Sexual Offences) Act 1993*.

5 years;²² (c) in the case of a male person who commits or attempts to commit an act of gross indecency with another male person who is “mentally impaired” the male person is liable on conviction for a term not exceeding 2 years.²³

1.17 Fourth, section 5 provides two defences: (a) that the accused is married to the other person or the accused believes with reasonable cause he (or she in the case of sexual intercourse) is married to the other person; 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 person in respect of whom he or she is charged was “mentally impaired”.²⁴

1.18 Fifth, in terms of procedure, proceedings against a person charged with an offence under the section will only be taken with the consent of the Director of Public Prosecutions.²⁵

1.19 Section 5 of the 1993 Act introduced a new offence which applies where a person has or attempts to have sexual intercourse or buggery²⁶ with a person who is “mentally impaired” unless they are married to each other. The Commission noted in its 2005 Consultation Paper on Capacity that “a regrettable effect of section 5 of the 1993 Act is that outside a marital context a sexual relationship between two ‘mentally impaired’ persons may constitute a criminal offence because there is no provision for consent as a defence in respect of a relationship between adults who were both capable of giving a real consent to sexual intercourse.”²⁷

1.20 The operation of section 5 of the 1993 Act therefore, in effect, bars a mutually consensual sexual relationship with another person with limited decision-making capacity. This runs contrary to the Commission’s recommendation in the *Report on Sexual Offences against the Mentally Handicapped*²⁸ that a relationship between participants who both have either a mental handicap or mental illness should not in itself be prohibited. As mentioned, in the Commission’s 2005 Consultation Paper on Capacity a fear of prosecution on the part of parents and carers may prevent the development of

²² Section 5(1) of the *Criminal Law (Sexual Offences) Act 1993*.

²³ Section 5(2) of the *Criminal Law (Sexual Offences) Act 1993*.

²⁴ Section 5(3) of the *Criminal Law (Sexual Offences) Act 1993*.

²⁵ Section 5(4) of the *Criminal Law (Sexual Offences) Act 1993*.

²⁶ See also O’Malley *Sexual Offences: Law, Policy and Punishment* (Round Hall Sweet & Maxwell 1996) Chapter 6.

²⁷ LRC CP 37-2005 at paragraph 6.20.

²⁸ LRC 33-1990.

relationships between two adults with intellectual disability even though they have the capacity to consent and where there is no element of exploitation.²⁹

1.21 Section 5 of the 1993 Act also makes it an offence for a male person to commit or attempt to commit an act of gross indecency with another male who is mentally impaired.³⁰ Section 5 provides a defence where a person did not know and had no reason to suspect that the person with whom he performed the sexual act was ‘mentally impaired’.³¹

1.22 “Mentally impaired” is defined in section 5 of 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 or³² of guarding against serious exploitation.”³³

1.23 In determining capacity to consent, the Commission noted in its 1990 Report that the test of ability to guard against serious exploitation (the second test in section 5(5) of the 1993 Act) constitutes a more accurate yardstick for determining capacity to consent than the ability to lead an independent life (the first test in section 5(5) of the 1993 Act).³⁴ This position is premised on the argument that an element of dependency should not necessarily preclude an ability to consent.³⁵ According to Doyle, equating a person’s ability to live independently with their capacity to consent to sexual relations:

²⁹ LRC CP 37-2005 at paragraph 6.20.

³⁰ Section 5(2) of the *Criminal Law (Sexual Offences) Act 1993*.

³¹ Section 5(3) of the *Criminal Law (Sexual Offences) Act 1993*.

³² See LRC CP 37-2005, Chapter 6 fn 53 where the Commission states: “It would appear that the tests contained in this definition are disjunctive or alternative - the person must be incapable of leading an independent life *or* incapable of guarding against serious exploitation”: Department of Justice, Equality and Law Reform *The Law on Sexual Offences* (Discussion Paper) (The Stationery Office 1998) at 9.3.2.

³³ Section 5(5) of the *Criminal Law (Sexual Offences) Act 1993*. Part 4 of the *Sex Offenders Act 2001* also uses the definition of “mentally impaired” in section 5 of the *Criminal Law (Sexual Offences) Act 1993*.

³⁴ LRC CP 37-2005 at paragraph 6.19.

³⁵ This view is approved in the NAMHI Discussion Document *Who Decides and How? People with Intellectual Disabilities - Legal Capacity and Decision Making* (2003) at 65.

“both imports a medical model of mental disability and also fails to recognise its imposition of socially constructed barriers to the enjoyment by persons with mental disabilities of their sexual lives. The inherent discrimination of this offence is compounded by the fact that, on its face, this provision also prohibits two persons who are both determined “mentally impaired” from engaging in sexual activity.”³⁶

1.24 The Commission considers that predicating capacity to consent on ability to live independently is not an accurate assumption. For example, in the Canadian 2008 case *R v Prince*³⁷ the complainant adult was assessed as having the ability of a 6 to 8 year old (broadly corresponding to the WHO-based classification of “moderate intellectual disability,” discussed in Part C below), but she also lived independently (which also reflects the potential envisaged in the WHO classification for persons with moderate intellectual disability: see also Part C, below). The accused was acquitted in *Prince* on the basis that the trial court found that there was nothing in the situation that should have alerted him to the need to make inquiries as to mental capacity. Even if the court had found that there was no consent, the court would have found that there was an honest but mistaken belief in the complainant’s capacity to consent.³⁸

1.25 A prosecution under section 5 of the 1993 Act requires the consent of the Director of Public Prosecutions.³⁹ The Department of Justice in its 1998 Discussion Paper *The Law on Sexual Offences*⁴⁰ noted that the issue of sexual offences and vulnerable adults was of such sensitivity that proceedings against a person charged with an offence under section 5 should continue to require the consent of the Director of Public Prosecutions. It considered that where the definition of the category of persons was “of necessity” partially subjective in nature, an otherwise appropriate and clear statutory provision as to the scope of the offence would be no guarantee against an inappropriate prosecution (by a person other than the Director of Public Prosecutions) or even an inappropriate

³⁶ Doyle “The notion of consent to sexual activity for persons with mental disabilities” (2010) 31 *Liverpool Law Review* 2 111, at 123.

³⁷ *R v Prince* [2008] MBQB 241.

³⁸ *R v Prince* [2008] MBQB 241, at paragraph 64.

³⁹ Section 5(4) of the *Criminal Law (Sexual Offences) Act 1993*. See also *Director of Public Prosecutions Guidelines for Prosecutors* (Office of Director of Public Prosecutions, Revised November 2010) at para 7-5, available at www.dppireland.ie.

⁴⁰ Department of Justice, Equality and Law Reform *The Law on Sexual Offences* (Discussion Paper) (The Stationery Office 1998).

decision not to prosecute.”⁴¹ The English Court of Appeal decision in *R v Hall*⁴² indicates, of course, that in the event of a prosecution, the question of whether a person has an intellectual disability would be a matter for the jury to decide.

1.26 The Commission notes here that there is very little information available on the operation in practice of section 5 of the 1993 Act. This may be explained by the deficiencies identified in section 5 of the 1993 Act already discussed, including that it is limited to sexual intercourse and does not deal with sexual abuse or exploitation more generally. The Commission is aware that, in recent years, the Prosecution Unit of the Office of the Director of Public Prosecutions has carried out analysis of cases in its files concerning section 5 of the 1993 Act. This analysis, which focused primarily on the application of the general prosecution policy, including the discretion to prosecute, is analysed in the context of criminal procedure issues in Chapter 6, below.⁴³

1.27 There is no reference in the 1993 Act to section 254 of the *Mental Treatment Act 1945* which, as already noted, provided for a higher possible maximum sentence on conviction under section 4 of the 1935 Act where the accused was in a position of trust, such as a carer or in the management or employment of the mental institution where the victim was a patient or prisoner.⁴⁴ Contrary to the Commission’s recommendation in its 1990 Report, provision for a higher sentence in such circumstances was not included in section 5 of the 1993 Act. The Commission had also recommended that the maximum sentence in such cases be increased from 5 to 10 years’ imprisonment, but this recommendation was also not implemented in section 5 of the 1993 Act. As a result, currently there is no distinction between accused persons who are in a position of trust or authority or accused persons who have no relationship with the victim. As O’Malley notes:

“on the grounds of social policy, there is much to be said for marking out institutional abuse as more serious and heinous than abuse

⁴¹ Department of Justice, Equality and Law Reform *The Law on Sexual Offences* (Discussion Paper) (The Stationery Office 1998).

⁴² *R v Hall* (1988) 86 Cr App R 159.

⁴³ See paragraphs 6.08 to 6.10, below. The Commission is extremely grateful to the Office of the Director of Public Prosecutions for providing the Commission with the results of this analysis.

⁴⁴ Section 254 of the 1945 Act was, ultimately, repealed when the *Mental Health Act 2001* was brought fully into force: see the Schedule to the 2001 Act and the *Mental Health Act 2001 (Commencement) Order 2006* (SI No.411 of 2006). This repeal was not directly connected to the replacement of section 4 of the 1935 Act by section 5 of the 1993 Act.

occurring in a relationship which has been formed in the community. Persons are usually confined to institutions on the grounds of infirmity or vulnerability, and any exploitation they suffer at the hand of those employed by the institution involves a grave breach of trust as well as the commission of a substantive offence.”⁴⁵

1.28 The gender neutral approach adopted in section 5 of the 1993 Act was a welcome advance on the approach taken in section 4 of the 1935 Act. In other important respects, however, section 5 of the 1993 Act remains paternalistic in its approach by failing to enact a specific recognition of the functional approach to capacity which the Commission had recommended in 1990 Report. As discussed later in this Consultation Paper, in that respect, section 5 of the 1993 Act involved a retreat from the common law (judge-made) approach to capacity to consent in the law of sexual offences generally, under which a functional approach had been in place since the 19th Century. Because of this, in its 2005 Consultation Paper on Capacity,⁴⁶ the Commission provisionally recommended that section 5 of the 1993 Act be amended “in order to ensure that relationships between adults with limited decision-making ability would be lawful where there is real informed consent.”⁴⁷ The Commission also invited views:

“as to whether the offence should be re-modelled so that it would be an offence to have or attempt to have sexual intercourse or buggery with a person who lacked capacity to consent to the relevant act at the time because they did not understand the nature or reasonably foreseeable consequences of the act or could not communicate their consent or lack of consent.”⁴⁸

1.29 Submissions received by the Commission after the publication of the 2005 Consultation Paper on Capacity indicate that this is an area in which many different perspectives need to be taken into account. There was some support for the approach taken in section 30 of the English *Sexual Offences Act 2003* (and, since then, the comparable Article 43 of the *Sexual Offences (Northern Ireland) Order 2008*) discussed in detail in Chapter 7, below. Section 30 of the English 2003 Act (and Article 43 of the Northern Ireland 2008 Order) defines lack of capacity in functional terms as to whether the person lacks the ability to

⁴⁵ O'Malley, *Sexual Offences: Law, Policy and Punishment* (Round Hall Sweet & Maxwell 1996) at 131.

⁴⁶ LRC CP 37-2005. In the remainder of this Paper, this is referred to as the Consultation Paper on Capacity.

⁴⁷ LRC CP 37-2005 at paragraph 6.26.

⁴⁸ LRC CP 37-2005 at paragraph 6.28.

choose whether to agree to the touching because of an absence of understanding of what is being done or for any other reason or because the person is unable to communicate their choice. The English 2003 Act (and Northern Ireland 2008 Order) contains a number of sexual offences in relation to a person who lacks functional capacity to consent or is unable to communicate their choice. However, as noted by the Commission in its 2006 *Report on Vulnerable Adults and the Law*,⁴⁹ a strong theme in the submissions was the need to provide appropriate protection for vulnerable members of society. Submissions emphasised the vulnerability of adults with limited decision-making ability to exploitation and abuse. There was also a perceived need to consider how the law in this area should fit together with the Trust in Care policy⁵⁰ and developing elder abuse policies.⁵¹ There was support in the submissions received for a specific offence in this area to be formulated to cover circumstances where there is an imbalance in power between parties, for instance where a person is in a position of trust or authority over someone with limited decision-making capacity.⁵² The extension of section 5 of the *Criminal Law (Sexual Offences) Act 1993* to include all forms of unwanted sexual contact rather than limiting the offence to attempted or actual penetrative acts of sexual intercourse, buggery and acts of gross indecency between males was also evident from submissions received.

1.30 The Commission notes here that, in its 2006 *Report on Vulnerable Adults and the Law*, the Commission ultimately concluded that, because that Report was concerned primarily with reform of the civil law concerning mental capacity, it was not appropriate to make final recommendations concerning

⁴⁹ LRC 83-2006. In the remainder of this Paper, this is referred to as the Report on Vulnerable Adults.

⁵⁰ *Trust in Care: Policy for Health Service Employers on Upholding the Dignity and Welfare of Patients/Clients and the Procedure for Managing Allegations of Abuse against Staff Members* (Health Service Executive, 2005). The Trust in Care policy forms part of the services agreement between the service provider and the service user.

⁵¹ The Elder Abuse National Implementation Group was established in 2003 following the recommendations of the Working Group on Elder Abuse in its Report *Protecting Our Future* (2002).

⁵² The possibility of increased sanctions for abuse by an institutional carer was mooted by the Department of Justice in its Discussion Paper *The Law on Sexual Offences* (Stationery Office, 1998) at paragraph 9.5.2. As already noted, and discussed in detail below, this had previously been recommended by the Commission in its *Report on Sexual Offences against the Mentally Handicapped* (LRC 33-1990) at paragraph 36.

section 5 of the 1993 Act, which is of course confined to criminal law. This Consultation Paper, against the background of the general review of the law on sexual offences being conducted by the Department of Justice and Equality, provides an appropriate setting within which the Commission can review this area.

1.31 O'Malley, commenting on the need for the criminal law to achieve the appropriate balance between paternalism and autonomy, stated that section 5:

“may swing the balance too far in the direction of depriving mentally ill or disabled persons of the right to a sexual life compatible with their physical, mental and emotional capacities. The policy adopted in s.5 of the Act of 1993 may be faulted on this ground. Even allowing for the tacit assumption that prosecutorial discretion will diminish the incidence of ‘hard cases’, the section fails to reflect the right of persons who are mentally impaired (to use its own language) to have a sexual life.”⁵³

1.32 It is clear that section 5 of the 1993 Act reflects the need to protect from sexual exploitation and abuse identified in the Commission’s 1990 Report but that it does not address the competing principle concerning the right to sexual expression.

1.33 Since the enactment of section 5 of the *Criminal Law (Sexual Offences) 1993 Act*, the Commission has examined in detail the need to reform the civil law aspects of the law on capacity, culminating in its 2006 *Report on Vulnerable Adults and the Law*. The 2006 Report recommended the enactment of mental capacity legislation that would be comparable to legislation enacted in many other states in recent decades, and which would be consistent with relevant international human rights standards, including the rights-based analysis found in the 2006 UN Convention on the Rights of Persons with Disabilities. The Commission is aware that the Government is committed to publishing, in early 2012, a *Mental Capacity Bill* that is consistent with the 2006 UN Convention.⁵⁴

⁵³ O'Malley *Sexual Offences: Law Policy and Punishment* (Round Hall Sweet & Maxwell 1996) at 133.

⁵⁴ The *Programme for Government 2011-2016* contains a commitment to “introduce a Mental Capacity Bill that is in line with the UN Convention on the Rights of Persons with Disabilities”. The *Government Legislation Programme, Autumn Session 2011*, available at www.taoiseach.ie, states that the *Mental Capacity Bill*, which is to take account of the Commission’s 2006 Report, is scheduled for publication in early 2012. In September 2011, the Oireachtas Committee on

1.34 The Commission notes that, in general, research on persons with limited capacity has tended to focus on consent to make healthcare decisions or testamentary capacity.⁵⁵ Historically, the issue of capacity to consent to sexual relationships has not featured centrally in the debate on capacity. The limited research that has been carried out in this area indicates differing approaches in assessing capacity to consent to sexual activity. A minority of commentators suggest that, once a person has previously been found capable of giving informed consent in at least one other area, it is more likely that the person will be found capable of consenting to sexual contact. The Commission notes, however, that the more widely accepted view in the literature is to assess capacity on an “issue-specific” functional basis, which the Commission recommended in its 2006 *Report on Vulnerable Adults and the Law* should be the basis for reform of the law in this area.

C Decision-making capacity and the functional approach

1.35 In general terms, a person’s capacity refers to their ability to perform a given task. A person whose capacity is limited may be capable of making decisions in one area but may not have the requisite capacity to understand the nature and the consequences of making a decision in another area or be able to communicate their decision on the matter. This task-specific or functional approach to capacity has become the most commonly-used basis for assessing capacity internationally. In this Part, the Commission discusses the use of the functional approach against the general background of the classification of mental disability by the World Health Organization’s (WHO) and its application in Ireland. The Commission then discusses the functional test of capacity in its legal setting, including in the context of the law of sexual offences.

(1) The WHO approach to classifying intellectual disability and the functional approach

1.36 The task-specific, functional, approach to capacity is reflected in the World Health Organization’s internationally-recognised classification system for diseases and related health problems, ICD-10.⁵⁶ Chapter 5 of the ICD-10 is headed “Mental and Behavioural Disorders” and contains the sub-chapter

Justice, Defence and Equality requested interested parties to make submissions to the Committee on the proposed mental capacity legislation.

⁵⁵ See for example the Commission’s *Report on Vulnerable Adults and the Law* (LRC 83-2006) and *Report on Children and the Law: Medical Treatment* (LRC 103-2011).

⁵⁶ *International Statistical Classification of Diseases and Related Health Problems*, 10th Revised Version (ICD-10), available at www.who.org.

“Mental Retardation”⁵⁷ (F70-F79) which, in turn is divided into the following four main headings: “mild mental retardation” (F70), “moderate mental retardation,” (F71), “severe mental retardation” (F72), and “profound mental retardation” (F73). As discussed in the Introduction to this Consultation Paper, the terminology used, “mental retardation”, is outdated and in Ireland has been replaced by “intellectual disability”.

1.37 Nonetheless, it is also clear that the ICD-10 follows a functional approach to assessing capacity. Thus, the ICD-10 refers to estimation of the degrees of “mental retardation” in this way:

“Degrees of mental retardation are conventionally estimated by standardized intelligence tests. These can be supplemented by scales assessing *social adaptation in a given environment*. These measures provide an approximate indication of the degree of mental retardation. The diagnosis will also depend on the overall assessment of intellectual functioning by a skilled diagnostician. Intellectual abilities and social adaptation *may change over time*, and, however poor, may improve as a result of training and rehabilitation. *Diagnosis should be based on the current levels of functioning.*” (emphasis added)

1.38 The functional approach to assessing capacity is clearly indicated by the references to “social adaptation in a given environment”, that this “may change over time” and, in particular, that any diagnosis of ability or disability “should be based on the current levels of functioning.”

1.39 ICD-10 also contains the following discussion of each of the four main headings of “mental retardation”:

“F70 Mild mental retardation

Approximate IQ range of 50 to 69 (in adults, mental age from 9 to under 12 years). Likely to result in some learning difficulties in school. Many adults will be able to work and maintain good social relationships and contribute to society.

F71 Moderate mental retardation

Approximate IQ range of 35 to 49 (in adults, mental age from 6 to under 9 years). Likely to result in marked developmental delays in childhood but most can learn to develop some degree of independence in self-care and acquire adequate communication and academic skills. Adults will need varying degrees of support to live and work in the community.

⁵⁷ The ICD-10 defines “mental retardation” as: “a condition of arrested or incomplete development of the mind, which is especially characterized by impairment of skills manifested during the developmental period, skills which contribute to the overall level of intelligence, i.e. cognitive, language, motor, and social abilities. Retardation can occur with or without any other mental or physical condition.”

F72 Severe mental retardation

Approximate IQ range of 20 to 34 (in adults, mental age from 3 to under 6 years). Likely to result in continuous need of support.

F73 Profound mental retardation

IQ under 20 (in adults, mental age below 3 years). Results in severe limitation in self-care, continence, communication and mobility.”

1.40 It is clear from this analysis in the ICD-10 that persons with mild intellectual disability are very well able to have good social relationships and that persons with moderate intellectual disability can do so with varying degrees of support, while persons with severe intellectual disability are likely to be in continuous need of support. Persons with profound intellectual disability are likely to have severe limits in terms of their self-care.

(2) *The WHO classification system in Ireland*

1.41 Reflecting the discussion of terminology in the Introduction to this Consultation Paper, the Commission reiterates here that it does not consider that the word “retardation” is an appropriate term to use in Ireland. Nonetheless, the ICD-10 graduated four steps of “mild”, “moderate”, “severe” and “profound” are accepted in the context of policy development by the Health Research Board.

1.42 In its 2009 Report on the National Intellectual Disability Database (NIDD),⁵⁸ the Board notes that the 2006 National Disability Survey (NDS) carried out by the Central Statistics Office indicates that 50,400 people in Ireland have a diagnosed intellectual disability. The NDS figure includes 14,000 individuals whose main disability was classified as dyslexia or a specific learning difficulty and 2,500 individuals whose disability was classified as attention deficit disorder. As a general principle, the Board states that the NIDD registers data only on individuals with an intellectual disability for whom specialised health services are being provided or who, following a needs assessment, are considered to require specialised services in the next five years. As a result, and by contrast with the NDS figure, there were 26,066 people registered on the NIDD.⁵⁹ In compiling the NIDD, the Board carries out an individual assessment of each person and uses the WHO ICD-10 classification system discussed above.⁶⁰

⁵⁸ *Annual Report of the National Intellectual Disability Database Committee 2009* (Health Research Board, 2010), p.21, available at www.hrb.ie.

⁵⁹ *Annual Report of the National Intellectual Disability Database Committee 2009* (Health Research Board, 2010), p.15, available at www.hrb.ie.

⁶⁰ *Annual Report of the National Intellectual Disability Database Committee 2009* (Health Research Board, 2010), p.21, available at www.hrb.ie.

1.43 The Board notes that “almost everyone with a moderate, severe or profound intellectual disability” is expected to be included on the NIDD, because they are likely to be in receipt of or require intellectual disability services. The Board accepts that “the number of people on the NIDD with a mild intellectual disability may, however, be underestimated as they are less likely to require specialised intellectual disability services.”⁶¹ The Board added:

“By contrast, the NDS included all individuals who defined themselves as having an intellectual disability, regardless of whether they were in receipt of or required intellectual disability services.”

1.44 Bearing in mind the differences between the figures in the NDS and the NIDD, the information concerning persons registered in the NIDD is of particular importance in the context of this Consultation Paper. This is because it provides detailed indicators of both the prevalence of the ICD-10 categories of intellectual disability and the living circumstances of the persons involved.

1.45 The Board pointed out that the administrative prevalence rate for “mild intellectual disability” was 2.04 per 1,000 and the prevalence rate for “moderate, severe or profound intellectual disability” was 3.65 per 1,000. The Board noted that there were more males than females at all levels of intellectual disability, with an overall ratio of 1.30 to 1. The total number with moderate, severe or profound intellectual disability had increased by 37% since the first “Census of Mental Handicap in the Republic of Ireland” was carried out in 1974. The Board noted that one of the factors contributing to this increase in numbers was the growth in the general population over the period. Of the people with moderate, severe or profound intellectual disability, the proportion who were aged 35 years or over increased from 29% in 1974 to 38% in 1996, and to 49% in 2009. This reflected an increase in the lifespan of people with intellectual disability.

1.46 The Board pointed out that, in 2009, 64% of those registered on the NIDD (16,742 individuals) lived at home with parents, siblings, relatives or foster parents. More than one in four people who had a moderate, severe or profound intellectual disability and who were aged 35 years or over in 2009 lived in a home setting. The Board stated, however, that “formal supervised living arrangements will need to be provided for an increasing number of adults with intellectual disability as their carers begin to age beyond their care-giving capacity.”⁶²

1.47 In terms of the increasing move away from the institutional approach to a community setting, the Board pointed out that, during the period 1996 to 2009, there was an increase of 66% in the number of people with intellectual

⁶¹ *Ibid.*, at p.22.

⁶² *Annual Report of the National Intellectual Disability Database Committee 2009* (Health Research Board, 2010), p.16, available at www.hrb.ie

disability living full-time in community group homes, and a 71% reduction in the number of people with intellectual disability accommodated in psychiatric hospitals. This obviously represents a significant tangible indication of policy changes in Ireland, and is an important reflection of international trends in this respect, including the rights-based approach to be found, for example, in the 2006 UN Convention on the Rights of Persons With Disabilities.

1.48 The Board also projected that a number of services would be needed in the period 2010–2014, notably 2,298 full-time residential placements, an increase of 42 (or 2%) since 2009 and the highest number since the NIDD was established. The Board noted that the number of new full-time residential places required has been increasing consistently following a slight downward trend during the years 2000 to 2002. The Board also commented that the “demographic profile of people with intellectual disability in Ireland suggests that the number of new full-time residential places required is likely to continue to increase over the coming years as those with a more severe disability and those who care for them advance in age.”

1.49 Having set out some of the analysis of the prevalence of and living circumstances of persons with intellectual disability in Ireland, the Commission turns to discuss the general legal setting within which intellectual capacity arises.

(3) *Capacity and the functional test in the legal setting generally*

1.50 Capacity, in the legal sense, is a threshold requirement for persons to make enforceable decisions for themselves. Capacity can therefore be described as “the pivotal issue in balancing the right to autonomy in decision making and the right to protection from harm.”⁶³

1.51 As the Commission has already noted, its general approach in this Consultation Paper is that the criminal law concerning sexual offences should, on the one hand, provide for the legitimate right of all persons to engage in consensual sexual relationships and, on the other hand, protect people who may not have the requisite capacity to consent to sexual relations and therefore may be more at risk of abuse or exploitation.

1.52 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

⁶³ British Medical Association and the Law Society *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* 2nd ed (2004) at 3.

nothing” basis, in which a single test could deprive a person of their legal capacity. The status approach is associated with the current Wards of Court system, regulated under the *Lunacy Regulation (Ireland) Act 1871*, which the Commission recommended in its 2006 Report on Vulnerable Adults should be replaced by a statutory framework on mental capacity based on the functional approach. 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.

1.53 As noted by the Commission in its 2006 *Report on Vulnerable Adults and the Law* this is a complex area where many different aspects need to be accommodated. In advocating the functional “issue-specific” test for assessing capacity to consent to sexual relations, Stavitsky noted that “sexual consent is very different from medical or other types of consent in that no one else can consent [on behalf] of another to have sexual relations. There is no such thing as surrogate consent for sexual activity.”⁶⁴ The Commission agrees with this approach, which is consistent with its analysis in the Report on Vulnerable Adults.

(4) The functional approach applied in the criminal law

1.54 Regardless of the issue to be decided, capacity to make a decision can be described as a fluctuating phenomenon. Since the 19th Century, the common law has applied a functional approach in assessing capacity to consent in the context of sexual relationships. That is, an individual may be capable of consenting to some forms of sexual contact with a certain individual in a particular setting but not to other forms of sexual contact with the same, or other, individuals in other settings. There may be differences in capacity depending on the nature of the relationship between the accused and the complainant, particularly where the accused is in a relationship of trust or position of authority over the complainant. Decision-making is contextual and this situational assessment is one way of striking a balance, amongst others to be discussed below, between individual self-expression while ensuring that individuals are not exposed to risk of exploitation and abuse.

1.55 The functional approach in assessing capacity in the criminal context can be traced to the mid 19th Century when the requirements of force and lack of will in adjudicating rape cases were replaced by the concept of consent. The turning point was the case *R v Camplin*.⁶⁵ The accused had made the

⁶⁴ Reed “Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity” (1997) 83 Va. L. Rev. 799, at 819.

⁶⁵ *R v Camplin* (1845) 1 Den 89.

complainant drunk and subsequently had sexual intercourse with her. She made a complaint of rape, but there was no evidence presented of force by the accused. The accused was convicted. On appeal, the UK House of Lords widened the interpretation of rape to include instances where intercourse had taken place without the woman's consent even though there had been no force, fear or fraud.⁶⁶ This was confirmed in *R v Fletcher*⁶⁷ which set out the common law position on capacity in the criminal context. In *Fletcher*, the defendant was convicted of the rape of a girl with limited capacity (at that time, referred to as a girl of "weak intellect"). On appeal, the conviction was upheld on the basis that the girl was incapable of giving consent due to "a defect in reasoning", in other words, an inability to consent by reason of limited capacity. The *Fletcher* case therefore established a subjective, functional, test of capacity to consent to sexual relations. Under this functional test, 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.

1.56 Section 5 of the *Criminal Law (Sexual Offences) Act 1993* and its predecessor section 4 of the *Criminal Law Amendment Act 1935* were, in effect, 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 limited capacity. As a general approach, the functional test had been applied to the issue of capacity in a criminal law setting in connection to persons over the age of consent. The same approach however was not applied to persons whose functional capacity may be affected in specific instances. This includes girls under the age of 15, as well as those who in the past were described as "lunatics", "imbeciles" or "feeble-minded" or more recently those with a "mental disorder" or "mental handicap".

1.57 As noted in the *Draft Criminal Code and Commentary* prepared in 2010 by the Criminal Law Codification Advisory Committee and published in 2011,⁶⁸ consent may be vitiated due to lack of capacity.⁶⁹ The *Draft Criminal Code and Commentary* notes that two differing approaches to determining capacity co-exist in Irish law, the common law subjective, functional test and various statutory objective, status, tests. The *Draft Criminal Code and*

⁶⁶ Rook and Ward *Sexual Offences Law & Practice* 4th ed (Sweet & Maxwell 2010) at 36

⁶⁷ *R v Fletcher* (1886) LR 1 CCR 39.

⁶⁸ Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (May 2010) available at www.justice.ie.

⁶⁹ Commentary on Head 1105 (Consent) of the *Draft Criminal Code* at paragraph 34.

Commentary points out that under the subjective, functional, approach a person is considered to lack capacity if he or she, by reason of some personal characteristic is incapable of consenting to a particular transaction. It notes that the Oireachtas has created a number of protective offences, including section 5 of the *Criminal Law (Sexual Offences) Act 1993* and section 3 of the *Criminal Law (Sexual Offences) Act 2006* (statutory rape/defilement of a girl under 15 years), that depart from the common law position by imposing an objective test of capacity. The Oireachtas does so by enacting protective offences which apply to categories of vulnerable individuals and to which consent is not a defence.⁷⁰

1.58 The *Draft Criminal Code and Commentary* notes that the law identifies certain groups as being incapable of consenting to a particular act “regardless of their actual personal capabilities of consenting. The justification for such legislation is primarily paternalistic in so far as it affords greater protection to vulnerable groups, such as children or persons with mental disorders.”⁷¹ Section 5 of the *Criminal Law (Sexual Offences) Act 1993* is an example of how the law takes such an objective approach to capacity in the criminal context. As such, both a subjective and objective approach to capacity co-exist. Indeed, as noted in the *Draft Criminal Code Bill* this is a well-established aspect of Irish criminal law and of many other the common law jurisdictions generally.⁷² In the context of people with limited capacity, there may be “ineffective consent” to the sexual act as a result of an underlying condition which may impair their capacity to consent. By creating a specific offence it creates a protective provision for persons whose impairment may be so severe as to negate their consent if raised as a defence by the accused.

1.59 As noted above, the law concerning sexual relationships involving adults with limited decision-making ability can be compared with the law applying to children and adolescents under the age of criminal consent (in Ireland, currently 17) in that there is a need for a sufficiently protective regime in order to ensure that the criminal sanctions can be relied on where there is “ineffective consent”.⁷³ The Commission is acutely aware of the sensitivity

⁷⁰ Commentary on Head 1105 (Consent) of the *Draft Criminal Code* at paragraph 37.

⁷¹ Commentary on Head 1105 (Consent) of the *Draft Criminal Code* at paragraph 37.

⁷² Commentary on Head 1105 (Consent) of the *Draft Criminal Code* at paragraph 34.

⁷³ Oireachtas Joint Committee on Child Protection *Report on Child Protection* (2006) PRN A6/2024 available at www.oireachtas.ie.

involved in this area bearing in mind the immediacy of the legislative response to the decision of the Supreme Court in *CC v Ireland (No.2)*,⁷⁴ in which the Court declared unconstitutional section 1(1) of the *Criminal Law Amendment Act 1935*. Section 1(1) of the 1935 Act, which dealt with sexual offences between an adult, that is a person over 17, and a young girl, that is, under 15,⁷⁵ was declared unconstitutional by the Supreme Court because it did not include a defence of “honest mistake” as to age.

1.60 The Oireachtas almost immediately enacted an “honest mistake” defence in these cases in section 2(3) of the *Criminal Law (Sexual Offences) Act 2006*. In considering whether or not the defendant had an honest belief the court must have regard to the presence or absence of reasonable grounds for holding such a belief which guarantees that the defendant’s belief will be appraised both subjectively and objectively. The question as to whether the defence of “honest mistake” should continue to form part of the law is currently the subject of ongoing debate.⁷⁶ In particular there is considerable debate as to whether, if it were to be removed, an amendment to the Constitution would be required to provide for criminal liability where the defendant believed there had been consent. The CC case highlighted the importance of an offence being appropriately defined in order to prevent persons escaping punishment for the behaviour which the offence is designed to penalise.

D Evolution of the current general policy and legal framework

(1) Move from a Medical Model to a Social Model

1.61 In recent years, there has been a fundamental shift in the discourse on disability, including capacity, from the traditional medical or individual model which viewed disability as a physiological deficiency or abnormality towards the social model which locates disability within society and as a function of potential

⁷⁴ *CC v Ireland (No.2)* [2006] IESC 33; [2006] 4 IR 1.

⁷⁵ Section 1(1) of the *Criminal Law Amendment Act 1935* criminalised carnal knowledge of a girl under 15 years of age.

⁷⁶ In relation to section 1(1) of the *Criminal Law Amendment Act 1935* O’Malley had noted in 1996 that “[d]espite being apparently discriminatory against males, ss. 1 and 2 of the Act of 1935 have never been challenged as being inconsistent with the Constitution. The male is guilty even if the female clearly consented and there is no defence of genuine mistake as to age, a rule that may seem at variance with the generally subjective nature of criminal liability in Ireland, as exemplified by decisions on provocation and self-defence.” O’Malley *Sexual Offences: Law Policy and Punishment* (Round Hall Sweet & Maxwell 1996) at 97.

and actual material, economic, social and cultural barriers.⁷⁷ The social model also reflects a rights-based approach to disability. This requires that laws and practices should provide for full and equal enjoyment of human rights to persons with disabilities on the same basis as any other person.

1.62 As the Commission noted in its 2005 Consultation Paper on Capacity there has been a gradual move away from what may be termed “benign paternalism”.⁷⁸ The approach taken by the Oireachtas in section 5 of the 1993 Act appears to be consistent with a paternalistic view that people with limited capacity were considered to have the mind of a child and consequently either incapable of having sexual desires or needs or, if they did have such desires and needs, that they should be prevented from expressing them. A second stereotype saw people with intellectual disabilities as potentially dangerous⁷⁹ in that they would “reproduce excessively and thereby threaten the national heritage of intelligence”.⁸⁰ As such, it was seen that people with intellectual disabilities required protection from sex and in turn “society needed to be protected from all the sex that people with learning disabilities had within them”.⁸¹ This led to a culture of segregation in the form of institutionalisation in

⁷⁷ Commission on the Status of People with Disabilities *A Strategy for Equality: Report of the Commission on the Status of People with Disabilities* (1996) at 2.2; McCarthy *Sexuality and Women with Learning Disabilities* (Jessica Kingsley Publishers 1999) at 85.

⁷⁸ LRC CP 37-2005 at paragraph 1.21.

⁷⁹ According to McCarthy “Just as it was unthinkable to talk to young children about sex, so it was unthinkable to talk to adults with learning disabilities about sex - protecting their natural innocence was the priority and this fitted into an ‘ignorance is bliss’ philosophy. Within the belief system that saw people with learning disabilities as potentially dangerous, the effect this had on ideas about their sexuality are clear: it was thought that people with learning disabilities would have an uncontrolled sexuality, that they would be ‘over-sexed’, sexually promiscuous. In short, they were thought to be a potential sexual threat to others.” McCarthy *Sexuality and Women with Learning Disabilities* (Jessica Kingsley Publishers 1999) at 53.

⁸⁰ Murphy “Capacity to consent to sexual relationships in adults with learning disabilities” (2003) 29 *Journal of Family Planning and Reproductive Health Care* 3, at 148.

⁸¹ McCarthy *Sexuality and Women with Learning Disabilities* (Jessica Kingsley Publishers 1999) at 53.

Europe and/or compulsory sterilisation which was common in the US and Scandinavia.⁸²

1.63 Such stereotypes have gradually been undermined by a growing recognition that all adults, including those living with a disability, have a right to sexual expression and self-determination.⁸³ With the advent of normalisation and the growth of the rights movement, expression of one's sexuality is now seen as a human rights issue and is considered part of every-day life for people with disabilities and people without disabilities. Attention has now turned to ways of empowering people in relation to their sexuality while at the same time provide protection to people who may not have the requisite capacity to consent to sexual relations. The National Disability Authority (NDA) and the Crisis Pregnancy Programme (CPP) have pointed out that this has also meant that, in Ireland, like other countries with a similar policy development, there are a growing number of people with intellectual disabilities who are also parents.⁸⁴

1.64 The advent of this rights-based perspective has coincided with the emergence of evidence of high rates of sexual abuse involving people with intellectual disabilities.⁸⁵ This has, in turn, triggered the need to look at both empowerment of a traditionally disenfranchised group to make their own sexual choices while at the same time provide adequate legal safeguards in the form of sexual offences. The Commission discusses the issue of abuse involving people with intellectual disabilities in Chapter 4, below.

⁸² Murphy, "Capacity to consent to sexual relationships in adults with learning disabilities" (2003) 29 *Journal of Family Planning and Reproductive Health Care* 3, at 148.

⁸³ LRC CP 37-2005 at paragraph 1.21. McCarthy has identified the adoption of the principles of normalisation and the growth of the self-advocacy movement as two major ideological changes which have had a positive effect on the provision of services for people with intellectual disabilities. See McCarthy *Sexuality and Women with Learning Disabilities* (Jessica Kingsley Publishers 1999) at 44.

⁸⁴ See *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme, 2011), available at www.nda.ie, discussed in Chapter 3, below.

⁸⁵ Law Commission for England and Wales *Consent in Sex Offences A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.7 fn 15. See also *Setting the Boundaries Reforming the Law on Sexual Offences* (Home Office 2000) at paragraph 4.1.6.

(2) *From a Social Model to a Disability Human Rights Model*

1.65 The social model asserts that the constructed environment has created disabling conditions which have excluded people with disabilities from participating in society. Reasonable accommodations are a typical example of how the social model has corrected the disabling environment. Like the social model, the disability human rights framework recognises society's role in constructing disability and its responsibility to take positive measures to counteract disability-based exclusion. Unlike the social model, however, the disability human rights model offers a more inclusive approach in that it maintains that each individual, regardless of their level of functioning, is entitled to the means necessary to develop and express his or her individual talent. It seeks to combine both first and second generation rights in recognising the need for corrective measures while also realising the need for economic means as vehicles for the realisation of the first generation rights.

1.66 The 2006 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is an example of how, for the first time, first and second generation rights have been brought together in one single human rights instrument.

(3) *The Constitution and Rights of People with a Disability: Recent Legislative Developments*

1.67 In recent years constitutional case law in Ireland in connection with those with a disability has resulted in a movement towards a rights-based approach. The case law, which the Commission discusses briefly below, has led to important legislative developments with a rights-based approach, notably in the area of educational needs. These developments are part of a process of change nationally and internationally in the implementation of the social model of disability which embraces the notion of a rights-based approach to people with disabilities.

1.68 The recognition in constitutional case law of the rights of persons with a disability can be seen in a series of cases relating to the special education needs of persons with disabilities. In the 1993 High Court decision *O'Donoghue v Minister for Health*⁸⁶ O'Hanlon J considered the right to free primary education under Article 42.4 of the Constitution of Ireland in connection with the plaintiff, a 9 year old boy with special education needs. O'Hanlon J referred extensively to the enormous literature on the changing approach to the educational needs of children with a disability, and the need to ensure equality of access and

⁸⁶ *O'Donoghue v Minister for Health* [1993] IEHC 2, [1996] 2 IR 20.

treatment. O'Hanlon J cited the following provisions of the 1989 UN Convention on the Rights of the Child:⁸⁷

"Article 2 –

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without any discrimination of any kind irrespective of the child's... disability... or other status.

Article 23 –

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child... of assistance for which application is made and which is appropriate to the child's conditions and to the circumstances of the parents... caring for the child.
3. Recognizing the special needs of the disabled child, assistance extended in accordance with paragraph 2 shall be provided free of charge, wherever possible... and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services... in a manner conducive to the child's achieving the fullest possible social integration and individual development".

1.69 In the *O'Donoghue* case, O'Hanlon J also cited the 1975 UN General Assembly's Resolution 3447, or Declaration on the Rights of Disabled Persons, which was the genesis for what ultimately became the 2006 UN Convention on the Rights of Persons With Disabilities, discussed below. O'Hanlon J cited the following provisions of the 1975 UN Resolution:⁸⁸

- "3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost, the right to enjoy a decent life, as normal and as full as possible.
5. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

⁸⁷ *O'Donoghue v Minister for Health* [1996] 2 IR 20, at 55.

⁸⁸ *O'Donoghue v Minister for Health* [1996] 2 IR 20, at 56.

6. Disabled persons have the right to... education and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of social integration and reintegration.”

1.70 On the basis of this extensive overview of the literature, O’Hanlon J stated:⁸⁹

“[t]here is a constitutional obligation imposed on the State by the provisions of Article 42, s.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical mental and moral, however limited these capacities may be.” Or, to borrow the language of the [1989] United Nations Convention [on the Rights of the Child] and [1975] Resolution of the General Assembly – ‘such education as will be conducive to the child’s achieving the fullest possible social integration and individual development; such education as will enable the child to develop his or her capabilities and skills to the maximum and will hasten the process of social integration and reintegration’.”

1.71 This important judgment recognises the convergence between the rights-based approach of the Constitution of Ireland and the rights-based approach of relevant international conventions in an area where capacity arising from age and mental capacity were involved at the same time.

1.72 O’Hanlon J’s wide definition of education in the *O’Donoghue* case has been relied on in subsequent special education needs cases⁹⁰ and the *O’Donoghue* case also ultimately led to the enactment of the *Education for Persons with Special Educational Needs Act 2004*. The 2004 Act acknowledges that a child with a disability has a right to be educated in an inclusive environment,⁹¹ in a manner which is appropriate to his or her particular disability⁹² and to have an individual education plan which describes how he or she is to “participate in and benefit from education.”⁹³

⁸⁹ *O’Donoghue v Minister for Health* [1996] 2 IR 20, at 65.

⁹⁰ See *Comerford v Minister for Education* [1997] 2 ILRM 134; *Sinnott v Minister for Education* [2001] 2 IR 545.

⁹¹ Section 2 of the *Education for Persons with Special Educational Needs Act 2004*.

⁹² Section 3(5) of the *Education for Persons with Special Educational Needs Act 2004*.

⁹³ Section 7 of the *Education for Persons with Special Educational Needs Act 2004*.

1.73 In a wider setting, the *Equal Status Acts 2000* and *2004* aim to ensure that people with disabilities are not discriminated against in terms of goods and services based on their disability, whether provided by public sector or private sector undertakings. The *Disability Act 2005*⁹⁴ places certain obligations on Governmental Departments and public bodies concerning accessibility, participation and inclusion.⁹⁵ The 2005 Act incorporates a “needs-approach” and imposes an obligation across governmental departments to ensure effective service delivery to people with disabilities. The 2005 Act also established a complaints mechanism and gave the Office of the Ombudsman a mandate to investigate complaints and ensure compliance by public bodies with the provisions of the Act. The *Citizens Information Act 2007* established an advocacy service under the auspices of the Citizens Information Board specifically aimed at people with disabilities.⁹⁶

1.74 Internationally, the Commission has already noted that the issue of disability was discussed in, among other documents, the 1975 UN General Assembly Recommendation; and that this influenced the analysis of the Constitution of Ireland by O’Hanlon J in the O’Donoghue case. The 1975 Recommendation ultimately led to the 2006 United Nations Convention on the Rights of Persons with Disabilities, which supports a global effort to achieve greater progress in this area. In addition the 1950 Council of Europe’s European Convention on Human Rights has had an important influence in this area. The Commission now turns to discuss the general influence of a rights-based approach to disability.

⁹⁴ The *Disability Act 2005* does not formally take a “rights-based” approach to disability, although it does not contain a “non-justiciability” clause, which had been included in section 47 of the *Disability Bill 2001*. See LRC 83-2006 at paragraph 1.36.

⁹⁵ The 2005 Act gave rise to six Sectoral Plans of the following Departments: the Department of Health and Children; the Department of Social Protection; the Department of Communications, Energy and Natural Resources; the Department of Transport; the Department of Enterprise, Trade and Innovation and the Department of the Environment, Heritage and Local Government.

⁹⁶ A National Advocacy Service (NAS) was established by the Citizens Information Board in March 2011, in accordance with the *Citizens Information Act 2007*. The service allocates trained independent advocates to disabled people who can advise or support them to make a claim for services such as welfare or housing, or negotiate on their behalf on issues affecting them. In 2011 the NAS drafted a Non-Instructed Advocacy policy to ensure that appropriate advocacy is provided where advocates are unable to obtain instructions from the person they represent.

E A Rights-Based Analysis

(1) *The role of the law*

1.75 There are two competing interests in the context of sexual offences and persons with limited capacity. On the one hand, the criminal law operates to protect from sexual exploitation people whose capacity is limited. On the other hand, the sanctions of the criminal law are juxtaposed against the competing need to respect choices made by such persons. The protection of individuals with a “mental impairment” lies at the heart of section 5 of the 1993 Act. While it is recognised that the desired effect of this provision is the protection of persons whose capacity may be limited from sexual exploitation, it has, however, failed to strike the appropriate balance with this objective and the need to protect the rights of such persons to engage in sexual activity.

(2) *Capacity and human rights*

1.76 The determination of capacity is inextricably linked to the exercise of the right to autonomy and self-determination. The Commission has previously highlighted this point in terms of society’s response in empowering people to make decisions in the civil law context.⁹⁷ To make a finding of incapacity results in the restriction of one of the most fundamental rights enshrined in law, the right to autonomy.⁹⁸ In addition, the individual involved may have “to contend with practical limitations on his or her freedom and the stigmatising effect of being labelled “incapable”.⁹⁹ Section 5 of the 1993 Act ignores the circumstances in which sexual relationships can consensually occur between persons with limited capacity, thereby failing to enable such persons exercise their right to self-determination in the context of their sexuality. In this Part, the Commission discusses constitutional considerations at the centre of the debate on the capacity of vulnerable adults to consent to sexual relations.

⁹⁷ LRC 37-2005 at paragraph 1.26. Writing in the context of consent to or refusal of medical treatment Madden has noted that the Supreme Court has “definitively stated that one does not lose the right to autonomy and dignity with the loss of mental capacity, and therefore the constitutional rights of bodily integrity and privacy, as well as respect for the person apply in equal measure to those who may not have the ability to communicate their consent”. Madden *Medicine, Ethics and the Law* (Butterworths 2002) at 393.

⁹⁸ LRC 37-2005 paragraph 1.26; Donnelly “Legislating for Incapacity: Developing a Rights-Based Framework” (2008) 15(1) DULJ 395, at 5.

⁹⁹ Donnelly “Assessing Legal Capacity: Process and the Operation of the Functional Test” [2007] 2 *Judicial Studies Institute Journal*, at 142.

(3) Constitutional and human rights considerations

1.77 Human rights are, in general, based on a set of norms to which a person is inherently entitled simply because she or he is a human being. In the specific context of a person with a disability, a traditional, paternalistic, approach would have allowed limits to be placed on what would otherwise be a generally available right. The current model has gradually moved away from this in the form of a rights-based approach to disability. This model has created a framework in which the right to make one's own decisions is not wholly diminished where a person has limited capacity. The adoption of a rights-based approach to capacity to consent to sexual relations is grounded in the need to protect the rights and the conditions which enable adults to act as self-governing agents where possible even where there is limited capacity. This is reflected in the widely accepted functional model of capacity.¹⁰⁰

1.78 The interplay of the right to autonomy and respect for the equal dignity of all human beings in the context of adults with limited decision-making capacity has previously been discussed by the Commission in the context of making healthcare decisions and testamentary capacity. It is important to give a brief outline here of these personal rights.

(i) Autonomy, Dignity and Privacy

1.79 In the context of capacity, the concept of autonomy is consistent with the gradual move from a paternalistic model to a more person-centred approach. This shift can be seen in an emphasis on ability rather than disability. The fact that an adult has a partial, considerable or even complete lack of decision-making capacity does not entail a corresponding loss of constitutional rights on their part.¹⁰¹ In the context of legal regulation of sexual conduct autonomy involves placing emphasis on a person freely choosing to engage in sexual activity. Where a person has not freely chosen to engage in a sexual act, that person's autonomy has been infringed upon, and a wrong has been committed. The fundamental principle for the law on sexual offences is

¹⁰⁰ See sections 30-31 of the UK *Sexual Offences Act 2003*. The Act has adopted a functional approach to capacity to consent to sexual relations.

¹⁰¹ *In re a Ward of Court (No.2)* [1996] 2 IR 73, at 126. Hamilton CJ noted that a loss of mental capacity does not result in any diminution of a person's personal rights under Article 40.3.1 and Article 40.3.2 of the Constitution. See also *JM v Board of Management of St Vincent's Hospital* [2003] 1 IR 321 and *Fitzpatrick v FK (No.2)* [2008] IEHC 104, [2009] 2 IR 7.

that any activity that breaches someone's sexual autonomy is a wrong which the law must treat as a crime.¹⁰²

1.80 The right to respect for dignity is not specified as a fundamental right in the Constitution but Articles 40 and 41 are construed in accordance with the Preamble of the Constitution which states that the objective of the Constitution is to promote the common good so that the dignity and freedom of the individual may be assured.¹⁰³ The courts have recognised that the rights to dignity and privacy are interlinked as the "nature of the right to privacy must be seen as to ensure the dignity and freedom of an individual."¹⁰⁴ In its 2006 Report on Vulnerable Adults the Commission recommended that the proposed mental capacity legislation include a guiding principle that due regard be given to a person's dignity, privacy and autonomy;¹⁰⁵ which is likely to be incorporated into the proposed mental capacity legislation.

(ii) Equality before the Law

1.81 Article 40.1 of the Constitution prohibits invidious or unjustifiable discrimination by the State between different classes or persons but expressly permits the State in its enactments to have due regard to differences of capacity. In this respect Article 40.1 is not absolute.¹⁰⁶ Article 40.1 provides that equality before the law "shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function". On this point, O'Byrne J in *Re Clarke*¹⁰⁷ upheld an involuntary psychiatric detention under the *Mental Treatment Act 1945* and stated:

¹⁰² Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 1.25.

¹⁰³ *McKinley v Minister for Defence* [1992] 2 IR 333, at 349 (Hederman J). See also *In re a Ward of Court (No.2)* [1996] 2 IR 79, at 163 (Denham J); *North Western Health Board v HW and CW* [2001] 3 IR 622, at 717 (Denham and Hardiman JJ).

¹⁰⁴ *Kennedy v Ireland* [1987] IR 587, at 592 (Hamilton P).

¹⁰⁵ LRC 83-2006 at paragraph 2.106.

¹⁰⁶ *O'B v S* [1972] IR 144; *Brennan v Attorney General* [1983] ILRM 449; *Re Employment Equality Bill 1997* [2000] 2 IR 321; *Re Planning and Development Bill 1999* [2002] 2 IR 321. See further LRC CP 37-2005 at paragraph 1.32-1.33 fn 62.

¹⁰⁷ *Re Clarke* [1950] IR 235. See also *Re Keogh* High Court (Finnegan P) 15 October 2002 where it was held that Article 40.1 permitted differences of capacity to be taken into account in a wardship inquiry.

“The existence of mental infirmity is too widespread to be overlooked, and was, no doubt, present to the mind of the draughtsmen when it was proclaimed in Article 40.1 of the Constitution that, though all citizens, as human beings, are to be held equal before the law, the State may have regard to difference of capacity, physical and moral, and of social function.”¹⁰⁸

1.82 This passage was referred to by McGuinness J in *Gooden v St. Otteran’s Hospital*¹⁰⁹ where she advocated a purposive construction of section 194 of the 1945 Act which was again endorsed by Kearns J in *E.H. v Clinical Director of St. Vincent’s Hospital*.¹¹⁰

(iii) European Convention on Human Rights

1.83 Article 8 of the European Convention on Human Rights, which concerns the right to private and family life,¹¹¹ is central to the specific aspects of capacity under discussion in this Consultation Paper. Also of importance are Article 12, which concerns the right to marry and found a family¹¹² and Article 14 which prohibits discrimination in terms of the application of the rights and freedoms in the Convention.¹¹³ Although dignity is not referred to explicitly in the Convention, it is implicit, which was highlighted by the European Court of

¹⁰⁸ *Re Clarke* [1950] IR 235, at 247-248.

¹⁰⁹ *Gooden v St. Otteran’s Hospital* [2001] IESC 14.

¹¹⁰ *E.H. v Clinical Director of St. Vincent’s Hospital* [2009] IESC 46.

¹¹¹ Personal autonomy and dignity are included in the right to respect for private life as guaranteed by the ECHR. In *Pretty v United Kingdom* [2002] ECHR 2346/02, at paragraph 61, the ECtHR affirmed that the right of autonomy came within the protection of Article 8, stating that “the notion of personal autonomy is an important principle underlying the interpretation of its guarantees”. The Court confirmed this principle in *Goodwin v UK* [2002] ECHR 2978/02 and *I v UK* [2002] ECHR 2979.

¹¹² In *Hamer v United Kingdom* [1982] 4 EHRR 139, at paragraphs 60-62, the European Commission of Human Rights indicated that national law may not deprive “a person or category of persons of full legal capacity of the right to marry”.

¹¹³ While disability is not specifically listed in the enumerated grounds of prohibited discrimination in Article 14 of the ECHR it is generally regarded as coming within the words “or other status” in Article 14. Bartlett *et al Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff Publishers 2007) at 184. Article 14 is breached where there is different treatment with no objective reasonable justification or which is disproportionate to that justification.

Human Rights in *Pretty v United Kingdom*¹¹⁴ where the Court stated that “[t]he very essence of the Convention is respect for human dignity and human freedom.”¹¹⁵

(iv) 2006 UN Convention on the Rights of Persons with Disabilities

1.84 The 2006 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is the first international legally binding instrument that sets down minimum standards for the protection and safeguarding of the civil, political, social, economic and cultural rights of persons with disabilities throughout the world. As already mentioned, its uniqueness lies in it being the first human rights treaty which incorporates both first and second generation rights. On 23 December 2010 the EU ratified the UNCRPD and following this the UNCRPD became a legally binding instrument for the EU on 22 January 2011.¹¹⁶ Ireland was one of the first countries to sign the UNCRD when it opened for signature in 2007. Ireland has not yet ratified the Convention and has not yet signed the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The State adheres to the approach that it should not ratify international treaties until such time as that it is considered that domestic laws are in general conformity with its provisions. In 2007 a Governmental High-Level and Cross-Departmental Implementation Group was established whose role is to advise the Government on any amendments necessary to the National Disability Strategy, which will be the main mechanism for the implementation of the UNCRPD, in order to facilitate ratification.

1.85 Quinn notes that agreeing on a definition of disability for the purposes of the Convention was contentious with the result that “disability” is broadly defined and open-ended.¹¹⁷ The Convention applies to those who have long-term physical, mental, intellectual or sensory impairments which subsequently may hinder their full and effective participation in society. This is in line with the Preamble to the Convention which recognises disability as an “evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.” The Convention

¹¹⁴ *Pretty v United Kingdom* (2002) 35 EHRR 1.

¹¹⁵ *Pretty v United Kingdom* (2002) 35 EHRR 1, at paragraph 65.

¹¹⁶ This is the first comprehensive human rights treaty to be ratified by the EU as a whole. The EU became the 97th party to the treaty. It complements the EU’s Disability Strategy 2010-2020.

¹¹⁷ Quinn “Disability and Human Rights: A New Field in the United Nations” in Krause & Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) at 259.

perceives disability as a social phenomenon which encompasses persons with a wide range of impairments (physical, sensory, mental and intellectual) and considers various types of barriers (legal, physical, attitudinal and others) that persons with such impairments may face in the enjoyment of their human rights.¹¹⁸ In stressing the need that national legislation must reflect an understanding of disability as a social construct in order to achieve full and effective implementation of the Convention, the Office of the UN High Commissioner for Human Rights advises that medically-based definitions or definitions that are based on an incapacity due to an impairment to carry out daily life activities should be repealed.¹¹⁹

(v) Article 12 of the UNCRPD

1.86 Traditionally people with disabilities tended to be treated not as rights holders but rather as objects. This notion is best exemplified in the highly restrictive laws on legal capacity. As Quinn notes “full legal capacity is the key to making decisions for oneself. Having it withdrawn enables others to make those decisions and effectively direct one’s personal destiny.”¹²⁰ As noted by the Office of the High Commissioner for Human Rights:

“[a]rticle 12 of the Convention requires States parties to recognize persons with disabilities as individuals before the law, possessing legal capacity, including capacity to act, on an equal basis with others. Article 12, paragraphs 3 and 4, requires States to provide access by persons with disabilities to the support they might require in exercising their legal capacity and establish appropriate and effective safeguards against the abuse of such support. The centrality of this article in the structure of the Convention and its instrumental value in the achievement of numerous other rights should be highlighted. Article 16, paragraph 1, of the International Covenant on Civil and Political Rights already requires the

¹¹⁸ *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, Human Rights Council A/HRC/10/48 (adopted 26 January 2009) at paragraph 35.

¹¹⁹ *Thematic Study by the Office of the United National High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, Human Rights Council A/HRC/10/48 (adopted 26 January 2009) at paragraph 36.

¹²⁰ Quinn, “Disability and Human Rights: A New Field in the United Nations” in Krause & Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) at 262.

recognition of legal personality of persons with disabilities. The implementation of the obligations contained in article 12, paragraphs 2,3,4 and 5, of the Convention on the Rights of Persons with Disabilities, on the other hand, requires a thorough review of both civil as well as criminal legislation containing elements of legal competence.”

1.87 It is accepted that there is a significant amount of legislative reform necessary in Ireland before this ratification can occur. In particular, there is a need to introduce capacity legislation in order for Irish law to comply with Article 12 of the Convention which sets out equal recognition of persons with disabilities before the law. Article 12 makes clear that there is no legal contradiction in providing a person with decision-making support while maintaining their full legal capacity. This article represents an important breakthrough in advancing the self-determination and equality rights of people with disabilities. The Government has indicated its intention to ratify the Convention as quickly as possible and the proposed enactment of mental capacity legislation will enable the State to meet its obligations under the UN Convention, insofar as it relates to legal capacity issues.¹²¹

1.88 The functional approach is given clear expression in Article 12 of the Convention as well as evolving jurisprudence from the European Court of Human Rights¹²² and in the development of soft law at European level, including a number of Recommendations by the Committee of Ministers.¹²³

(4) Concluding comments on the constitutional and human rights considerations in the context of section 5 of the 1993 Act

1.89 The Commission has noted that, if the matter arose for consideration, section 5 of the *Criminal Law (Sexual Offences) Act 1993* may be considered to be in breach of Article 8 of the European Convention on Human Rights (ECHR) by disproportionately interfering with a person’s right to respect for their private life thereby not falling within the State’s narrow “margin of appreciation”.¹²⁴ In particular, the Commission has noted that the ECHR has held, in finding the

¹²¹ *Observations on the Scheme of the Mental Capacity Bill 2008* (Irish Human Rights Commission 2008) at 4.

¹²² See for example, *Winterwerp v. The Netherlands*, Judgment of 24 October 1979, (1979) 2 EHRR 387; *Shtukaturv v. Russia*, Judgment of 27 March 2008.

¹²³ Council of Europe Committee of Ministers *Recommendation No. R (99) on Principles Concerning the Legal Protection of Incapable Adults* (23 February 1999).

¹²⁴ LRC 37-2005 at paragraph 6.22.

criminalisation of consensual homosexual acts to be in breach of Article 8, that a practice of non-enforcement by the national authorities was not sufficient to prevent the law from being held incompatible.¹²⁵

1.90 The right to engage in sexual activity may be considered implicit in the constitutional right to privacy and under Article 8 of the ECHR. The right includes “to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one’s own personality.”¹²⁶ As noted above, this wider appreciation of the right to privacy has led, in particular, to laws criminalising private homosexual conduct between adults¹²⁷ being found to be contrary to Article 8,¹²⁸ because they concerned “a most intimate aspect of private life”.¹²⁹ O’Malley has cautioned¹³⁰ that in applying section 5 of the 1993 Act the courts must interpret it in line with the fundamental rights guaranteed expressly or implicitly by the Constitution including the right to marry,¹³¹ the right to privacy¹³² and the right to have children.¹³³ Any protective criminal legislation will need to recognise the right to private life under Article 8 and interference with the exercise of this right would have to be justified if in accordance with the law it is “necessary in a democratic society... for the protection of health and morals, or for the protection of the rights and freedoms of others.”

¹²⁵ See *Dudgeon v UK* (1981) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485. In Ireland, the blanket prohibition on buggery was removed by section 2 of the *Criminal Law (Sexual Offences) Act 1993*. LRC CP 37-2005 at paragraph 6.22 fn 68.

¹²⁶ *Bruggemann and Scheuten v Federal Republic of Germany* (1977) 3 EHRR 244, at paragraph 57.

¹²⁷ In *Dudgeon v United Kingdom* (1981) 4 EHRR 149 the prohibition of consensual homosexual conduct between males under the age of 21 was found not to be in breach of the European Convention on Human Rights, being justified under Article 8(2) as necessary for the protection of morals.

¹²⁸ *Dudgeon v UK* (1981) 4 EHRR 149 and *Norris v Ireland* (1991) 13 EHRR 186. Both cases were followed in *Modinos v Cyprus* (1993) 16 EHRR 485.

¹²⁹ *Dudgeon v UK* (1981) 4 EHRR 149, at paragraph 52.

¹³⁰ O’Malley *Sexual Offences: Law Policy and Punishment* (Round Hall Sweet & Maxwell 1996) at 133.

¹³¹ *Ryan v Attorney General* [1965] IR 294.

¹³² *Kennedy v Ireland* [1987] IR 587.

¹³³ *Murray v Ireland* [1991] ILRM 465.

CHAPTER 2 CONVERGENCE OF THE CIVIL AND CRIMINAL LAW IN ASSESSING CAPACITY TO CONSENT

A Introduction

2.01 In this Chapter, the Commission discusses the convergence of the civil and criminal law in assessing capacity to consent to sexual relationships. This includes discussion of this convergence in the case law developed in England and Wales in the wake of the enactment of reform of its law on sexual offences in 2003 and the enactment of modern mental capacity legislation in 2005. In the context of civil law determinations as to capacity,¹ which in general concern cases on the capacity to marry, while there is no uniform approach in determining capacity to consent to sexual relations, there is an implicit right that individuals with limited capacity can lawfully engage in sexual relationships.² This right may be compromised, however, by the criminal law which, as for example under section 5 of the *Criminal Law (Sexual Offences) Act 1993*, creates offences that may have the effect of limiting the exercise of any perceived rights granted by virtue of the civil law approach while aiming to protect people from sexual exploitation.

B Capacity to consent in the criminal law context

2.02 As already noted in Chapter 1, under the common law's 19th century *Fletcher* rule, 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* were effectively a departure from the established common law rule by incorporating a status based

¹ Intentionally having sex with an individual without consent or without the capacity to consent is not only a violation of the criminal law but could also give rise to a civil law claim for assault or battery.

² See *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. In *Re F (Mental Patient: Sterilisation)* Lord Donaldson noted that "Mentally handicapped people have the same needs, feelings and longings as other people, and this is much more frequently acknowledged nowadays than years ago." *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, at 10.

assessment of capacity to consent to sexual relations in respect of persons with limited capacity.

2.03 Currently, the common law presumption of capacity exists unless the issue of an individual's capacity is called into question. As Inclusion Ireland noted in 2003, the assessment of a person's sexual consent capacity, which encompasses similar issues when assessing legal capacity in general, focuses on 6 areas when making a determination. The test looks at: (i) the ability to absorb relevant sexual information; (ii) whether there is an understanding of the information; (iii) an ability to evaluate critically different relevant considerations, including different advice; (iv) understanding explanations of the nature of decisions to be taken; (v) understanding the consequences of the decision to be taken when it is explained and (vi) an ability to communicate a decision to engage or not engage in various sexual behaviours.³

2.04 The issue of consent distinguishes between when sexual activity becomes a criminal act or a protected right of the individual. A sexual offence concerning adults can only be established where a lack of consent by the victim can be proved by the prosecution beyond reasonable doubt. The lack of consent can often be particularly difficult to prove where adults with limited capacity are concerned.⁴ The judgment of the Supreme Court of Victoria in *R v Morgan*⁵ has been useful in developing a threshold in determining capacity to consent.⁶ According to this test a person has the capacity to consent unless they do not have sufficient knowledge to understand either that sex may involve physical penetration of the body or that penetration is an act of sexual connection, as distinct from an act of a totally different character.⁷

2.05 The challenge is to determine the extent to which adults with limited capacity have a sufficient level of knowledge or understanding in order to make

³ *Who Decides and How? People with Intellectual Disabilities - Legal Capacity and Decision Making* (NAMHI, 2003) at 20. Inclusion Ireland, founded in 1961, was formerly known as NAMHI.

⁴ Proving lack of consent is the subject of much legal debate since there is no statutory definition giving guidelines as to what is deemed consent. In *R v Jenkins* 2000 (unreported) it was held that there was no reason in law why a severely mentally impaired woman could not consent to sex.

⁵ *R v Morgan* [1970] VR 337.

⁶ The threshold set down in *Morgan* was recently approved by the High Court Family Division in the UK in *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam).

⁷ *R v Morgan* [1970] VR 337, at 341.

sexually related decisions. Generally, it is a question of fact which is determined “in accordance with the ordinary meaning of the word ‘consent’ on the basis of common sense and experience.”⁸ What can be a straightforward determination is compounded, however, by the considerable degrees of capacity amongst persons with a “mental impairment” who have reached the age of consent⁹ but who may not be capable of giving consent. In such situations, the degree of impairment may act as a barrier to understanding the nature of the sexual act and, therefore, an obstacle to giving an effective consent. The individual’s vulnerability might also add an additional layer of complexity in making a determination as it may be possible to coerce a person with limited capacity “into having a sexual relationship without having to use threats of a degree which would be sufficient to sustain a rape charge.”¹⁰ For this reason the State, through its criminal law, has a compelling interest in protecting people with limited capacity from harm. Indeed, failure to fulfil this positive obligation could be a breach of the ECHR.¹¹

C Convergence of the criminal law and the civil law

2.06 Recent English case law has seen the convergence of both the civil and criminal context in assessing capacity.¹² As already mentioned the diagnostic or medical approach was previously used in making an assessment

⁸ Law Commission for England and Wales *Consent in Sexual Offences A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.5.

⁹ The statutory age for sexual consent in Ireland is currently 17 years of age. In 2009, the Oireachtas Committee on the Rights of the Child recommended that this be reduced to 16 years, and the Commission understands that this is currently (July 2011) under consideration by Government.

¹⁰ Millan Committee “*New Directions*” *Report on the Review of the Mental Health (Scotland) Act 1984* (2001) at paragraph 25.

¹¹ *X and Y v Netherlands* (1985) *Application No.8978/80*. The case considered Article 8 of the ECHR. The Court found the Netherlands in breach of Article 8 having failed in its duty to provide an effective criminal remedy to ensure deterrence in relation to sexual assault. The court held that although the object of Article 8 is the protection of the individual against arbitrary interference from the state there is also a positive obligation on the state in showing effective respect for private life under Article 8. This obligation may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals.

¹² *X City Council* [2006] EWHC 168 (Fam); *In the matter of MM* [2009] 1 FLR 443; *R v Cooper* [2009] UKHL 42.

of capacity to consent to sexual relations. The assessment of capacity from a functional approach can be seen as a “substantive step forward in terms of progressing the agenda for a meaningful approach” to assessing capacity of persons with limited capacity to sexual activity and which can be equally applied in both the criminal and civil law.¹³

2.07 Section 5 of the *Criminal Law (Sexual Offences) Act 1993* provides a defence to the accused to the offences therein where the accused is married to the victim or where the accused has reasonable cause to believe he is married to the victim. In addition to the question of reform of section 5 in general, a question arises as to whether this blanket exemption remains valid. In this respect, the English courts have recently examined the capacity question in the context of marriage and people with limited decision-making ability.

2.08 In this Part, the Commission examines the legal test in determining capacity to marry and how the English courts have revisited this test in light of an individual’s capacity to consent to sexual relations.

(1) Test for capacity to marry

2.09 As noted by the Commission in its Consultation Paper on Capacity¹⁴ the classic common law statement of the nature of the contract of marriage is that of Lord Penzance in *Hyde v Hyde*¹⁵ where he described it as “the voluntary and permanent union of one man and one woman to the exclusion of all others for life.”¹⁶ Legally, marriage is a civil contract which created reciprocal rights and duties between the parties and which established a status which is constitutionally protected by Article 41.3.1° of the Constitution.¹⁷ Once solemnised, a marriage is presumed valid until the contrary is established.¹⁸ In Ireland, a right to marry has been recognised as one of the unenumerated

¹³ Doyle “The notion of consent to sexual activity for persons with mental disabilities” (2010) 31 *Liverpool Law Review* 2, 111, at 128.

¹⁴ LRC CP 37-2005 at paragraph 6.29.

¹⁵ *Hyde v Hyde* (1866) L.R. 1 P&D 130.

¹⁶ (1866) L.R. 1 P&D 130, at 133. The permanency characteristic has been watered down as a result of the divorce referendum which led to the amendment of Article 41.3.2° and a provision for divorce pursuant to the *Family Law (Divorce) Act 1996*.

¹⁷ See generally Shannon (ed) *Family Law Practitioner* (Round Hall Sweet & Maxwell loose-leaf) at Division A.

¹⁸ *N (or se K) v K* [1986] ILRM 75, 89 per Griffin J.

personal rights under Article 40.3.1° of the Constitution¹⁹ although it has not been considered an absolute right.²⁰

2.10 The contract of marriage is essentially a simple one, which does not require a high degree of understanding however it is not sufficient that a person's understanding only extends to participating in a marriage ceremony. Traditionally the courts have established a low threshold for determining capacity to marry.²¹ As Hannen P observed in *Durham v Durham*,²² "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend."²³

2.11 In Ireland, the formalities (including the required age) in relation to marriage are set out in statute²⁴ while the issue of capacity to marry remains a matter of common law.

(2) Understanding the nature of marriage

2.12 Apart from observing the necessary formalities required to effect a valid marriage, the free consent of both parties is a prerequisite to a valid marriage. As well as requiring an exercise of independent will, 'informed consent' means that each party must have an understanding of the nature and responsibilities of marriage at the time of marriage otherwise the marriage is void. In certain circumstances an adult with limited decision-making ability may not be in a position to give informed consent to marriage. The onus of proving that a person did not understand or was incapable of understanding the nature and consequences of the marriage ceremony rests on the person asserting this.²⁵ Under common law there is a presumption that all persons, once they have met the age requirement, have the capacity to marry.

¹⁹ *Ryan v Attorney General* [1965] IR 294. See also *Donovan v Minister for Justice* (1951) 85 ILTR 134.

²⁰ *Foy v An t-Ard Chláraitheoir* High Court (McKechnie J) 9 July 2002.

²¹ *In Re Park* [1953] 2 All ER 1411.

²² *Durham v Durham* (1885) 10 PD 80.

²³ *Durham v Durham* (1885) 10 PD 80, at 82

²⁴ Section 31(a) of the *Family Law Act 1995* permits persons over 18 to marry. An exemption to the age requirement may be granted on application to the Circuit Family Court pursuant to section 33 of the *Family Law Act 1995*.

²⁵ *Sheffield City Council v E* [2004] EWHC 2808 (Fam).

2.13 In relation to the question of whether the person has capacity to marry the relevant law was set out by Singleton LJ in *In Re Park*²⁶ that the question is whether the person was:

“capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.”²⁷

2.14 The English case *Sheffield City Council v E and S*²⁸ sets down the test to determine whether a person has capacity to marry or enter into a civil partnership under English law. In this case, a declaration was sought by a local authority to prevent a young lady ‘E’ with spina bifida and an alleged mental age of 13 from marrying or associating with ‘S’ who had a history of sexual violent crimes. A preliminary issue arose as to the correct test to be employed in assessing capacity to marry.

2.15 The Court summarised the test for assessing capacity to marry in four propositions:

- (i) it is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understands its words;
- (ii) he or she must understand the nature of the marriage contract;
- (iii) this means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage; and
- (iv) that said, the contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend.²⁹

2.16 There are two requirements which need to be fulfilled; namely (a) does the person understand the nature of the marriage contract? and (b) does the person understand the nature and responsibilities that normally attach to marriage?³⁰ Munby J stated:

²⁶ *In Re Park* [1954] P 112.

²⁷ *In Re Park* [1954] P 112, at 127.

²⁸ *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] Fam 326.

²⁹ *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), at paragraph 67.

³⁰ *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] Fam 326, at paragraph 141.

“‘[u]nderstanding’ a problem, so as to have the capacity to decide what to do about it, requires on this approach, the mental ability: (i) to recognise the problem; (ii) to obtain, receive, take in, comprehend and retain information relevant to the problem and its solution; (iii) to believe that information; and (iv) to weigh (evaluate) that information in the balance so as to arrive at a solution (decision).”³¹

2.17 As such a question arose as to whether the appropriate test for assessing E’s capacity to marry was (a) whether E was capable of understanding the nature of a marriage contract generally; or (b) whether E had the capacity to understand the responsibilities created by marriage. Mr. Justice Munby concluded that the question is not whether a person has capacity to marry X rather than Y. Rather, the relevant question is whether the person has capacity to marry. If the person does, it is not necessary to show that she also has capacity to take care of her own person and property. Munby J went on to note that the question of whether a person has capacity to marry is quite distinct from the question of whether it is in the person’s best interests to marry; at all, or wise to marry X rather than Y. Munby J stated that the essence of a contract of marriage is:

“an agreement between husband and wife to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other’s society, comfort and assistance.”³²

2.18 In terms of policy, Munby J noted that:

“[t]here are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled.”³³

2.19 The Court rejected a submission that capacity should be assessed in relation to the particular marriage proposal in question. Rather, in assessing a person’s capacity to marry, the Court held that it is not concerned with the wisdom of their marrying in general nor with the wisdom of marrying the particular person contemplated. The Court held that:

³¹ *Sheffield City Council v E* [2004] EWHC 2808 (Fam), at paragraph 134.

³² *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), at paragraph 132.

³³ *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), at paragraph 144.

“[t]he implications for A of choosing to marry B rather than C may be immense. B may be a loving pauper and C a wife-beating millionaire. But this has nothing to do with the nature of the contract of marriage into which A has chosen to enter. Whether A marries B or marries C, the contract is the same, its nature is the same, and its legal consequences are the same. The emotional, social, financial and other implications for A may be very different but the nature of the contract is precisely the same in both cases.”³⁴

2.20 In its 2006 *Report on Vulnerable Adults and the Law* the Commission recommended that the law on capacity to marry would continue to be governed by the common law and that the proposed mental capacity legislation would specifically exclude the law relating to capacity to marry in relation to the test of capacity. The Commission also recommended that it should, however, also be provided that a presumption of capacity will operate in relation to capacity to marry.³⁵

(3) *Interplay with capacity to consent to sexual relations*

2.21 Apart from requiring an exercise of independent will, “full and free” consent means that each party must have an understanding of the nature and responsibilities of marriage at the time the contract is entered into. Otherwise the marriage is void.³⁶ Capacity to marry is therefore assessed in an issue-specific or functional manner. As already mentioned, capacity is presumed unless proven otherwise³⁷ therefore the onus of proving that a person did not understand or was incapable of understanding the nature and consequences of the marriage ceremony rests on the person asserting this.³⁸

2.22 The English courts have revisited the question of capacity which has crystallised the issue of sexual relations within the legal test of capacity to marry. In this respect the courts have advocated that given the nature of marriage, capacity to consent to marriage will normally require the capacity to consent to sexual relations.

³⁴ *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), at paragraph 85.

³⁵ LRC 83-2006 at paragraph 3.19.

³⁶ *N (otherwise K) v K* [1986] ILRM 75, at 89.

³⁷ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) at paragraph 6.60. A person who is made a Ward of Court may not marry. See Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 6.48.

³⁸ *Sheffield City Council v E* [2004] EWHC 2808 (Fam).

2.23 In order to ensure that marriage is not a blanket invitation to sexual relations between spouses regardless of capacity,³⁹ Munby J, in *X City Council v MB, NB and MAB*⁴⁰ held that capacity to marry must generally include the capacity to consent to sexual relations. In doing so Munby J endorsed the test for determining consent set out by the Supreme Court of Victoria in *R v Morgan*⁴¹ and stated that:

“[t]he question is whether a woman (or man) lacks the capacity to understand the nature and character of the act. Crucially, the question is whether she (or he) lacks the capacity to understand the sexual nature of the act. Her knowledge and understanding need not be complete or sophisticated. It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent.”⁴²

2.24 While agreeing with the requirement of understanding laid down by *Morgan* Munby J noted however that the position of whether an individual has capacity to consent to sexual relations in England and Wales must be considered in the context of the *Sexual Offences Act 2003*. In order to have the requisite capacity to consent to sexual relations the 2003 Act requires an individual to have an understanding of the reasonably foreseeable consequences of the act as well as an understanding of the nature of the act.

2.25 The decision to apply the same test by Munby J was underpinned by the fact that a sexual relationship is usually implicit in marriage and without capacity to consent to sexual relations the parties to a marriage run the risk of committing serious criminal offences under the English *Sexual Offences Act 2003*. The conclusion reached in *X City Council* saw the merging of the two issues of capacity to consent to marriage and capacity to consent to sexual relations. Accordingly, the following question must be asked:

“[d]oes the person have sufficient knowledge and understanding of the nature and character - the sexual nature and character - of the act of sexual intercourse, and of the reasonably foreseeable

³⁹ Section 43 of the English *Sexual Offences Act 2003* provides a defence to the accused to the offences under sections 38-41 of the 2003 Act if he proves he is lawfully married or in a civil partnership with the victim at the time of the activity and the victim was over the age of 16.

⁴⁰ *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam).

⁴¹ *R v Morgan* [1970] VR 337.

⁴² *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), at paragraph 74.

consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse (and, where relevant, to communicate their choice to their spouse)?⁴³

2.26 The approach taken by Munby J in this case shows that a “rudimentary knowledge”⁴⁴ of the sexual act is all that is required to prove capacity to consent to sexual relations. This would include the capacity to choose whether to agree to the touching whether because the individual lacks sufficient understanding of the nature of the act and the capacity to understand the reasonably foreseeable consequences of what is being done, or for any other reason, or is unable to communicate such a choice.

2.27 The English case *KC, NNC v City of Westminster Social and Community Services & Anor*⁴⁵ involved an individual ‘IC’ who has a severe impairment of intellectual functioning and autism with skills expected of a three year old child. Thorpe J held that:

“physical intimacy is an ordinary consequence of a celebration of a marriage. Were IC’s parents to permit or encourage sexual intercourse between IC and NK, NK would be guilty of the crime of rape under the provisions of the Sexual Offences Act 2003. Physical intimacy that stops short of penetrative sex would constitute the crime of indecent assault under that statute.”⁴⁶

2.28 The marriage was held void under English law since IC did not have the sufficient capacity to consent to sexual relations which was seen as determining her ability to consent to the marriage contract.

2.29 The analysis employed by Munby J in *X City Council* was applied in *In the matter of MM*⁴⁷ where Munby J found the determination of capacity to consent to sexual relations to be issue-specific. He noted that:

⁴³ *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), at paragraph 84.

⁴⁴ *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), at paragraph 74.

⁴⁵ *KC, NNC v City of Westminster Social and Community Services & Anor* [2008] EWCA Civ 198. This case dealt with capacity to marry under Sharia law where capacity to consent of the spouses is not relevant and a marriage can therefore be validly contracted even if one or both would lack capacity under the tests set out in *Sheffield City Council v E*. However such a marriage would not be held valid under English law.

⁴⁶ *KC, NNC v City of Westminster Social and Community Services & Anor* [2008] EWCA Civ 198, at paragraph 32.

⁴⁷ *In the matter of MM* [2009] 1 FLR 443.

“someone who may have capacity to consent to sexual relations whilst lacking capacity to decide more complex questions about long-term relationships. There is... no necessary dissonance between the lack of capacity to consent to contact and capacity to sexual relations. The former is a potentially complex concept involving a range of considerations arising in the context of a potentially wide variety of situations, for example, from having a cup of tea with someone to going away with them on holiday, whilst the latter is often, and of its very nature, much less complex.”⁴⁸

2.30 As regards policy, Munby J stated that:

“there are sound reasons of policy why the civil law and the criminal law should in this respect be the same, why the law should, as it were, speak with one voice and why there should not be any inconsistency of approach as between the criminal law and the civil law. In this context both the criminal law and the civil law serve the same important function: to protect the vulnerable from abuse and exploitation... Viewed from this perspective, X either has capacity to consent to sexual intercourse or she does not. It cannot depend upon the forensic context in which the question arises, for otherwise, it might be thought the law would be brought into disrepute.”⁴⁹

2.31 The UK House of Lords (in one of its last decisions in 2009 before being replaced by the UK Supreme Court) endorsed the functional approach in *R v Cooper*.⁵⁰ The English Court of Appeal had overturned the defendant’s conviction on the grounds that “a lack of capacity to choose to agree to sexual activity could not be ‘person specific’ or ‘situation specific’.”⁵¹ The UK House of Lords rejected this analysis on the basis that:

“it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is

⁴⁸ *In the matter of MM* [2009] 1 FLR 443, at paragraph 95.

⁴⁹ *In the matter of MM* [2009] 1 FLR 443, at 467.

⁵⁰ *R v Cooper* [2009] UKHL 42. The complainant was a 28 year old woman with a diagnosis of schizo-affective disorder and emotionally unstable personality disorder and had an IQ of less than 75.

⁵¹ *R v Cooper* [2009] UKHL 42, Headnote.

guaranteed by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.”⁵²

2.32 The UK House of Lords also described the potentially fluctuating nature of capacity, recognising that a person may have sufficient understanding to consent on one particular day but not on another because of the variations in one’s mental state associated with a mental disability. It was noted that:

“[t]he complainant here, even in her agitated and aroused state, might have been quite capable of deciding whether or not to have sexual intercourse with a person who had not put her in the vulnerable and terrifying situation in which she found herself...The question is whether, in the state that she was in that day, she was capable of choosing whether to agree to the touching demanded of her by the defendant.”⁵³

2.33 Similarly, in *D. County Council v LS*⁵⁴ Wood J stated that:

“there should in principle be a significant degree of conformity in the tests relevant to establishing capacity in both the civil and the criminal courts, although it may be conceivable that there is room for some differentiation depending on the particular circumstances. For obvious reasons, it would be highly undesirable to have totally inconsistent and/or significantly incompatible approaches between the two jurisdictions.”⁵⁵

2.34 In the 2011 High Court decision, *D Borough Council v AB*,⁵⁶ D Borough Council applied for a declaration that the respondent, ‘AB’, lacked capacity to consent to sexual relations and an order restricting contact between AB and his partner. The case concerned AB, who had a moderate learning disability and had developed a homosexual relationship with a fellow service user, ‘K’. There was no evidence of an exploitative relationship, but the local authority had in addition been alerted to two incidents in which members of the public had raised concerns about AB’s behaviour in public. The local authority sought a declaration that AB did not have capacity to consent to sexual relations and that his sexual contact with K should end.

⁵² *R v Cooper* [2009] UKHL 42, at paragraph 27.

⁵³ *R v Cooper* [2009] UKHL 42, at paragraph 26.

⁵⁴ *D. County Council v LS* [2010] EWHC 1544 (Fam).

⁵⁵ *D. County Council v LS* [2010] EWHC 1544 (Fam), at paragraph 26.

⁵⁶ *D. Borough Council v AB* [2011] EWHC 101 (COP).

2.35 The relevant test had been questioned in obiter comments by Baroness Hale of Richmond in *R v Cooper*.⁵⁷ The expert in *Cooper* proposed a test for capacity based on understanding the following six factors:

- (i) the mechanics of the sexual act;
- (ii) that only adults over 16 should do it;
- (iii) that both or all parties to the act needed to consent;
- (iv) that there were health risks involved;
- (v) that heterosexual sex might result in the woman getting pregnant; and
- (vi) that sex was part of having relationships with people, and might have emotional consequences.

2.36 The expert's advice was that the man should not be offered sex-education, as this would create confusion and anxiety. The Official Solicitor reported to the court, however, that it was the man's wishes to have sexual relations again. The judge rejected the above test and the local authority's submission that the personality and characteristics of the sexual partner were relevant factors. The judge adopted the approach set out by Munby J in both *X City Council v MB, NB and MAB (By His Litigation Friend the Official Solicitor)*⁵⁸ and *Re MM, Local Authority X v MM (By the Official Solicitor) and KM*,⁵⁹ that consent to sexual relations is act-specific, not person- or situation-specific. The judge concluded that the only information relevant to giving consent which the person must understand and retain is (a) the mechanics of the act, (b) that there are health risks involved including sexually transmitted infections, and (c) for heterosexual relations only, that sex may result in pregnancy.

2.37 The judge found that AB lacked capacity because he had a very limited and a faulty understanding of sexually transmitted infections, believing that sex could give you spots or measles. The court, in making an interim declaration that at that time AB did not have the capacity to consent to and engage in sexual relations. However, the judge refused to make a final declaration and made several consequential orders, including an order for the provision of sex education.

⁵⁷ *R v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786.

⁵⁸ *X City Council v MB, NB and MAB (By His Litigation Friend the Official Solicitor)* [2006] EWHC 168 (Fam).

⁵⁹ *Re MM, Local Authority X v MM (By the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

2.38 The Court of Protection, in deciding whether AB, had capacity to consent, referred to the decisions of Munby J already discussed on the determination of capacity to consent to sexual relations prior to the coming into force of the *Mental Capacity Act 2005*.⁶⁰ Mostyn J drew on two analogies in *D Borough Council*. Firstly, following Munby J in *Re E*, he compared sexual consent to consenting to marriage.⁶¹ Mostyn J said that:

“it can be seen that the test of capacity to marry must be very closely related to the test of capacity to consent to sexual relations. And it would be a very strange thing if the latter were set higher than the former, for it would be an absurd state of affairs if a person had just sufficient intelligence to consent to marriage but insufficient capacity to consent to its (generally speaking) intrinsic component of consummation.”⁶²

2.39 The second analogy given by Mostyn J as being closely related to capacity to consent to sexual activity is the capacity of a girl under 16 to give consent to medical treatment in the form of prescribing contraception. In *Gillick v West Norfolk and Wisbech Area Health Authority*⁶³ the UK House of Lords held that a girl under 16 could validly consent to contraception “provided that she has sufficient understanding and intelligence to know what they involve.”⁶⁴ As such, all that is required for consent is ‘sufficient rudimentary knowledge’ to enable them to decide whether to give or withhold consent.⁶⁵ Recent court decisions, as mentioned above, had concluded that capacity to consent to sexual relations was act rather than partner specific. In other words, the court would have regard for the specific act rather than the sexual partner. Mostyn J went on to note that the English *Mental Capacity Act 2005* had no bearing on the test for consent as laid out by Munby J in *Re E*; *MAB* and *MM*. Moreover, he rejected Baroness Hale’s doubts in *Cooper* that consent could truly be act specific. Mostyn J concluded that the capacity to consent to sex remains act-

⁶⁰ *Re E (Alleged Patient)*; *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), *X City Council v MB, NB and MAB (by his Litigation Friend the Official Solicitor)* [2006] EWHC 168 (Fam) and *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam).

⁶¹ *D. Borough Council v AB* [2011] EWHC 101, at paragraph 14.

⁶² *D. Borough Council v AB* [2011] EWHC 101, at paragraph 15.

⁶³ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] All ER 402.

⁶⁴ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] All ER 402.

⁶⁵ *X City Council v MB, NB and MAB (by his Litigation Friend the Official Solicitor)* [2006] EWHC 168 (Fam).

specific and requires an understanding and awareness of the mechanics of the act; that there are health risks involved, in particular the acquisition of sexually transmitted and sexually transmissible infections and that sex between a man and a woman may result in pregnancy.⁶⁶ Mostyn J concluded by stating that a situation such as capacity to consent to sexual relations must be subject to a similar threshold as significant harm in the context of children where the state seeks to intervene and which is implicit under section 1(3) of the English *Mental Capacity Act 2005*. Finally, Mostyn J ordered that the local authority provide the subject of the proceedings sex education in line with the obligation under the *Mental Capacity Act 2005* that a person should not be treated as unable to make a decision unless all practicable steps are made to assist that person in making a decision.

(4) Issue specific test for capacity to consent to sexual relations

2.40 The leading English decisions on capacity to consent to sexual relations, *X City Council v MB, NB and MAB*⁶⁷ and *Re MM; Local Authority X v MM (By the Official Solicitor) and KM*⁶⁸ set out an issue specific test for capacity to consent to sexual relations, by analogy with capacity to marry and capacity to consent to contraception. Both cases, however, were decided before the English *Mental Capacity Act 2005* came into force.

2.41 Commentators have cautioned that *D Borough Council v AB* should not be adopted as a test case for future deliberations on capacity to consent to sexual relations. The case was not concerned with exploitation and the reasons for proposing a person- and situation-specific test were far from clear. As noted by Cole:

“[o]ne of the difficulties with cases on capacity to consent to sexual relations is that the particular circumstances of the individual concerned[ed] necessarily limit the scope of the court’s deliberations - decisions are made in the absence of sufficient information about the circumstances in which the test may need to be applied. Thus, in this case, the lowest degree of knowledge possible was found to be needed to consent to sex. Had, for example, the judge been considering heterosexual relations, he may well have concluded that understanding not just the risk of becoming pregnant but that pregnancy itself may carry risks, was necessary. Had, for example, there been an exploitative relationship, the judge may have been

⁶⁶ *D. Borough Council v AB* [2011] EWHC 101, at paragraph 42.

⁶⁷ *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam).

⁶⁸ *Re MM; Local Authority X v MM (By the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

more inclined to prefer a test that does not impose a blanket ban on sexual relations, but only within an exploitative relationship.”⁶⁹

(5) Concluding comments and provisional recommendations

2.42 It is clear from this discussion that, in the wake of the enactment of the English *Sexual Offences Act 2003* and the English *Mental Capacity Act 2005* the English courts have found it necessary to re-examine their approach to assessing capacity to consent to sexual relationships. As a result, there has been a marked convergence between the civil law and criminal law determinations as to capacity. Consistently with the presumption of capacity in the English 2005 Act, which is also likely to form a central part of the proposed mental capacity legislation in Ireland, there is an implicit recognition that individuals with intellectual disability or limited capacity can lawfully engage in sexual relationships. This right may be compromised, however, by the criminal law which, as for example under section 5 of the *Criminal Law (Sexual Offences) Act 1993*, creates offences that may have the effect of limiting the exercise of any perceived rights granted by virtue of the civil law approach while aiming to protect people from sexual exploitation.

2.43 The Commission considers that, having regard to these developments in English law, which is likely to mirror proposed developments in Irish law, the same functional test for assessing capacity to marry in the civil law should apply to assessing capacity to consent to sexual relations in the criminal law. The Commission, therefore, provisionally recommends that the same functional approach to capacity 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 Commission also provisionally recommends that capacity to marry should generally include capacity to consent to sexual relations. Furthermore, the Commission also provisionally recommends that, consistently with the functional approach, capacity to consent to sexual relations should be regarded as act-specific rather than person-specific.

2.44 *The Commission provisionally recommends that the same functional approach to capacity 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 Commission also provisionally recommends that capacity to marry should generally include capacity to consent to sexual relations. The Commission also provisionally recommends that, consistently with the functional approach, capacity to consent to sexual relations should be regarded as act-specific rather than person-specific.*

⁶⁹

Keene and Cole (eds) *Thirty Nine Essex Street Court of Protection Newsletter* Issue 6 February 2011.

CHAPTER 3 REPRODUCTIVE FREEDOM

A Introduction

3.01 This Consultation Paper is concerned primarily with reform proposals in the context of capacity to consent to sexual relations by persons with limited decision-making ability. Nonetheless, the Commission considers it is important to highlight briefly the related issues of reproductive and parental rights of persons with intellectual disability. In Part B, the Commission examines the historical approach which has framed section 5 of the *Criminal Law (Sexual Offences) Act 1993*. In Part C, the Commission considers the related policy issue of parental rights in the context of constitutional and international standards. Finally, in Part D, the Commission discusses the range of supports for parents with disabilities.

B Historical perspective

3.02 Historically, negative and repressive attitudes towards the sexual expression of people with disabilities resulted in their reproductive freedom being the subject of control by society. This was a result of false beliefs held by negative societal assumptions and attitudes regarding their potential criminality, promiscuous behaviour and sexual perversion and deviance. Well into the 20th century, the consequences of such prejudice and sexual stigmatisation led to the practice of selective breeding or eugenics, spurred by the eugenics movement,¹ which remained influential from the late 19th century to the mid 20th century.

(1) Eugenics movement

3.03 Women's sexual and reproductive rights were particularly controlled and violated by the eugenics movement through measures such as involuntary sterilisation; forced abortion; sex segregation by placing women in institutions; over-use of long-acting contraceptives; and the loss of custody of their children. These practices were justified on the premise that women with disabilities were

¹ Eugenic theory generally held that many of society's ills, including crime, poverty and mental deficiency, were largely caused by hereditary defects rather than environmental and social factors.

a threat that had to be 'controlled'; that they were unable to give informed consent, unable to parent and that they would give birth to children with disabilities.

3.04 The US Supreme Court decision in 1927 in *Buck v Bell*² indicated the continuing influence of the eugenics movement well into the 1920s and 1930s. The US Supreme Court upheld the constitutionality of a Virginia Act permitting eugenical sterilisation of persons with disabilities. The decision of the Court in *Buck v Bell* contained the following (now-embarrassing) comments of the otherwise liberal-minded Holmes J that:

“[i]t would be strange if [the public welfare] could not call upon those who already sap the strength of the State... in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes. Three generations of imbeciles are enough.”³

3.05 The Eugenics Movement became notorious when the medical experiments associated with the Nazi regime of World War II (1939-1945) came to light, and its views were ultimately largely abandoned. Some aspects of eugenics, such as sterilisation for non-therapeutic purposes, continued for some years in many countries and it was only towards the end of the 20th century that courts began to take a more rights-centred view. In the leading Canadian case on sterilisation of the 1980s, *Re Eve*⁴, the Supreme Court of Canada decided that the court's common law power to intervene to protect vulnerable or “at risk” adults with intellectual disability (its *parens patriae* jurisdiction) did not include a power to authorise sterilisation for non-therapeutic purposes. The Court was asked to consent to a mother's application for a sterilisation operation for her daughter who had (using the WHO classification discussed in Chapter 1) a mild to moderate intellectual disability. The reason the operation was sought was to prevent pregnancy rather than any medical necessity. Delivering the unanimous decision of the Canadian Supreme Court, La Forest J stated:⁵

“The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilisation without

² *Buck v Bell* 274 US 200 (1927).

³ *Buck v Bell* (1927) 274 US 200, at 207.

⁴ *Re Eve* (1986) 31 DLR (4th) 1.

⁵ *Re Eve* (1986) 31 DLR (4th) 1, at 32.

consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorised for non-therapeutic purposes under the *parens patriae* jurisdiction.”

3.06 Accordingly, taking this rights-based approach the Court refused the application for consent to sterilisation. The comparable leading English decisions of recent years have tended to focus on whether sterilisation is in the ‘best interests’ of the person involved.⁶

(2) The Irish position on eugenics

3.07 In its 1990 *Report on Sexual Offences against the Mentally Handicapped*⁷ the Commission commented that, if the issue of non-consensual sterilisation arose for judicial consideration in Ireland, it seems probable that the approach taken by the Canadian Supreme Court in *Re Eve*⁸ would be applied. The Commission has previously noted that it has since been argued that a consideration of whether sterilisation is in the best interests of an individual would not be sufficient given the existence of the individual’s underlying constitutional rights.⁹ In Ireland, the right to have children has been recognised in a marital context as one of the unenumerated rights guaranteed by Article 40 of the Constitution as being essential to the human condition and personal dignity.¹⁰ A person who has the capacity to marry or capacity to consent to sexual relations, and who retains that capacity, has the capacity to consent to or refuse sterilisation. A wider right to reproduce has not yet been judicially recognised in Irish constitutional law. In addition, the constitutional right to bodily integrity and the right to family life and privacy in Article 8 of the European Convention on Human Rights (ECHR) are relevant in this context.

⁶ *In re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199; *In re F (Mental Patient: Sterilisation)* [1989] 2 WLR 1025

⁷ LRC 33-1990.

⁸ *Re Eve* (1986) 31 DLR (4th) 1. The decisions in *Re Eve* and *Buck v Bell* were discussed by the Supreme Court in *North Western Health Board v HW and CW* [2001] IESC 90, [2001] 3 IR 622.

⁹ Donnelly “Non-Consensual Sterilisation of Mentally Disabled People: The Law in Ireland” (1997) 32 Ir Jur 297, at 310, cited in LRC CP 37-2005.

¹⁰ *Murray v Ireland* [1991] ILRM 465, 471, 476. In the decision of the UK House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, Lord Brandon described the right to bear children as “one of the fundamental rights of a woman.”

Furthermore, in certain circumstances non-consensual sterilisation may constitute, under civil law, a trespass against the person and, under criminal law, an assault under the *Non-Fatal Offences Against the Person Act 1997*.

3.08 The Commission in its 2006 *Report on Vulnerable Adults and the Law*¹¹ endorsed the approach of the Commission on the Status of People with Disabilities that there should be a legal prohibition on sterilisation on the basis of disability alone, that is, non-therapeutic sterilisation, and that every effort should be made to ensure that informed and free consent exists. This would require prior court approval for the non-therapeutic sterilisation of an adult who lacks capacity to make a decision to consent to or to decline such a procedure. The Commission recommended that any proposed sterilisation of an adult where there is no serious malfunction or disease of the reproductive organs would require the prior consent of the High Court where the adult lacks the capacity to make a decision to consent to or to decline such a procedure.¹²

(3) Moves towards a community and rights-based approach

3.09 It was not until the 1970s that groups began to advocate for individual choices and desires for people with disabilities. Since the de-institutionalisation period began, people with intellectual disability have begun to live and participate in their community, but the Commission notes that attitudes to sexuality for people with disability may survive. In a Special Olympics survey undertaken in 2003, 53% of Irish respondents thought that people with intellectual disability were capable of marriage but only 23% believed they would be capable of caring for their children.¹³

3.10 This reflects some of the international literature on this and may also echo some of the eugenics myths, as infamously stated in *Buck v Bell* in 1927, including that parents with intellectual disability are also more likely to have children with an intellectual disability. Given that people with intellectual disability have only been in a position in many countries to have children in recent years, there are very few evidence-based studies to address this. One Australian study concluded that there was no statistically significant correlation found between the developmental status of children and the characteristics of the mother or their home environment, but that the developmental status of the children varied markedly in physical, self-help, academic, social and communication domains; and that in all developmental domains, between 35%

¹¹ LRC 83-2006 at paragraph 3.13.

¹² LRC 83-2006 at paragraph 3.14.

¹³ Cited in *Friendship and Taboos: Research on Sexual Health Promotion for People with Mild to Moderate Intellectual Disabilities in the 18-25 Age Range* (Health Service Executive, 2009) at 9.

and 57% of children showed a delay of at least three months.¹⁴ It is clear, of course, that many factors affect the intellectual and developmental capacity of children, including: the presence or absence of lead in petrol; the presence of absence of alcohol during conception and pregnancy; the intellectual capacity of parents; nutrition; social grouping; access to ante-natal and post-natal health care; the presence or absence of immunisation programmes to prevent measles, mumps and rubella; and screening programmes to prevent congenital disorders such as phenylketonuria (PKU).

3.11 As the Australian study referred to above noted, a specific challenge is that pregnant women with intellectual disability may have poor health relative to the general population and may also access ante-natal services relatively late and have a poor birth experience, which may also impact on the child. The 2011 literature review by the National Disability Authority (NDA) and the Crisis Pregnancy Programme (CPP),¹⁵ discussed below, confirms that there is a need to develop appropriate policies and supports to ensure enhanced parenting outcomes. The NDA and CPP literature review also concluded that the repeal and replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* would complement these support measures.

3.12 The Commission emphasises of course, that pregnancy, and parenting, are aspects of a fully-expressed sexual life for persons with intellectual disability, but they are not the sole focus. Indeed, the limited focus of section 5 of the 1993 Act in criminalising sexual intercourse only, but not other forms of sexual assaults or exploitation, may reveal a lingering aspect of older prejudices and myths. The Commission agrees with the view expressed in the NDA and CPP literature review that policy development in this area must deal not simply with supporting parents with intellectual disability but must also focus on general sexual health, including the emotional aspects of interpersonal feelings that develop from a sexual relationship, the use of contraception and sexually transmitted infections. Just as policy development should reflect this holistic view to all aspects of positive sexual health, reform of the criminal law,

¹⁴ McConnell and Ors, "Developmental Profiles of Children Born to Mothers with Intellectual Disability" (2003) 28 *Journal of Intellectual and Developmental Disability* 122-134, cited in *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme, June 2011), available at www.nda.ie.

¹⁵ *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme, June 2011), available at www.nda.ie.

the focus should not be limited to sexual offences involving intercourse, but should also reflect the wider aspects of a sexual life, including other sexual assaults and sexual abuse and exploitation.

C Parental rights of persons with intellectual disability

3.13 In considering the sexual rights of persons with intellectual disability or limited decision-making capacity, the Commission turns to discuss the related policy issue of parental rights in the context of constitutional and international standards. As already noted the eugenics movement had framed the historical context of people with disabilities as sexual beings and as parents. Eugenics is driven by a fear that people with disabilities would (i) give birth to children with disabilities; (ii) be incapable of adequately parenting their children regardless of supports provided; (iii) be incapable of understanding the legal implications of marriage and parenthood; and (iv) be unable to bond with their children.¹⁶

3.14 In this Part, the Commission considers the barriers confronting people with disabilities as parents. Before turning to the literature in this area, the Commission discusses the *Child Care Act 1991*, notably the power under the 1991 Act to make a care order bringing a child into the care of the Health Service Executive. The Commission is conscious in this respect that the 1991 Act has been used as a response to a person with an intellectual disability becoming pregnant or having a child.

(1) Child Care Act 1991

3.15 The *Child Care Act 1991* is the primary legislation dealing with children who are in need of adequate care and protection in the State. Section 3(1) of the *Child Care Act 1991*¹⁷ states that the Health Service Executive (HSE) “shall... promote the welfare of children who are not receiving adequate care and protection”, and section 3(3) adds that the HSE must provide “child care and family support services.” Section 3(2) of the 1991 Act provides that, in carrying out its mandatory statutory function to promote the welfare of children, the Health Service Executive shall:

“(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children;

¹⁶ Richards *et al* “Sexuality and Human Rights of Persons with Intellectual Disabilities” in Owen and Griffiths (eds) *Challenges to the Human Rights of Persons with Intellectual Disabilities* (Jessica Kingsley Publishers 2009) at 194.

¹⁷ As amended by the *Health Act 2004*, which established the Health Service Executive to replace the former health boards.

- (b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—
 - (i) regard the welfare of the child as the first and paramount consideration, and
 - (ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and
- (c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.”

3.16 Section 3(2)(c) of the 1991 Act clearly reflects the constitutional position and relevant international human rights standards that it is presumed to be in the best interests of a child that he or she be brought up in their own family by their parents or guardians.¹⁸ It is only when extensive efforts to achieve this have failed that the more interventionist aspects of the 1991 Act should be employed.¹⁹

3.17 A care order may be made by the District Court under section 18 of the 1991 Act, which places a child in the care of the Health Service Executive, either temporarily or permanently. Section 18(1) of the 1991 Act states that such an order may be made only where the court is satisfied that: (a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or (b) the child’s health, development or welfare has been or is being avoidably impaired or neglected, or (c) the child’s health, development or welfare is likely to be avoidably impaired or neglected.

(2) Threshold required to apply for care order

3.18 The consequences of a care order under the 1991 Act requires that it be used as a measure of last resort where parents are afforded every opportunity to demonstrate their intention and ability to provide a safe and secure environment for their child.²⁰ Thus, in *KC and AC v An Bord Uchtála*,²¹ Finlay CJ noted “that the welfare of the child... is to be found within the family unless the court is satisfied that there are compelling reasons why this cannot

¹⁸ The Commission examined in detail the relevant constitutional and international human rights standards in this area in its 2011 *Report on Children and the Law: Medical Treatment* (LRC 103-2011), at paragraphs 1.21-1.32.

¹⁹ Buckley *et al* “Protecting children under the Child Care Act 1991 – Getting the Balance Right” (1999) 21 IJFL 10, at 2.

²⁰ Shannon (ed) *Family Law Practitioner* (Round Hall Sweet & Maxwell loose-leaf) at Division I, I-133A.

²¹ [1986] ILRM 65.

be achieved". Similarly, in *North Western Health Board v HW and CW*²² the High Court and Supreme Court noted that it was only in exceptional cases that the State could intervene under the 1991 Act in respect of decisions made by parents. This was so even where, as in that case, which involved the refusal by parents to consent to a PKU screening test for their baby, the decision was one that most other parents would not have made.

3.19 In the context of care orders under the comparable English *Children Act 1989*, the UK House of Lords in *Lancashire County Council v Barlow*²³ noted that an application for a care order requires caution and restraint. One of the judges in the case, Lord Clyde, commented that "the stress which care proceedings may well impose on the parents may even itself be damaging to the child". Lord Clyde also referred to the right to family life and privacy under Article 8 of the European Convention on Human Rights, noting that this underlines "the need for caution and restraint" in applying for a care order. Similarly, in another UK House of Lords decision, *Re H (Minors) (Sexual Abuse: Standard of Proof)*,²⁴ Lord Nicholls stated that parents:

"are not to be at risk of having their children taken from them and removed into the care of the local authority on the basis only of suspicions, whether of the judge or the local authority or anyone else. A conclusion that the child is suffering or is likely to suffer harm must be based on the facts, not just suspicion."

3.20 Lord Nicholls added that the more improbable the event, the stronger the requirement for evidence that abuse or neglect did occur before, on the balance of probabilities, its occurrence will be established. Nonetheless, he also added that:

"It is, of course, open to a court to conclude there is a real possibility that the child will suffer harm in the future although harm in the past has not been established. There will be cases where, although the alleged maltreatment itself is not proved, the evidence does establish a combination of profoundly worrying features affecting the care of the child within the family. In such cases, it would be open to a court in appropriate circumstances to find that, although not satisfied the child is yet suffering significant harm, on the basis of such facts as are proved there is a likelihood that he will do so in the future."

²² [2001] IESC 90, [2001] 3 IR 622. See the discussion of the case in *Report on Children and the Law: Medical Treatment* (LRC 103-2011), at paragraphs 1.29 and 2.28.

²³ *Lancashire County Council v Barlow* [2000] UKHL 16.

²⁴ *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, at 592.

3.21 Shannon suggests that the Irish courts are likely to follow this approach, namely that the pre-condition for a care order under section 18 of the 1991 Act is met if it can be shown that there is a real possibility that the child is likely to suffer significant harm.²⁵

(3) Legal aid for appointed person to assist parent with intellectual disability

3.22 As already noted, the Commission is aware that applications for care orders have been made under the 1991 Act as a response to a person with an intellectual disability becoming pregnant or having a child. In *Legal Aid Board v Brady*²⁶ the respondent judge of the District Court had appointed a guardian *ad litem* (litigation guardian) to assist in communicating the views of a parent with an intellectual disability in an application for a care order under section 18 of the 1991 Act. At the end of the hearing, the judge ordered the Legal Aid Board to pay the costs of the guardian *ad litem*. The Legal Aid Board challenged this order on judicial review.

3.23 The Irish Human Rights Commission (IHRC) intervened in the proceedings as *amicus curiae* (friend of the court) in accordance with the *Irish Human Rights Commission Act 2000*. In its written submissions to the Court, the IHRC argued that, in the absence of legal aid support, the proceedings under section 18 of the 1991 Act would be in breach of the rights of the parent and child to fair procedures under Article 40.3 of the Constitution as well as Articles 6 and 8 of the European Convention on Human Rights. The IHRC also referred to the 2006 UN Convention on the Rights of Persons With Disabilities in this context. The IHRC also argued that the parent, like all parents, must have every reasonable opportunity to present her case against the making of a care order, having particular regard to the fact that such an order would have the effect of transferring parental responsibility to the Health Service Executive “and displacing the parent’s role in a most fundamental manner” and argued that such procedural rights cannot be diminished by virtue of a lack of legal capacity on the part of the parent.

3.24 The case was ultimately settled in 2007 and, arising from it, the Legal Aid Board issued a policy document for these cases.²⁷ As a result,

²⁵ Shannon (ed) *Family Law Practitioner* (Thomson Round Hall loose-leaf) at Division I, I-133B.

²⁶ *Legal Aid Board v Brady and Ors* High Court, March 2007 (settlement of case), High Court Record Nos.474/2005 JR and 2006/652 JR.

See <http://www.ihrc.ie/enquiriesandlegal/amicuscuriae/intellectualdis.html>

²⁷ Circular 2/2007: Arrangements to appoint persons to assist clients with impaired capacity in child care proceedings.

arrangements have been in place since 2007 to appoint a person (the Legal Aid Board policy stating he or she is not a guardian *ad litem*) for an adult with an intellectual disability in care order proceedings under section 18 of the 1991 Act. The appointed person will assist in communicating the views of a parent with an intellectual disability to the solicitor who has been retained in the proceedings. The Commission very much supports this important aspect of ensuring that care proceedings under section 18 of the 1991 Act properly respect the rights of parents with intellectual disabilities.

3.25 The Commission now turns to discuss the available literature in Ireland on the provision of appropriate and accessible support to people with an intellectual disability who are pregnant or who have had a child.

(4) *Parents with disabilities, capacity to parent and the need for support services*

3.26 As already noted, in Ireland the 2006 National Disability Survey (NDS) carried out by the Central Statistics Office indicates that 50,400 people in Ireland have a diagnosed intellectual disability. This includes 14,000 whose main disability was classified as dyslexia or a specific learning difficulty and 2,500 whose disability was classified as attention deficit disorder. Many of these 16,500 individuals are unlikely to require specific supports outside their specific educational needs. As also already pointed out, the Health Research Board, which has adapted the WHO classification system in the development of its National Intellectual Disability Database (NIDD), has noted that, in 2009, there were 26,066 people registered on the NIDD.²⁸

3.27 Within this group of about 50,000, there is no reliable figure as to the number of people with intellectual disability or a learning disability who are also parents. In a 2011 literature review, the National Disability Authority (NDA) and the Crisis Pregnancy Programme (CPP) have pointed out that, in Ireland, “the number of women with intellectual disability having children is increasing and that when a woman announces her pregnancy, the reactions of people close to her are almost exclusively negative. Other challenges faced by women with an intellectual disability experiencing pregnancy and parenthood include accessing sexual health information, accessing sexual health services, inadequate information and negative attitudes to pregnancy and parenthood among service providers and the wider community.”²⁹ This analysis indicates that, while the

²⁸ *Annual Report of the National Intellectual Disability Database Committee 2009* (Health Research Board, 2010), p.15, available at www.hrb.ie. See also the discussion in Chapter 1, above.

²⁹ *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National

worst features of the eugenics movement may be in the past, some lingering elements of it continue to make their presence felt. The NDA/CPP literature review confirms that current practice has meant that parents who have disabilities must disprove stereotyped myths surrounding their ability to parent. This practice does not reflect the functional approach which has at its core a rebuttable presumption of capacity.

3.28 As mentioned, the 2011 literature review by the NDA and CPP indicates that, while the number of women with intellectual disability having children is increasing, there is no reliable figure as to the total current number. The NDA and CPP note that, in the UK, estimates vary widely from 23,000 to 250,000, and that an English 2005 study found that almost 7% of adults with “learning difficulties” were parents.³⁰ Other international literature confirms that the numbers that are known to the health and welfare services are widely recognised to be on the increase.³¹ This increase can be attributed to the move towards services based on the principle of ‘normalisation’ and as a result of a well-developed child protection system.³²

3.29 In connection with the discussion above on the use of the *Child Care Act 1991*, in the English setting Booth and Booth note that parents with learning difficulties are between 30 and 60 times more likely to be the subject of a care order application than their numbers in the general population would warrant.³³

Disability Authority and Crisis Pregnancy Programme, June 2011), p.18, available at www.nda.ie.

³⁰ *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme, June 2011), p.165, available at www.nda.ie.

³¹ Booth “Parents with learning difficulties, child protection and the courts” (2000) 13 *Representing Children* 3, at 175-188. It is estimated that there are 250,000 parents with learning difficulties known to health and social service agencies in the UK.

³² Booth and Booth “A family as risk: multiple perspectives on parenting and child protection” (2004) 32 *British Journal of Learning Disability* 1, at 9-15. International research shows rates of removal of children from parents with a learning disability vary but are seen to be in the range of 30 and 80%. Booth and Booth argue that parents with learning difficulties often live under closer scrutiny of child protection agencies and that such scrutiny sometimes results in the application of stricter standards of accountability that might be applied for ‘non-disabled’ parents.

³³ Booth and Booth “A family as risk: multiple perspectives on parenting and child protection” (2004) 32 *British Journal of Learning Disability* 1, at 10.

Other English research suggests that decisions about the future placement of children of parents with intellectual disabilities are regularly taken without adequate information, arrangements or support being put in place to allow parents to demonstrate that they can look after their children satisfactorily.³⁴ The following barriers have been identified in the literature on parenting:³⁵

- assessments are not accessible and do not test parents' abilities or support needs effectively;
- professionals often have negative or stereotypes attitudes about people with an intellectual disability and their ability to be parents;
- information about parenting which is routinely given to parents without an intellectual disability is not provided in an accessible format to new parents who have an intellectual disability;
- support which parents with an intellectual disability may require to help them look after their children satisfactorily may not be available from services, due to the application of increasingly narrow eligibility criteria for support by services.

3.30 Another NDA commissioned study found in 2010 that expectant mothers with disabilities are confronted with having to prove their capacity to parent. It found that health professionals tended to overly-focus on the impact of the woman's disability on the child and the physiological risks associated with inheritance.³⁶ This was accompanied by a perception that health professionals were constantly observing, watching and scrutinising their ability to parent and to execute parenting skills without receiving adequate supports.³⁷

3.31 The study recommended that a common tool be used to assess a person's ability to parent, with clear explicit criteria as well as the engagement of the parents throughout the process and that such an assessment be carried

³⁴ *A Life Like Any Other? Human Rights of Adults with a Learning Disability* (House of Lords/House of Commons Joint Parliamentary Committee on Human Rights 2008) at paragraph 165.

³⁵ *A Life Like Any Other? Human Rights of Adults with a Learning Disability* (House of Lords/House of Commons Joint Parliamentary Committee on Human Rights 2008) at paragraph 165.

³⁶ Begley *et al*, *The strengths and weaknesses of publicly-funded Irish health services provided to women with disabilities in relation to pregnancy, childbirth and early motherhood* (National Disability Authority 2010) at 196.

³⁷ Begley *et al*, *The strengths and weaknesses of publicly-funded Irish health services provided to women with disabilities in relation to pregnancy, childbirth and early motherhood* (National Disability Authority 2010) at 147.

out in their own home with supports.³⁸ International literature shows that over the past 20 years, an evidence-based intervention technology has been developed to teach parenting skills to parents with intellectual disabilities. Using these behavioural instructional strategies, parents with intellectual disabilities have learned a wide variety of skills including: basic newborn, infant and child care; nutrition; health and safety; and positive interactions. The literature suggests that when measured, their children's health and development benefit from such training and the family unit remains intact.³⁹ As such, there is strong evidence that with the appropriate supports many of these parents are able to provide a nurturing, healthy, and safe home environment for their children.

3.32 Literature suggests that the absence of specialist support and other services directed towards disabled adults with parenting responsibilities, combined with resource constraints, has meant that in many instances, disabled parents receive attention from service providers only after problems have arisen in respect of their children. Research suggests that best practice would include providing timely and appropriate support to assist disabled adults to fulfil their parenting role and responsibilities is the best way to safeguard the welfare of children.⁴⁰ Best practice also shows that when child protection procedures are instituted, there should be joined-up coordination among adult and child services which ensure that disabled parents continue to receive specialist support and have access to such advocacy as they require.⁴¹

3.33 The NDA study called for relevant education programmes for staff working in this area in order to tackle the stigmatising practices and attitude which can sometimes exist. Central to this is the need for modern capacity legislation grounded in the presumption of capacity rather than incapacity in the context of parenting by persons with disabilities. In this situation mothers would have to be proven to be incapable of parenting before social services could apply for a care order to take the child into care. There would also be the need for services to be put in place to support these women during all stages of

³⁸ Begley *et al*, *The strengths and weaknesses of publicly-funded Irish health services provided to women with disabilities in relation to pregnancy, childbirth and early motherhood* (National Disability Authority 2010) at 197.

³⁹ Richards *et al* "Sexuality and Human Rights of Persons with Intellectual Disabilities" in Owen and Griffiths (eds) *Challenges to the Human Rights of Persons with Intellectual Disabilities* (Jessica Kingsley Publishers 2009) at 194.

⁴⁰ *Supporting disabled adults in their parenting role* (Joseph Rowntree Foundation 2002) at 27.

⁴¹ *Supporting disabled adults in their parenting role* (Joseph Rowntree Foundation 2002) at 39.

pregnancy and early motherhood. This would require accepting the sexual rights of women with intellectual disabilities and to move from the current situation where sexuality is discouraged and pregnancy is viewed as a failure of preventive strategies.

3.34 There is an obligation on the State to provide support to parents to realise their rights rather than intervene to deny them the right. As the 2001 UK White Paper *Valuing People* noted:

“[p]arents with learning disabilities are amongst the most socially and economically disadvantaged groups. They are more likely than other parents to make heavy demands on child welfare services and have their children looked after by the local authority. People with learning disabilities can be good parents and provide their children with a good start in life, but may require considerable help to do so. This requires children and adult social services teams to work closely together to develop a common approach. Social services departments have a duty to safeguard the welfare of children, and in some circumstances a parent with learning disabilities will not be able to meet their child’s needs. However, we believe this should not be the result of agencies not arranging for appropriate and timely support.”⁴²

3.35 The Commission now turns to discuss the obligations of the State to provide support to parents with disabilities under the *Disability Act 2005* and the unenumerated personal rights under the Irish Constitution.

(5) *The Disability Act 2005 and the nature of socio-economic rights in Ireland*

3.36 The protection of socio-economic rights under the Constitution has been seen through the doctrine of unenumerated personal rights and the Directive Principles of Social Policy, through the guarantee of equality under the Constitution or by way of amendment.⁴³

3.37 The main tenet of the *Disability Act 2005* was the provision of an independent assessment of need⁴⁴ which results in the compilation of a service statement listing the services a person deemed to have a disability, as defined

⁴² UK Government White Paper *Valuing People: A New Strategy for Learning Disability for the 21st Century* (2001) at 7.40.

⁴³ O’Connell “The Death of Socio-Economic Rights” (2011) 74 *The Modern Law Review* 4 533, at 541.

⁴⁴ Sections 8-9 of the *Disability Act 2005*. An assessment of need determines what services the person needs based on their specific disability and circumstances.

under the Act, requires.⁴⁵ Arising from the assessment, the person concerned will be given an assessment report which indicates whether a person has a disability; the nature and extent of the disability; the health and education needs arising from the disability; the services considered appropriate to meet those needs and the timescale ideally required for their delivery; and when a review of the assessment should be undertaken.

3.38 The *Disability Act 2005*, while it creates a statutory entitlement once a person comes within the definition of having a ‘disability’ there is no guarantee built into the legislation to ensure that the relevant services required can be litigated through the courts.⁴⁶ The provisions enshrined in the *Disability Act 2005* “can best be described as ones which are based on the fundamental civil and political rights to participation and autonomy.”⁴⁷ People with disabilities may require supports to facilitate their participation in society and this may include education, training and health service provision. These provisions can be described as mechanisms necessary in order to access other substantive rights.

3.39 Under the 2005 Act, 6 statutory Departmental Plans are obliged to implement the provisions in the Act. As highlighted by the Commission in its 2006 Report on Vulnerable Adults the UNCRPD, when ratified by Ireland, will provide a further framework for the future discussion of rights in Ireland. The ‘rights-based’ approach of the Convention, however, may not sit easily with the approach taken in the *Disability Act 2005*, although the Commission accepts that the sectoral plans and funding arrangements surrounding the 2005 Act provide tangible evidence of movement towards the objectives of the UN Convention.

3.40 The legislative basis for the identification of health and social needs is contained in Part 2 of the *Disability Act 2005* which provides for the identification of health and social needs of people with disabilities. Part 2 of the Act also provides for identifying and allocating responsibility of such needs to the relevant departments and agencies.

3.41 Of particular importance is section 30 of the 2005 Act which provides that the Minister for Justice and Equality may request the NDA to prepare codes of practice specifying what public bodies must do to comply with their obligation

⁴⁵ Section 11 of the *Disability Act 2005*.

⁴⁶ De Wispelaere and Walsh “Disability Rights in Ireland: Chronicle of a Missed Opportunity” (2007) 22(4) *Irish Political Studies*, at 517.

⁴⁷ Flynn “Ireland’s compliance with the Convention on the Rights of Persons with Disabilities: Towards a rights-based approach for legal reform” (2009) 16(1) *DULJ* 357, at 7.

to make their mainstream services, information resources and heritage sites properly accessible. A Code of Practice on Accessibility of Public Services and Information was published in 2006 by the NDA⁴⁸ which includes clear guidance on how public bodies can comply with their statutory duties under the 2005 Act.

3.42 The assessment of need under the *Disability Act 2005* does not extend to a positive assessment of need for parents with limited capacity in the context of the *Child Care Act 1991*. The following section discusses the nature of socio-economic rights in Ireland and how the provision of a positive assessment of need and the implementation of a range of supports identified under the assessment process under the *Disability Act 2005* could support parents with limited capacity in their parenting role.

3.43 The Commission considers there should be a positive assessment of capacity to parent in line with section 8 of the *Disability Act 2005* which specifies that an assessment officer should be independent in carrying out his or her functions and that an assessment should be carried out without regard to the cost of providing the services required.⁴⁹ Where it has been determined that the applicant has a disability the assessment of needs statement for parents with limited capacity could include the following:⁵⁰

- (i) a statement of the nature and extent of the disability,
 - (ii) a statement of the health and education needs (if any) occasioned to the person by the disability,
 - (iii) a statement of the services considered appropriate... to meet the needs of the applicant and the period of time ideally required by the person or persons for the provision of those services and the order of such provision,
 - (iv) a statement of the period within which a review of the assessment should be carried out.
- (6) ***Constitutional considerations***

3.44 The guarantee of free primary education in Article 42 of the Constitution as well as the implied right of 'at risk' children to be placed in the care of the State in certain extreme circumstances has generated a substantial body of jurisprudence. The Irish Supreme Court, in 2001, delivered two

⁴⁸ *Code of Practice on Accessibility of Public Services and Information* (National Disability Authority 2006) available at www.nda.ie.

⁴⁹ Currently a request for an assessment of need in the *Disability Act 2005* can only be done by those who are eligible.

⁵⁰ Section 7(b) of the *Disability Act 2005*.

particularly significant judgments. *TD v Minister for Education*⁵¹ dealt with the State's obligation to provide for the needs of at risk children, whose parents had failed to do so. *Sinnott v Minister for Education*⁵² concerned the provision of special educational needs regardless of age for those with severe disabilities. More broadly, however, these two cases were ultimately about whether or not the Irish courts would protect socio-economic rights, and if so, in what way.⁵³ In overturning the High Court, the Irish Supreme Court reaffirmed that the Irish Constitution was a charter of negative rights and that socio-economic rights should be the domain of the elected branches of government.

3.45 In the 1993 High Court decision *O'Donoghue v Minister for Health*⁵⁴ case, O'Hanlon J also cited the 1975 UN General Assembly's Resolution 3447, or Declaration on the Rights of Disabled Persons, which was the genesis for what ultimately became the 2006 UN Convention on the Rights of Persons With Disability, discussed below. O'Hanlon J cited the following provisions of the 1975 UN Resolution:⁵⁵

"6. Disabled persons have the right to... education and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of social integration and reintegration."The Commission now turns to discuss the position of the 'family' under the Constitution and international standards."

(7) *The Family, the Constitution and International Standards*⁵⁶

3.46 The 'family' is guaranteed special protection under Article 41 of the Irish Constitution. Article 41.1.1° provides that:

"The State recognises the Family as the natural primary and fundamental unit group of society."

Article 41.1.1° is sometimes regarded as an unusually strong recognition of the importance of the family unit, but it is virtually identical to Article 16.3 of the 1948 UN Universal Declaration of Human Rights, which states:

⁵¹ *TD v Minister for Education* [2001] 4 IR 545.

⁵² *Sinnott v Minister for Education* [2001] 2 IR 241.

⁵³ O'Connell "The Death of Socio-Economic Rights" (2011) 74 *The Modern Law Review* 4 533, at 541.

⁵⁴ [1993] IEHC 2, [1996] 2 IR 20.

⁵⁵ [1996] 2 IR 20, at 56.

⁵⁶ See also the discussion in *Report on Children and the Law: Medical Treatment* (LRC 103-2011), paragraphs 1.22-1.26.

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

3.47 Article 23.1 of the 1966 UN International Covenant on Civil and Political Rights (ICCPR) involves a remarkable reflection of the text of Article 41.1.1° and provides:

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

3.48 Similarly, the Preamble to the 1989 UN Convention on the Rights of the Child (UNCRC) reiterates that the family is “the fundamental group in society.” The 1966 and 1989 UN Conventions thus underline that Article 41.1.1° reflects a contemporary views at international level of the fundamental importance of the family unit. It is unsurprising, therefore, that this approach is reflected not only in Article 41 of the Constitution of Ireland but also in the law of other countries, such as Germany and Australia.⁵⁷ In family law proceedings in Australia, for instance, section 43(1)(b) of the Australian (federal) *Family Law Act 1975* states that Australian courts must have regard to “the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society.” The Australian 1975 Act clearly was intended to codify Article 23.1 of the 1966 ICCPR.⁵⁸

3.49 Article 42.1 of the Constitution reinforces the statement in Article 41 that the family is the fundamental unit group of society by acknowledging that the family is “the primary and natural educator of the child.” Article 42.5 provides that only in “exceptional circumstances” where parents “fail in their duty towards their children” the State may “supply the place of parents.” Article 42.5 also states that any such role of the State must have due regard for the rights of the child. As with Article 41.1.1°, Article 42 is reflected in relevant international human rights documents. The provisions of Article 41 and 42 of the Constitution, and the relevant international instruments such as the 1948 UN Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1989 UN Convention on the Rights of the Child

⁵⁷ Hogan and Whyte (eds) *Kelly: The Irish Constitution* 4th ed (LexisNexis, 2003) fn 2 paragraph 7.6.01, citing Article 6 of the 1949 German Grundgesetz (the German Basic Law, in effect its Constitution) and section 43(1)(b) of the Australian (federal) *Family Law Act 1975*.

⁵⁸ Australian Law Reform Commission *Family Violence - A National Legal Response* (ALRC Report 114, 2010) at paragraph 4.42, referring to the Second Stage speech on the *Family Law Bill* (which became the 1975 Act) of the then Australian Attorney General, Lionel Murphy (who had cited the ICCPR in this context).

and the 2006 UN Convention on the Rights of Persons with Disabilities contain the following important elements: (a) parents and guardians have primary responsibility for the upbringing and development of their children, (b) the State may intervene to supply the place of parents only in exceptional circumstances where this is necessary, and (c) the rights of the child, and their best interests, must always be taken into account in this context.

(8) *The European Convention on Human Rights*

3.50 Article 8 of the ECHR guarantees as a basic right respect for private and family life, home and correspondence. Paragraph 2 of the provision provides that there will be no interference with this right except where it is in accordance with law, in pursuit of a legitimate aim and necessary in a democratic society. Unless justified as a proportionate and necessary response to a risk to the child, or others, compulsory removal of a child from the care of its parents constitutes a significant infringement of the rights of both the child and its parents, to respect for their family life as protected under Article 8 of the ECHR and the *ECHR Act 2003*. As such, those who enjoy family life must be able to do so without the arbitrary interference of the state.⁵⁹ Where this right is not adhered to such as a situation where a child is taken into care, family members are able to challenge the validity of the order and its compatibility with article 8 of the ECHR. In deciding whether the measure is compatible consideration must be given to whether it is in accordance with law, in pursuit of a legitimate aim and necessary in a democratic society.⁶⁰

3.51 The best interest element, although not explicit, is the accepted principle by which the consistency with Article 8(2) of state interference with family life is maintained.⁶¹ The principle of proportionality is applied in balancing the interference of the state with family life and the aim of protecting the interests and rights of the child. The Court must consider whether, in light of the details of the particular case, the authorities had relevant and sufficient reasons for initiating the measures.⁶² The State enjoys considerable discretion in making a care order which must be justified under Article 8(2) of the Convention. KilKelly notes that in cases where there is not clear evidence of

⁵⁹ KilKelly “Child Protection and the European Convention on Human Rights” (2000) 3(2) IJFL 12, at 1.

⁶⁰ KilKelly “Child Protection and the European Convention on Human Rights” (2000) 3(2) IJFL 12, at 1.

⁶¹ KilKelly “Child Protection and the European Convention on Human Rights” (2000) 3(2) IJFL 12, at 2.

⁶² KilKelly “Child Protection and the European Convention on Human Rights” (2000) 3(2) IJFL 12, at 3.

abuse or neglect or a failure on the part of the parent to protect the child from injury or neglect determining compatibility with Article 8 is not so easily achieved.⁶³ Kilkelly gives the example in situations where:

“it is not readily apparent that taking a child into care because his/her parent suffers from a mental condition, which either prevents him from understanding the child’s needs, or may lead to the development of similar problems in this child is justified under Article 8. The difficulty in balancing the interests of the child with the family life of the parent is even greater where the child is removed from a parent with such a condition shortly after birth.”⁶⁴

3.52 Kilkelly notes that the Commission on Human Rights recognised the severity of the interference with family life which such a measure would cause. In situations where children of parents with disabilities were being taken into care the Commission queried whether the relevant authorities provided support to parents or took other preventive measures before they instigated proceedings for the removal of the child from the care of its parent(s).⁶⁵

3.53 Although the State has a broad margin of appreciation in taking individual decisions on the need for child protection measures, the ECtHR has stressed that decisions to remove a child must take into account the availability of help, such as additional educational support for children, and whether it would be more appropriate to provide additional support to a family rather than remove a child. The fact that a child could be placed in a more beneficial environment for his or her upbringing is not a sufficient justification for compulsory removal from the care of its biological parents. The Court must have regard to the positive obligation of the state to enable the ties between parents and their children to be preserved.

3.54 In *Kutzner v Germany*⁶⁶ the European Court of Human Rights considered the removal of parental responsibility for two daughters of a couple with learning disabilities. The children were placed in different foster homes, despite evidence that the parents were capable of meeting the children’s needs with support. Although existing levels of educational support had been

⁶³ Kilkelly “Child Protection and the European Convention on Human Rights” (2000) 3(2) IJFL 12, at 3.

⁶⁴ Kilkelly “Child Protection and the European Convention on Human Rights” (2000) 3(2) IJFL 12, at 3. See *Johansen v Norway* [1996] 33; EHRR.

⁶⁵ Kilkelly “Child Protection and the European Convention on Human Rights” (2000) 3(2) IJFL 12, at 3-4. See *L v Sweden* (Application 10141/82 40 D & R 140).

⁶⁶ *Kutzner v Germany* [2002] 35 EHRR 2, at paragraphs 65-82.

inadequate to meet the needs of the children, the State had not considered whether greater levels of support would be appropriate. The Court also considered that the parents were given very limited opportunities for visitation and that the children had been placed in separate foster homes. The Court considered that while the State enjoys a margin of appreciation in relation to individual decisions on child protection, in this case Germany had acted in breach of Article 8 of the ECHR in that the interference was not proportionate to the legitimate aims pursued.

3.55 In the English case *In Re B*⁶⁷ Thorpe LJ stated that

“where the application is for a care order empowering the local authority to remove a child or children from the family, the Judge in modern times may not make such an order without considering the European Convention for the Protection of Human Rights and Fundamental Freedoms Art 8 rights of the adult members of the family and of the children of the family. Accordingly he must not sanction such an interference with family unless he is satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children.”⁶⁸

3.56 Furthermore, in *EH v Greenwich*⁶⁹ Baron J stated that

“In a case where the care plan leads to adoption the full expression of the terms of Article 8 must be explicit in judgment, because, ultimately there can be no greater interference with family life. Accordingly, any judge must show how his decision is both necessary and proportionate.”⁷⁰

3.57 In *P., C. and S. v UK*⁷¹ the European Court of Human Rights found that there was a violation of Article 6(1) and Article 8 of the ECHR. The Court found that the baby’s rights had been breached by being deprived the milk of its mother where the baby was the subject of a court-ordered adoption. The Court found that both the mother and baby’s rights had been breached since it was sought at birth.

⁶⁷ *In Re B (Care: Interference with Family Life)* [2003] EWCA Civ 786.

⁶⁸ *In Re B (Care: Interference with Family Life)* [2003] EWCA Civ 786, at 34.

⁶⁹ *EH v Greenwich* [2010] EWCA Civ 344.

⁷⁰ *EH v Greenwich* [2010] EWCA Civ 344, at 64.

⁷¹ *P., C. and S. v United Kingdom* Application No. 56547/00 16 July 2002.

3.58 Social services, courts, and other public authorities working with parents with limited capacity and their children are subject to the duty to act compatibly with the right to respect for family life, as guaranteed by Article 8 ECHR. The State has a positive, human rights based obligation to protect children from harm and promote their development. However, any decision that impinges on the relationship between a parent and his or her child could have very serious implications for the protection of family rights. Care must be taken to ensure that any restrictions on the development of ordinary family relationships must not only be in the best interests of the child, but also be a necessary and proportionate response to the level of risk posed to the child or to its parents though continuing care in the home. An assessment of risk must take into account all of the relevant facts of each case, including the provision of supports to meet the needs of parents and their children.

(9) *United Nations Convention on the Rights of the Child 1989*

3.59 The UN Convention on the Rights of the Child⁷² confirms that every child has the right not to be separated from its parents, unless separation is necessary to meet the child's best interests.⁷³ This may be determined in a case involving abuse or neglect of the child by the parents. In such a situation parents are to be given an opportunity to participate in proceedings and make their views known. The Convention also notes that parents have the primary responsibility for the upbringing and development of the child. The Convention also notes that States may only intervene to separate a child from parents against their will where "such separation is necessary for the best interests of the child".⁷⁴

(10) *United Nations Convention on the Rights of Persons with Disabilities 2006*

3.60 The UNCRPD affirms that people with disabilities have the right to parenthood, fertility, reproduction, family planning and to "the same range, quality and standard of free or affordable health care and programmes... in the area of sexual reproductive health".⁷⁵ Article 4(1)(a) of the Convention requires States Parties to "adopt all appropriate legislative, administrative, and other measures for the implementation of the rights" recognised in the Convention. In particular, Article 23(1)(a) of the Convention recognises the "right of all persons

⁷² The 1989 Convention entered into force on 2 September 1990. Ireland ratified the Convention on 28 September 1992 without reservation.

⁷³ Article 9 of the UN *Convention on the Rights of the Child*.

⁷⁴ Article 18 of the UN *Convention on the Rights of the Child*.

⁷⁵ Article 25(a) of the UNCRPD.

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". Article 23(1)(b) ensures that 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... and the means necessary to enable them to exercise these rights". Article 12(2) obliges States Parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of their lives.

(11) Comments of Committee on Economic, Social and Cultural Rights

3.61 Article 10 of the International Covenant on Economic Social and Cultural Rights (ICESCR) provides that States Parties recognise that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Special measures of protection and assistance should also be taken on behalf of all children and young persons without any discrimination of parentage or other conditions.

3.62 General Comment No.5 of the Committee on Economic Social and Cultural Rights⁷⁶ requires States parties to endeavour to ensure that persons with disabilities can, when they so wish, live with their families. It also requires them to ensure that "laws and social policies and practices" do not impede the realisation of the rights of persons with disabilities to marry and form a family.⁷⁷ In addition, persons with disabilities should have access to "necessary counselling services in order to fulfil their rights and duties within the family."⁷⁸

3.63 General Comment No.5 reiterates Rule 9(2) of the Standard Rules on the Equalization of Opportunities, stating that "persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual

⁷⁶ Committee on Economic Social and Cultural Rights *Persons with Disabilities* (General Comment No.5 of 1994 of E/1995/229 December 1994) at paragraph 30.

⁷⁷ Committee on Economic Social and Cultural Rights *Persons with Disabilities* (General Comment No.5 of 1994 of E/1995/229 December 1994) at paragraph 30.

⁷⁸ Committee on Economic Social and Cultural Rights *Persons with Disabilities* (General Comment No.5 of 1994 of E/1995/229 December 1994) at paragraph 30.

relationships and experience parenthood.”⁷⁹ It stresses that “[t]he needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts.”⁸⁰ The Committee on Economic, Social and Cultural Rights noted that while these rights are commonly denied to both sexes, it mentions explicitly that “[w]omen with disabilities also have the right to protection and support in relation to motherhood and pregnancy.” The provision of the Standard Rules corresponding to Article 10 of the Covenant is Rule 9, according to which:

“States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.”⁸¹

3.64 Rule 9 states that persons with disabilities should not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. They must have access to family planning methods and information in accessible form on the sexual functioning of their bodies. States should remove all “unnecessary obstacles” to the adoption of fostering of a person with a disability.⁸² It is incumbent on States to promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons (especially girls and women) with disabilities. Part of this obligation is encouraging the media to tackle the negative attitudes.⁸³

⁷⁹ Committee on Economic Social and Cultural Rights *Persons with Disabilities* (General Comment No.5 of 1994 of E/1995/229 December 1994) at paragraph 31.

⁸⁰ Committee on Economic Social and Cultural Rights *Persons with Disabilities* (General Comment No.5 of 1994 of E/1995/229 December 1994) at paragraph 31.

⁸¹ *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities* General Assembly Resolution 48/96 of 20 December 1993, rule 9.

⁸² *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities* General Assembly Resolution 48/96 of 20 December 1993, rule 9(1).

⁸³ *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities* General Assembly Resolution 48/96 of 20 December 1993, rule 9(3).

D Supports for parents with disabilities

(1) Ireland

3.65 Action 27 of the Government's 2001 Health Strategy⁸⁴ details an expansion programme for family support services including the expansion of positive supports and programmes for families. There already exists a range of services which fall under national family support programmes, as provided by Community Mothers, Family Support Workers, Teen Parents, and Spring Board Projects and encompass specific interventions such as Parents Plus programme, the Family First Parenting Initiative as well as a range of general parenting programmes and supports.

3.66 Recent developments have taken place in Ireland in recognition of the need to provide supports to parents with limited decision-making ability who are engaged in care order proceedings. The National Advocacy Service for People with Disabilities which was formally launched in 2011 provides independent, representative advocacy services for people with disabilities. Advocates can provide an important role in supporting parents in accessing services. Section 7A(5) of the *Comhairle Act 2000*, as inserted by section 5 of the *Citizens Information Act 2007* specifies the grounds on which the Personal Advocacy Service should prioritise its services and is based on urgency of needs and risk of harm, the degree of benefit of having an advocate appointed and availability of alternative services.

3.67 The Personal Advocacy Service has also an important role in supporting parents with disabilities in court proceedings.⁸⁵ Since it was established the Service has already been involved in a number of cases where people with disabilities have been threatened with losing their children.⁸⁶ The Commission has also noted the appointment of persons to represent the views of parents with an intellectual disability in care proceedings under section 18 of the *Child Care Act 1991* arising from the settlement in 2007 in *Legal Aid Board v Brady and Ors*.⁸⁷

⁸⁴ *Quality and Fairness: A Health System for You* (Department of Health and Children 2001) at 71.

⁸⁵ "Disabled parent' children removed with 'no support'" *The Irish Times* 1 June 2011.

⁸⁶ "Disabled parent' children removed with 'no support'" *The Irish Times* 1 June 2011.

⁸⁷ See the discussion of *Legal Aid Board v Brady and Ors* in paragraphs 3.22-3.24, above.

(2) United Kingdom

3.68 The UK Government's 2001 White Paper *Valuing People* states that:

"[p]arents with Learning Disabilities are increasing in number; the most socially and economically disadvantaged groups. They are more likely than other parents to make heavy demands on child welfare services and have their children looked after by the local authority. People with learning disability can be good parents and provide their children with a good start in life, but need considerable help to do so. This requires children and adult social services teams to work closely together to develop a common approach. Social services departments have a duty to safeguard the welfare of children, and in some circumstances a parent with learning disabilities will not be able to meet their child's needs. However, we believe this should not be the result of agencies not arranging for appropriate and timely support."⁸⁸

3.69 It acknowledges that support for disabled parents has been disjointed and underdeveloped and recognises that tensions exist within social services departments between those whose focus is the welfare of the child and those concerned with assisting the parent in developing their parenting capabilities. The Strategy highlighted that people with learning disabilities and their children are often passed between organisations and professionals with insufficient clarity about where responsibility rests for ensuring effective service provision. The Strategy recommended that effective partnerships are needed in promoting social inclusion of people with learning disabilities and the need for timely and appropriate supports for parents to prevent children being removed from their care.⁸⁹ Protocols have now been developed to address the specific needs of safeguarding and protecting children of parents with a learning disability.

3.70 Such protocols have been introduced in recognition of the need to increase effectiveness of assessment, communication and joint working arrangements between professionals from different agencies if parents are to be adequately supported and children protected. The protocols are used by all

⁸⁸ UK Government White Paper *Valuing People: A New Strategy for Learning Disability for the 21st Century* (2001) at 7.40.

⁸⁹ UK Government White Paper *Valuing People: A New Strategy for Learning Disability for the 21st Century* (2001) at 9.3 and 9.4. The White Paper recommended the establishment of Learning Disability Partnership Boards in all local authority areas by October 2001. These Partnership Boards are responsible for implementing Government proposals relating to adults with learning disabilities.

adult and children services, non-statutory, private and voluntary sector services and are to be considered in line with child protection procedures and the national policy on delivering social care. Such protocols emphasise the need for multi-agency assessments, to ensure appropriate multi-agency intervention to support parents and safeguard children, to ensure access to most appropriate specialist assessments and assessment tools and lastly, to ensure the child's welfare is paramount.

3.71 In 2006 the UK Department of Health and Department for Education and Skills published *Good practice guidance on working with parents with a learning disability*. The guidance is aimed at professionals in health and social care. The guidance recommends that good practice is underpinned by the policy, legislation and guidance which set out the responsibilities of both children's and adult services. Legislation and associated guidance in the *Good practice* document set out the following as integral to achieving good practice⁹⁰:

- children have a right to be protected from harm;
- in family court proceedings children's interests are paramount;
- children's needs are usually best met by supporting their parents to look after them;
- local authorities and all other agencies working in contact with children have a responsibility to safeguard and promote children's welfare;
- parents with learning disabilities have the right to an assessment of their needs for support in their daily lives; such assessment include any assistance required with parenting roles and tasks; parents should have their assessed needs met where eligible and considering available resources in line with Fair Access to Care Services;⁹¹

⁹⁰ *Good practice guidance on working with parents with a learning disability* (UK Department of Health and Children and Department of Education and Skills 2006) at 6.

⁹¹ The Fair Access to Care Services (FACS) framework was introduced in 2003 to address inconsistencies across the UK about who gets support, in order to provide a fairer and more transparent system for the allocation of social care services. See *Fair Access to Care Services- guidance on eligibility criteria for adult social care* (UK Department of Health 2003). The principle behind FACS was that there should be one single process to determine eligibility for social care support, based on the risks to independence over time. Its aim was to provide a framework to enable councils to stratify need for social care support in a fair and proportionate manner to individuals and the community taking into account local budgetary considerations.

- parents with learning disabilities are entitled to equal access to services, including parenting support and information services;
- public bodies have a duty to actively promote equality of opportunity for people with learning disabilities.

3.72 The Guidance also notes that good practice is underpinned by an approach to parenting and learning disability which addresses needs relating to both impairment and the disabling barriers of unequal access and negative attitudes. This approach recognises that it would be difficult to understand how to bring about positive changes for parents and their children if the issue to be addressed is entirely attributed to the impairment and personal limitations. Furthermore, the Guidance advises that if the focus is instead put on measures that can ameliorate a situation such as adequate housing and support needs that can be met such as equipment to help a parent measure baby feeds, there can be many more possibilities for bringing about positive results.⁹²

3.73 The Guidance notes there are five key features of good practice in working with parents with learning disabilities. These are accessible information and communication; clear and co-ordinated referral and assessment procedures and processes, eligibility criteria and care pathways; support designed to meet the needs of parents and children based on assessments of their needs and strengths; long-term support where necessary; and lastly, access to independent advocacy.⁹³

3.74 In reinforcing the 2001 Strategy and 2006 Guidance, the UK Joint Parliamentary Committee on the Human Rights of Adults with a Learning Disability⁹⁴ outlined that, unless justified as a proportionate and necessary response to a risk to the child, or to others, compulsory removal of a child from the care of its parents poses a significant infringement of the rights of both the child and its parents and respect for their family life under Article 8 of the ECHR and the *Human Rights Act 1998*.

⁹² *Good practice guidance on working with parents with a learning disability* (UK Department of Health and Children and Department of Education and Skills 2006) at 7.

⁹³ *Good practice guidance on working with parents with a learning disability* (UK Department of Health and Children and Department of Education and Skills 2006) at 7.

⁹⁴ *A Life Like Any Other? Human Rights of Adults with a Learning Disability* (House of Lords/House of Commons Joint Parliamentary Committee on Human Rights 2008).

(3) Concluding comments and provisional recommendations

3.75 The Commission notes that the presumption of capacity envisaged in the forthcoming mental capacity legislation will, consistently with a rights-based approach, be enabling rather than restrictive in nature. This will include, therefore, a rebuttable presumption of capacity to parent by any person with intellectual disability, and that onus of displacing the presumption of capacity will be on any person asserting lack of capacity, including in the context of parenting by persons with intellectual disability. The Commission has therefore concluded, and provisionally recommends, that consistently with the general presumption of capacity in the forthcoming mental capacity legislation, which would include 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*. The Commission also provisionally recommends that, in providing assistance to parents with disabilities, an inter-agency protocol is needed between the child protection services 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 and training that would assist parents with disabilities to care for their children.

3.76 *The Commission provisionally recommends, that consistently with the general presumption of capacity in the forthcoming mental capacity legislation, which would include 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. The Commission also provisionally recommends that, in providing assistance to parents with disabilities, an inter-agency protocol is needed between the child protection services 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 and training that would assist parents with disabilities to care for their children.*

CHAPTER 4 SAFEGUARDS FROM SEXUAL ABUSE

4.01 In this Chapter, the Commission discusses the literature on sexual abuse which suggests that people with disabilities are at a greater risk of sexual abuse and assault than the general population. In doing so, the Commission sets out the reasons why this may be so, the prevalence of sexual abuse against this cohort of the population and the barriers confronting disclosing sexual abuse for people with disabilities.

A Prevalence of abuse

4.02 There is considerable research which suggests that people with disabilities are at a higher risk of sexual abuse and assault than the general population.¹ Research shows that the incidence of sexual abuse against this cohort of the population can be as much as four times higher than it is among the 'non-disabled' population and people with an intellectual disability are at the highest risk of abuse.²

4.03 In Ireland, research carried out on sexual violence of intellectually disabled adults over a three-year period found that, in 5 of the 13 cases, the abuse was intra-familial. 8 of the 13 cases described in the study were of ongoing abuse, with 4 continuing over a period of months and 4 over a period of years. The study found that behaviour problems and "acting out" are significant indicators of sexual violence having occurred, particularly among those who have limited communication skills.³

¹ See *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme, June 2011), available at www.nda.ie. See also *A review of the literature and qualitative studies on sexual abuse and people with disabilities: findings and methodologies* (National Disability Authority, July 2011) available at www.nda.ie.

² Voice UK, Respond and Mencap UK *Behind closed doors: preventing sexual abuse against adults with a learning disability* (2001) at 5.

³ Dunne and Power "Sexual abuse and mental handicap: Preliminary findings of a community-based study" (1990) 3 *Mental Handicap Research*, at 111-125 as

4.04 The 2002 Sexual Abuse and Violence in Ireland (SAVI) Report was the first Irish study that documented the actual prevalence of sexual violence among disabled people.⁴ The Report estimated that sexual abuse of people with disabilities ranged from 8 to 58 per cent.⁵ 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 due to a number of factors. As noted above, poor communication skills compounded by limited capacity to recall and articulate past events, difficulties in assessing capacity to consent and co-morbidity conditions have contributed to the difficulties in developing reliable data.⁶ To date, researchers have either employed the diagnostic or functional approach to assess capacity to consent to sexual activity, both of which have further caused difficulties in applying a consistent working definition of sexual violence amongst this population.⁷

(1) Statistics on abuse

4.05 As noted above, the SAVI Report found stark variations in estimates of sexual abuse against people with disabilities. In an analysis of national statistical information collected by Rape Crisis Network Ireland (RCNI) in 2009, it was found that 7.3% of survivors who had availed of its services had a disability.⁸ This figure is just slightly lower than the proportion of people identified as living with a disability nationally, which was recorded in the 2006 Census at 9.6%. Of the 7.3% in the RCNI 2009 survey, 48.5% had a learning disability and 41.2% had a mobility impairment. In an analysis of its statistics of those who availed of its services in 2006 the RCNI found that one in 20 of every client had a disability and there was little variation across gender groups. More than four in every five clients in this category had a learning disability or mobility

referred to in McGee *et al. Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 252-253. The SAVI Survey reported that out of 3,000 randomly selected telephone respondents, approximately a third disclosed some form of unwanted sexual contact.

⁴ McGee *et al. Sexual Abuse and Violence in Ireland* (The Liffey Press 2002).

⁵ McGee *et al. Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 244.

⁶ McGee *et al. Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 245-246.

⁷ McGee *et al. Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 246.

⁸ *National Rape Crisis Statistics* (Rape Crisis Network Ireland 2009) at 18.

impairment.⁹ As many as 41% of disabled service users had been subjected to abuse by multiple perpetrators and at multiple times involving multiple perpetrators.¹⁰ The analysis reported a higher proportion of service users with a disability among those who had been abused as a child and adult, compared to either “child only” and “adult only” groups, showing 13.9 per cent versus 4.1 per cent and 6.8 per cent respectively.¹¹

4.06 These statistics from RCNI for 2009 and 2006 confirm the findings in 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 subsequently in terms of disclosure and verification of that abuse.”¹² In the next section, the Commission considers the issue vulnerability and examines a number of situational factors which can increase the risk of abuse.

(2) Risk factors

4.07 Vulnerability to abuse is a multi-faceted. The research suggests that vulnerability involves a complex relationship and interaction between individual, situational and societal factors. For example, while disability may increase risk directly whether through not being able to fend off an attack, or not being able to communicate what happened, more often it indirectly increases risk because of the way society views and responds to persons with disabilities.

4.08 The 2002 SAVI Report identified a number of situational risk factors which suggest why this cohort of people might be more ‘at risk’ of abuse. The reasons ranged from deficiencies of sexual knowledge, physical and emotional dependence on caregivers may create difficulties in disclosure as people may not feel that they have other care alternatives and therefore constrained from making complaints. The Report also noted that multiple caregiving, limited communication skills, and behavioural difficulties might also be factors which contribute to situational risk factors.¹³ The Report put forward that “people with learning disabilities are more trusting of strangers than others, may be unable to discriminate between appropriate and inappropriate behaviour, readily comply with the requests of others, may be unable to defend themselves, and may not report incidences” as they may not have the skills necessary to identify abuse

⁹ *National Rape Crisis Statistics* (Rape Crisis Network Ireland 2007) at 51.

¹⁰ *National Rape Crisis Statistics* (Rape Crisis Network Ireland 2007) at 51.

¹¹ *National Rape Crisis Statistics* (Rape Crisis Network Ireland 2007) at 42.

¹² McGee *et al.* *Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 243.

¹³ McGee *et al.* *Sexual abuse and violence in Ireland* (The Liffey Press 2002) at 244.

and when incidences are reported their experiences may at times be overlooked, trivialised, or even not believed.¹⁴ As such, the situational or environmental setting may offer opportunities for abuse without detection. In residential or community care settings, people can be at an even higher risk of abuse if appropriate safeguards are not in place. This may be so as limits are placed on personal control, privacy and personal autonomy. People are expected to follow directions of staff and caregivers in daily activities contributing to an air of compliance. In such settings people may be more isolated from friends and family, which may render them more 'at risk'.

4.09 The Commission considers that one's impairment does not necessarily create an inherent vulnerability to sexual abuse but rather situational settings can also create an environment which places people at increased risk of abuse. In the next section, the Commission examines how the Law Commission of England and Wales has recently advocated a change in terminology on the issue of 'vulnerability' and risk of abuse.

(i) The shift from 'vulnerable adults' to 'adults at risk'

4.10 The Law Commission for England and Wales, in its 2010 *Consultation Paper on Adult Social Care*¹⁵ choose to adopt different legal terminology to define the cohort of people who are or may be unable to protect themselves from abuse or neglect. The term 'vulnerable adults' or 'adults at risk' was an attempt to move beyond the term 'mental incapacity' as a means of defining this cohort. This can also be seen as a move from the status approach to the use of more appropriate language which does not see one's impairment as the disabling factor with regard to one's environment. The Law Commission noted that more recent definitions have adopted the term 'adults at risk' since it focuses on the risk factor rather than the impairment. The definition of 'adult at risk' is any person "who is or may be eligible for community care services" and "whose independence and wellbeing is at risk due to abuse or neglect".¹⁶ The term 'adults at risk' has been adopted in the *Adult Support and Protection (Scotland) Act 2007* which refers to people who are unable to safeguard their own well-being, property, rights or other interests; at risk of harm; and because

¹⁴ McGee *et al.* *Sexual abuse and violence in Ireland* (The Liffey Press 2002) at 244.

¹⁵ Law Commission of England and Wales *Consultation Paper on Adult Social Care* (No. 193 2010).

¹⁶ Association of Directors of Adult Social Services *Safeguarding Adults: A National Framework of Standards* (2005) at 5, as referred to in Law Commission of England and Wales *Consultation Paper on Adult Social Care* (No. 193 2010) at paragraph 12.28 fn 26.

they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

4.11 In England and Wales, the *Safeguarding Vulnerable Groups Act 2006* views vulnerability solely through the situation in which an adult is placed. The mere fact that an adult is receiving a service means that they are classified as a 'vulnerable adult'. The Law Commission noted that while this situational definition may be useful for vetting and barring care workers, it is of less use as a definition of who is potentially at risk of abuse and neglect as it would require an additional subjective element.¹⁷ The Law Commission recommended that the term 'vulnerable adults' be replaced by 'adults at risk' to reflect the need to focus on the risk that a person faces rather than the characteristics of the person concerned for the purposes of the duty to make enquiries.¹⁸ The Law Commission put forward a two limbed approach of the definition of an 'adult at risk'. It recommended that the first limb should be based on a person's social care needs, rather than being based on the receipt of services or diagnosis. The second limb, it recommended, should be based on what the person would be at risk from. The Law Commission provisionally recommended that the threshold of significant harm which is currently used in *No Secrets, In Safe Hands* and the *Children Act 1989*, should be retained and welcomed views on whether the term is useful in practice or whether it establishes a threshold which is too high. It also recommended that the term 'harm' be defined in legislation but that the term 'significant harm' should continue to be left undefined and left to interpretation. It put forward that 'harm' could be defined as ill-treatment or the impairment of health and development, or unlawful contact, including specifically financial abuse.¹⁹ The Law Commission proposed that an 'adult at risk' should be statutorily defined as anyone with social care needs who is or may be at risk of significant harm.²⁰

(3) 'At risk' groups

4.12 A study on sexual abuse of learning disabled people by others with learning disabilities was compared to cases where the perpetrator was a paid

¹⁷ Law Commission of England and Wales *Consultation Paper on Adult Social Care* (No. 193 2010) at paragraph 12.37- 12.40.

¹⁸ Law Commission of England and Wales *Report on Adult Social Care* (Law Com. No.326 2011) at paragraph 9.21.

¹⁹ Law Commission of England and Wales *Consultation Paper on Adult Social Care* (No. 193 2010) at paragraphs 12.36

²⁰ Law Commission of England and Wales *Report on Adult Social Care* (Law Com. No. 326 2011) at paragraph 9.22.

staff or family member or other person. Of 171 substantiated cases, 42% involved perpetrators who themselves had a learning disability. Men comprised 44% of those who had been abused by learning disabled perpetrators and 15% of those were abused by staff, family and others.²¹ Another study of sexual abuse of adults with learning disabilities by other people with learning disabilities found that men were as much at risk of being sexually abused as women.²² 94% of the perpetrators were men and eighty-one per cent had lived or still lived in congregate settings. Findings were congruent with research that perpetrators with a disability victimise men and women at similar rates, that living in congregate settings results in significant risks, and that men and women with disabilities need to be provided with the skills necessary to identify what constitutes sexual abuse and what actions are needed to prevent and guard themselves from it. In fact, abuse prevention work by services has been identified as a way to raise awareness of situations in which people might be more at risk of abuse.²³ The Commission returns to this issue later in this Chapter.

4.13 The UN Declaration on the Elimination of Violence Against Women, adopted by the UN General Assembly in 1993, specifically identified women with disabilities as particularly at risk of sexual abuse.²⁴ A preliminary scoping study carried out by Women's Aid found that the forms of violence experienced by women with disabilities range over a wide spectrum, including physical, sexual and psychological abuse, often depending on the context in which the violence occurs, but that abuse is largely a hidden problem and women with disabilities are particularly vulnerable to intra-familial abuse.²⁵ It concluded that the possibilities for women with disabilities to leave their situation are often extremely limited due to a number of factors including difficulties in naming and identifying abuse both by women and service providers; women's isolation and low self esteem; lack of accessible information for women with disabilities; institutionalised settings in which many women with disabilities live and the lack

²¹ McGee *et al.* *Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 253.

²² Furey and Niesen "Sexual Abuse of Adults with Mental Retardation by Other Consumers" *Sexuality and Disability* 12 (1994) 4.

²³ Voice UK, Respond and Mencap UK *Behind closed doors: preventing sexual abuse against adults with a learning disability* (2001) at 2.

²⁴ *United Nations Declaration on the Elimination of Violence against Women* General Assembly Resolution 48/104 of 20 December 1993.

²⁵ Wilson *Violence Against Disabled Women. Report on a Consultation by Women's Aid of the Feasibility of Carrying out Research* (Women's Aid 2001).

of awareness that women with disabilities can also be victims of sexual violence.

4.14 Similar findings were presented by the Irish Human Rights Commission (IHRC) in its 2003 submission to the UN Committee on the Elimination of Discrimination Against Women. In its submission, the IHRC noted that women with disabilities are particularly at risk of mistreatment in closed environments, such as residential institutions and rehabilitation centres. It also noted that a limited number of organisations working to address violence against women with disabilities have the specific training or expertise to respond to the needs of disabled women who have experienced abuse. Practical issues, including a lack of access to information on medical, psychological and legal services, were identified as obstacles for women with disabilities who have experienced sexual violence.²⁶ The IHRC recommended that the Government carry out comprehensive research on the experiences of sexual violence by disabled women taking into consideration the various contexts in which disabled women live, in particular institutional settings. The IHRC also recommended that extra funding be allocated to organisations that provide support and services to women who have experienced sexual violence in order to make their services accessible to women with disabilities.²⁷

B Barriers to disclosing sexual abuse

4.15 It is recognised that there are difficulties in evaluating the levels of sexual crimes partly because crimes of a sexual nature are underreported. Many factors mitigate against disclosure of such crimes by victims. Research suggests that some groups in the community do not have effective access to the criminal justice system and face particular difficulties in reporting sexual

²⁶ *Wilson Violence Against Disabled Women. Report on a Consultation by Women's Aid of the Feasibility of Carrying out Research* (Women's Aid 2001) at 9 quoted in *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination against Women, in respect of Ireland's combined 4th and 5th periodic reports under the Convention on the Elimination of Discrimination against Women* (Irish Human Rights Commission 2003) at 46-48. The National Disability Authority and Women's Aid have written a booklet outlining a good practice response for organisations working to address violence against women and disability organisations should take to respond to violence against women with disabilities.

²⁷ *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination against Women, in respect of Ireland's combined 4th and 5th periodic reports under the Convention on the Elimination of Discrimination against Women* (Irish Human Rights Commission 2003) at 49.

assault. Sexual offences are also highly personal and traumatic. Instigating proceedings against the accused can often result in a process of retraumatisation for the complainant. Another factor identified in the literature is the victim's expectations of how she or he will be dealt with by the police, prosecuting authorities and the courts.²⁸ The capacity of the criminal justice system to hear and respond to allegations of abuse from people with limited capacity is a factor that affects disclosure. As well as facing the same impediments to reporting sexual assault that other victims face, such as embarrassment, shame and powerlessness, persons with limited capacity must also manage additional problems such as misconceptions about their credibility, their memory and their presentation as witnesses; difficulties communicating with policy, lawyers and judges as well as lack of appropriate information about the criminal justice process.²⁹ The difficulties experienced by adults with limited capacity in the criminal justice system will be dealt with in greater detail in Chapter 6, below.

4.16 The international literature in this area is supported by the relevant literature in Ireland. The figures for reporting sexual violence to the Gardaí are strikingly low.³⁰ Of the respondents in the SAVI Report, only 1 in 5 women and only 1 in 10 men had reported their experience of contact sexual assault. As noted above, figures from RCNI reveal that in 2009 7.3% of clients accessing rape crisis centre services were reported as having a disability.³¹ This is just slightly lower than the proportion of people with disabilities nationally, which was recorded by the 2006 Census as 9.3%.³² This confirms there may be issues around disclosure and access to rape crisis services for persons with limited capacity which may indicate that these figures do not accurately reflect the true incidences of sexual abuse of people with disabilities. Research from RCNI also reveals that the majority of victims of sexual violence know their abuser which disputes the myth that sexual offences are most commonly perpetrated

²⁸ Victorian Law Reform Commission *Sexual Offences: Discussion Paper* (2001) at paragraph 3.21.

²⁹ Victorian Law Reform Commission *Sexual Offences: Interim Report* (2003) at paragraph 3.32.

³⁰ McGee *et al.* *Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at xxxiii.

³¹ The main categories of disabled people reported to have used rape crisis centre services had an intellectual or mobility impairment.

³² *National Rape Crisis Statistics and Annual Report (Rape Crisis Network Ireland 2009)* at 18. The Network estimates that that a fully accessible Rape Crisis Centre service would have more than 9.3% of survivors with disabilities.

by strangers. The Report shows that where the complainant is attacked by a stranger in a public place and reports the rape immediately she is more likely to have her case prosecuted than the “far more common rape which is committed in a private place by someone known to the victim and where the delay in reporting is greater than an hour.”³³ It was noted that institutional obstacles and bureaucratic structures are contributors to the low reported response rate to abuse.³⁴ Enquiries into allegations of abuse committed by individual members of staff were not presented as isolated incidents in the Report, but rather “a sub-culture within which the (organisational) hierarchy who at [the very] least passively acknowledged or condoned what was going on”.³⁵ This sub-culture can perpetuate the position of people with limited capacity as potential victims of sexual violence.

4.17 As already mentioned, the environmental context has been identified internationally as a barrier to reporting abuse. The Victorian Law Reform Commission in its 2003 *Interim Report on Sexual Offences*,³⁶ noted that dependency on the state, families or caregivers for everyday needs, coupled with the unwillingness of some agencies to recognise the public nature of sexual assault can lead to a denial of its existence and an unwillingness to intervene. Other factors leading to non-disclosure were restricted social lives and experiences which can impact on the level of understanding of boundaries of social relations and legal rights. The Victorian Law Reform Commission also noted that myths surrounding people with limited capacity can often result in their rights to sexual expression being compromised, or their credibility put into question with the result that their complaint may not be taken seriously by police. It also noted that when complaints are made communication difficulties may arise when victims are interviewed by police, that complex courtroom

³³ Figures from the Rape Crisis Network Ireland National Rape Crisis Statistics for 2009 show that sexual violence perpetrated by a stranger only accounted for 7.3% of all abuse disclosed to the Rape Crisis Centres in 2009. Approximately two thirds of perpetrators were either family members/relatives or friends/acquaintances/neighbours (34.6% and 33.1% respectively). Partners/ex-partners, both cohabiting and non-cohabiting, accounted for one in ten perpetrators (10.5%) while authority figures were disclosed as perpetrators in one in ten first incidents of abuse (10.9%). See *National Rape Crisis Statistics* (Rape Crisis Network Ireland 2009) at 2 & 7

³⁴ McGee *et al.* *Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 247.

³⁵ McGee *et al.* *Sexual Abuse and Violence in Ireland* (The Liffey Press 2002) at 249.

³⁶ Victorian Law Reform Commission *Sexual Offences: Interim Report* (2003).

language makes it difficult to respond to questioning or understanding the legal process and that cross-examination presented particular difficulties for complainants with limited capacity.³⁷

4.18 The proposed mental capacity legislation is likely to provide that all practicable steps should be taken to assist an individual in making his or her decision which includes being given an explanation of information in relation to the decision to be made in a way that is appropriate to his or her circumstances; including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision. Rule 9 of the UN Standard Rules on the Equalization of Opportunities also notes that:

“States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood. Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Taking into account that persons with disabilities may experience difficulties in getting married and setting up a family, States should encourage the availability of appropriate counselling. Persons with disabilities must have the same access as others to family-planning methods, as well as to information in accessible form on the sexual functioning of their bodies. Persons with disabilities and their families need to be fully informed about taking precautions against sexual and other forms of abuse. Persons with disabilities are particularly vulnerable to abuse in the family, community or institutions and need to be educated on how to avoid the occurrence of abuse, recognize when abuse has occurred and report on such acts.”³⁸

C The changing nature of service provision

4.19 The changing model of service provision in Ireland has meant that people with intellectual disability are able to realise aspects of their independence and autonomy, in particular by living in the community setting, rather than in an institutional setting, and living independently or with some supports. In that respect, people living with intellectual disability are

³⁷ Victorian Law Reform Commission *Sexual Offences: Interim Report* (2003) at paragraph 3.29.

³⁸ United Nations *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* General Assembly Resolution 48/96 of 20 December 1993.

encouraged to live full and rewarding lives. In another important respect, however, section 5 of the 1993 Act means that they are, in effect, restricted from developing intimate relationships that are enjoyed by the 'non-disabled' population. In this section, the Commission examines the need for policies on educational programmes on personal and intimate relations for persons with disabilities. In doing so, the Commission notes the effect of section 5 of the 1993 Act on the development of policies on sexuality and the provision of education on personal and sexual relations in services.

(1) *The importance of education on personal and sexual relations*

4.20 It is well documented that people with limited capacity often have limited sexual knowledge by comparison with the 'non-disabled' population. There is a clear connection between the level of one's sexual knowledge and in being to identify exploitative situations and guard oneself from sexual abuse. Knowledge about sexuality, relationships and sexual rights and safety is hugely important and may assist people with limited capacity to develop appropriate sexual and self-protective behaviours which may in turn reduce the risk of unwanted sexual contact.

4.21 This point was highlighted in the 2002 SAVI Report which raised the issue of lack of sex-education as an indicator of vulnerability. The Report found that while sex-education did not seem to prevent sexual abuse, it did increase the likelihood of it being reported. In recognising this, the Commission its 2005 Consultation Paper on Capacity emphasised the close connection between the promotion of capacity to consent to sexual relationships with the provision of education on personal and sexual relations for young adults whose capacity may be limited which would be pitched at an appropriate level to their capacity.³⁹

4.22 The Commission considers that any legislative change in this area should be accompanied by greater awareness and understanding by people with limited capacity concerning privacy, intimacy, relationships and the ability to identify what constitutes abuse or exploitation. The Commission in its Report on Vulnerable Adults noted that the Office of Public Guardian, which is anticipated will be established in the forthcoming mental capacity legislation, will have a general educational role by including codes of practice and general advice and guidelines to a range of professionals working in a variety of area, including medical, health, care staff, financial institutions, legal professionals and others.⁴⁰

³⁹ LRC CP 37-2005 at paragraph 6.26.

⁴⁰ LRC CP 37-2005 at paragraph 1.98.

(2) Policies on personal and intimate relationships

4.23 The Commission is aware that there is a general desire by service providers to have in place policies and procedures aimed at empowering people to realise their sexual rights. Currently, the provision of sex-education is a voluntary step taken by the service provider. The Commission has learnt that for the most part the policies on sexuality have focused on protection rather than empowering clients and providing them with information on sexuality and relationships which in turn perpetuates their lack of knowledge in this area.

4.24 From a practical perspective section 5 of the *Criminal Law (Sexual Offences Act 1993* has created a dilemma for many services. There is a clear lack of knowledge how the law is applied. Staff are fearful that if they encourage mutually consensual relationships between clients they could be held liable for aiding and abetting a crime. As such, given the difficulties section 5 of the 1993 Act presents, service providers are slow to take a proactive approach to sexuality which consequently perpetuates the ignorance experienced by service users in this area. At the same time organisations are vulnerable to criticism that, if they support people to develop relationships that are seen as contravening the provisions of section 5 of the 1993 Act and also open to failure in their duty of care if they allow relationships between service users.

4.25 From a service user perspective the impact of section 5 of the 1993 Act is that their right to sexual relationship is denied; repressive rules on sexual expression and discussion in services and in the family context is forbidden; if the provisions of section 5 of the 1993 Act are complied with, a mutually consenting relationship is dependent on the permission of staff or family members; a culture exists wherein a sexual relationship is seen as creating difficulties in terms of its 'management' and general negative attitudes towards sexual expression and sexuality.

4.26 The Commission considers there is merit in having a national sex-education programme which would give guidance on what the law permits and the steps required to protect adults who may be vulnerable to abuse while maintaining their right to sexual freedom. The introduction of national guidelines on sex-education would also benefit from training of staff, carers and parents. Without such guidelines there is a danger that information and training would be inconsistent. A curriculum along the lines of the FETAC level training courses which are currently provided on a range of topics could be developed. In the past, the Irish Sex-Education Network funded research on sex-education programmes and this could be reviewed in line with national guidelines. As noted above, the Commission in its 2006 *Report on Vulnerable Adults and the Law* recommended that the proposed Office of Public Guardian should ensure appropriate codes of practice are formulated for a range of people dealing with

‘vulnerable adults’, including medical, health and social care staff, financial institutions, legal professionals and others.⁴¹ A code of practice could be developed by the Office of Public Guardian to provide guidance for those working with people with disabilities in the area of sexuality and relationships on interpreting the provisions in the forthcoming mental capacity legislation.

D Adult Protection Framework

(1) Ireland

4.27 In its 2006 Report on Vulnerable Adults the Commission recommended a mechanism so that anyone may complain to the proposed Office of Public Guardian in relation to abuse, to ensure that the necessary investigation can take place and relevant action instigated. The Commission also noted once the Public Guardian is established, coordination will be required between the Public Guardian, and other bodies such as the National Disability Authority, the Health Service Executive and the Health Information Quality Authority.⁴²

4.28 Formal policies, standards, regulations and inspection, together with advocacy services represent the key current protective mechanisms for disability service users.⁴³ In this section, the Commission examines these existing frameworks.

(i) General Health Service Executive Policy

4.29 The HSE’s *Trust In Care* Policy document provides the framework for the treatment of allegations of abuse within health and social care services.⁴⁴ The Policy recognises that health and social care agencies have a duty of care to their clients that goes beyond their duty as employers. In discharging this duty of care the policy identifies the need for a robust procedure for dealing with allegations of abuse against staff members while safeguarding the welfare of clients.

⁴¹ LRC 83-2006 at paragraph 7.25.

⁴² LRC 83-2006 at paragraph 1.97.

⁴³ *Abuse of People with Disabilities: Briefing Paper by the NDA* (National Disability Authority) available at www.nda.ie.

⁴⁴ *Trust In Care Policy for Health Service Employers on Upholding the Dignity and Welfare of Patients/Clients and the Procedure for Managing Allegations of Abuse against Staff Members* (HSE 2005).

4.30 The policy identifies the following measures that each health and social care agency must adhere to in discharging its responsibility to protect the dignity and welfare of clients and support staff in their work:

- sufficient allocation of resources to enable best practice standards to be delivered;
- provide safe systems of work to minimise the potential for abuse;
- provide information leaflets setting out how clients, their relatives and members of the public can report concerns or complaints of abuse to the relevant authorities;
- rigorous recruiting process and selection procedures with induction for all new staff;
- the provision of effective supervision, support and training;
- communicate the Trust In Care Policy to all staff so they are fully aware that the welfare of clients is of paramount importance and know what action is required if abuse is suspected or alleged; and
- manage allegations of abuse against staff members promptly and with due regard of the right to fair procedure while safeguarding the welfare of clients.

(ii) The Health Act 2007

4.31 The Health Information and Quality Authority (HIQA) was established under the *Health Act 2007* with the specific role to set standards and oversee the quality throughout the health and social care services. HIQA's role also extends to monitoring compliance with these standards and operates accreditation programmes for services. It is also responsible for registration and inspection of residential care centres for people with disabilities.

4.32 In 2009, HIQA published a set of non-statutory standards in relation to residential care for people with disabilities, with specific provisions on abuse.⁴⁵ Standard 6 of the *National Quality Standards: Residential Services for People with Disabilities* states that each individual must be safeguarded and protected from abuse through risk assessment and management policies and procedures for dealing with situations where people's safety may be risk. Standard 9.2 states that individuals should be encouraged to access appropriate health information and education, both within the residential setting and in the local community in all aspects of his or her life, including sexual relationships and sexual health. The HIQA guidelines do not apply to people

⁴⁵ *National Quality Standards: Residential Services for People with Disabilities* (HIQA 2009) available at www.hiqa.ie.

with disabilities availing of community-based or day services. The 2011 Programme for Government pledges to put these National Standards on a statutory footing and ensure that services are inspected by HIQA.⁴⁶

4.33 The Social Services Inspectorate has a remit which was extended under the *Health Act 2007* to include the registration and inspection of nursing homes and residential services for people with disabilities as well as its original responsibility which was to oversee residential child care settings. The mandate of the Inspectorate does not cover community-based or day services for people with disabilities.

4.34 The Commission considers that with the current drive towards community living there is a need to develop national standards for community-based or day services similar to those developed by HIQA for residential services. Furthermore, the Commission believes there is merit in extending the remit of the Social Services Inspectorate to cover community-based and day services.

(2) England and Wales

(i) Legislative framework

4.35 In England and Wales social services authorities have statutory powers and duties in adult protection cases. Section 47 of the *NHS and Community Care Act 1990* imposes a duty on a local authority to carry out an assessment of need for community care services where a person appears to be someone for whom community care services could be provided and a person's circumstances may need the provision of some community care services. This duty could be regarded as amounting to a statutory duty to investigate. It notes that where a local authority becomes aware that a person may be in need of services due to actual or potential abuse or neglect, the duty to assess will be triggered. This assessment will establish the facts of the case and may in turn initiate referrals to other services and organisations, for instance, local safeguarding teams, mental health services, the police and the Public Guardian.

4.36 Where an authority provides services it may have be held accountable for any failure to investigate where there is an allegation of abuse. Local authorities may also be held accountable for not adhering to their responsibilities, particularly where a failure to investigate or use the powers conferred on it, leads to a situation where a person suffers harm.⁴⁷

⁴⁶ *Programme for Government 2011 to 2016*, at 24, available at www.taoiseach.gov.ie.

⁴⁷ England and Wales Law Commission *Consultation Paper on Adult Social Care* Consultation Paper (No.192 2010) at paragraph 12.7. The local authority could be

4.37 The duty to assess or investigate is triggered where a local authority becomes aware that a person may be in need of services due to actual or potential abuse or neglect. This assessment establishes the facts of the case and referrals to other services and organisations may be required, such as local safeguarding teams, mental health services, the police and the Public Guardian.⁴⁸

4.38 Furthermore, local authorities have statutory powers to take or initiate compulsory action under section 47 of the *National Assistance Act 1948*. Section 135(1) of the *Mental Health Act 1983* enables a person to be removed from their home to a place of safety where it is believed that they are being ill-treated or neglected. In terms of statutory guidance *No Secrets* and *In Safe Hands* establishes social services as the lead co-ordinating agency for safeguarding and public law requirements including those imposed under the European Convention on Human Rights. The Commission will discuss the statutory guidance as outlined in *No Secrets* and *In Safe Hands* in the next section.

4.39 In its 2011 *Report on Adult Social Care*, the Law Commission of England and Wales noted, however, that the community care assessment duty, which is the main legal vehicle for carrying out investigations, was not framed with primarily with adult protection in mind and has become an unsatisfactory mechanism. It proposed that a statute should clarify the existing legal position and establish a duty on local authorities to make enquiries and take appropriate action in adult protection cases. It proposed that such appropriate action could include service provision, monitoring or the use of existing compulsory powers.⁴⁹

4.40 The *Care Standards Act 2000* established a new regulatory body for social care and care services in England, known as the National Care Standards Commission. It is responsible for inspecting and regulating almost all forms of residential and domiciliary care. In 2004 this body was replaced by two organisations, the Commission for Social Care Inspection and the Commission for Healthcare Audit and Inspection. In 2009 these two bodies were replaced by the Care Quality Commission which was established under the Health and Social Care Act 2008. The Care Quality Commission is now the

held liable for damages by the victims or an investigation of maladministration by the Local Government Ombudsman.

⁴⁸ England and Wales Law Commission *Consultation Paper on Adult Social Care* Consultation Paper (No.192 2010) at paragraph 12.8.

⁴⁹ England and Wales Law Commission Report on Adult Social Care (Law Com. No. 326 2011) at paragraph 9.4.

new independent body with exclusive responsibility for the inspection, monitoring and regulation of health and social care in England.

4.41 The English *Mental Capacity Act 2005* also permits decisions or actions to be taken by local authorities. The 2005 Act enables local authorities and NHS bodies to appoint an Independent Mental Capacity Advocate where it is alleged that a person who lacks capacity is or has been abused or neglected by another person, or the person is abusing or neglecting another person.⁵⁰

(ii) Statutory guidance

4.42 The English statutory guidance document *No Secrets*⁵¹ and Welsh equivalent *In Safe Hands*⁵² provide for the development of local inter-agency policies, procedures and joint protocols for the purposes of safeguarding adults, and establish the local social services authority as the lead agency. Both documents were issued as guidance in 2000 under section 7 of the *Local Authority Social Services Act 1970*. The guidance was introduced on foot of calls that national guidelines be developed in conjunction with local multi-agency codes of practice for the protection of adults at risk.⁵³ The guidance states that criminal investigation should take priority over all other lines of inquiry. The guidance emphasises the importance of cooperation at all levels of management and operations; rigorous recruitment and vetting procedures for all staff and volunteers working with vulnerable adults; training for staff and volunteers; internal guidelines for agencies; and information to service users, carers and the public. *No Secrets* and *In Safe Hands* are to be read in

⁵⁰ Regulations 2006, SI 2006 No.2883 *Mental Capacity Act 2005* (Independent *Mental Capacity Act* Advocates) (Expansion of Role).

⁵¹ Department of Health and Home Office *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* (2000). *No Secrets* has been criticised for failing to draw an adequate distinction between duties to report suspected criminal behaviour and responsibilities for safeguarding vulnerable adults, when abusive treatment does not amount to a crime. See *A Life Like Any Other? Human Rights of Adults with a Learning Disability* (Joint Parliamentary Committee on Human Rights 2008) at paragraph 193.

⁵² National Assembly for Wales *In Safe Hands* (2000).

⁵³ The English Law Commission, in its *Consultation Paper on Safeguarding Adults at Risk*, provisionally proposed that the term “vulnerable adults” be replaced by “adults at risk” to reflect the need to focus on the risks that a person faces rather than the characteristics of the person concerned. Law Commission for England and Wales *Adult Social Care A Consultation Paper* (Consultation Paper No.192 2010) at paragraph 12.36.

conjunction with the Safeguarding Adults Protocol and Guidance, as issued by the Commission for Social Care Inspection which is discussed below.

4.43 The guidance states that an investigation is normally justified on the basis of “harm”, which includes ill-treatment, impairment of or avoidable deterioration in physical or mental health and impairment of physical, intellectual, emotional, social or behavioural development.⁵⁴ All staff have a responsibility to act if there is a suspicion or evidence of abuse or *neglect*. In most cases, the guidance outlines, there should be a joint investigation rather than a series of separate investigations.⁵⁵ As such, both *No Secrets* and in *Safe Hands* require social services authorities in England and Wales to investigate cases of actual or alleged abuse and neglect, and to coordinate any appropriate action.

4.44 The *Care Standards Act 2000* and the *Health and Social Care (Community Health and Standards) Act 2003* place specific responsibilities and duties on the Commission for Social Care Inspection and in working to safeguard adults the Commission for Social Care Inspection must work within that legal framework. In 2007 the UK’s Commission for Social Care Inspection issued the Safeguarding Adults Protocol and Guidance which is a national framework of standards for good practice and outcomes in adult protection work. The protocol involves setting up Safeguarding Adult teams for each local authority area. These teams provide a forum for locally based statutory bodies such as police, social workers, health service and the voluntary service providers and people with disabilities themselves to meet on a regular basis to share and follow up on concerns relating to possible abuse and neglect.⁵⁶

4.45 The national framework is comprised of eleven standards for good practice and outcomes in relation to adult protection:

- a multi-agency partnership in each local authority to lead ‘Safeguarding Adults’ work;
- accountability for and ownership of Safeguarding Adults work is recognised by each partner agency’s executive body;

⁵⁴ Law Commission for England and Wales *Adult Social Care A Consultation Paper* (Consultation Paper No.192 2010) at paragraph 12.12.

⁵⁵ Department of Health and Home Office (UK) *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* (2000) at paragraphs 2.18, 6.2 and 6.10; National Assembly for Wales *In Safe Hands* (2000) at paragraph 1.1.

⁵⁶ Commission for Social Care Inspection *Safeguarding Adults Protocol and Guidance* (2007) available at www.cqc.org.uk.

- the Safeguarding Adults policy includes a clear statement of every person's right to lead a life free from abuse and neglect, and this message is actively promoted to the public by partner organisations;
- each partner agency has a well-publicised policy of zero-tolerance of abuse within the organisation;
- there is a multi-agency development/training strategy resources within each partnership;
- all citizens can access information about how to gain safety from abuse and violence, including information about local Safeguarding Adults procedures
- there is a local multi-agency Safeguarding Adults policy and procedure describing the framework for responding to all adult who may be or are eligible for community care services or who may be at risk of abuse of neglect;
- each partner agency has a set of internal guidelines, consistent with the local multi-agency Safeguarding Adults policy and procedures, which sets out the responsibilities of all workers to work within such guidelines;
- the multi-agency Safeguarding Adults procedures detail the following stages: alert, referral, decision, safeguarding assessment strategy, safeguarding assessment, safeguarding plan, review, recording and monitoring;
- the Safeguarding Adults procedures are accessible to all adults covered by the policy;
- the partnership explicitly includes service-users as key partners in all aspects of its work.

4.46 In 2010, the Law Commission for England and Wales published a *Consultation Paper on Adult Social Care*⁵⁷ in response to growing calls for the introduction of new adult protection powers and duties on local authorities to investigate abuse. Arising from a consultation on the review of the legal framework for safeguarding adults in England, the Government set up an Inter-Departmental Ministerial Group on Safeguarding Vulnerable Adults with the intention of introducing new legislation to strengthen the local governance of safeguarding adults by putting Safeguarding Adults Boards on a statutory footing. On foot of the consultation process the Government also launched a programme of work with agencies and stakeholders to support effective policy

⁵⁷ Law Commission of England and Wales *Consultation Paper on Adult Social Care A Consultation Paper* (Consultation Paper No.192 2010).

and practice in safeguarding vulnerable adults. The Law Commission's Consultation Paper proposes that the future adult social care statute should clarify the existing legal position and establish a duty to make enquiries and take appropriate action in adult protection cases within the existing powers of social services authorities. The Commission provisionally recommended that the "proposed duty would operate in conjunction with the community care assessment duty by enabling *explicitly* a formal process to be initiated in adult protection cases. The duty to investigate would be triggered if the authority has *reasonable* case to suspect abuse or neglect, which would not be the case, for example, if the authority did not have and could not be expected to have full knowledge of the relevant facts."⁵⁸

4.47 In the Law Commission's 2011 *Report on Adult Social Care* the Commission recommended that a future adult social care statute should provide clearly that local social services authorities have the lead co-ordinating responsibility for safeguarding. It also recommended that a future statute should place a duty on local social services authorities to investigate adult protection cases, or cause an investigation to be made by other agencies, in individual cases; and that the future statute should place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the process for adult protection investigations.⁵⁹

(iii) Common law duty of care

4.48 The issue of the common law duty of care came to light in the 2009 case *X v Hounslow London Borough Council* where the Court of Appeal held that a local authority did not owe a common law duty of care to protect tenants living in one of its flats by moving them into alternative accommodation as a result of "the unusual but dangerous situation which had developed".⁶⁰ The case illustrates the difficulties in bringing claims against public authorities. X, Y and Y's children lived in a flat provided for by the local authority. The local authority knew that X and Y had learning difficulties. Local youths took control of the flat and used it for illicit activity, including taking drugs, underage sexual activity and storing stolen goods, and on several occasions the couple had been subjected to *threatening* and abusive *behaviour*. X claimed that the local authority should have realised that the family were in imminent physical danger

⁵⁸ Law Commission of England and Wales *Consultation Paper on Adult Social Care A Consultation Paper* (Consultation Paper No.192 2010) at paragraph 12.22.

⁵⁹ Law Commission of England and Wales *Report on Adult Social Care* (Law Com. 326 2011) at paragraph 9.19.

⁶⁰ *X v Hounslow London Borough Council* [2009] EWCA Civ 286, (2009) 12 CCLR 254, at 55.

which should have triggered its responsibility in providing alternative accommodation. The Court of Appeal held that the local authority did not owe a duty of care to protect X from the criminal acts of third parties. The Court held that in order to establish a duty of care to protect one party against the criminal acts of a third party, something more than reasonable foreseeability of harm was needed. The necessary factors for establishing the duty of care include situations where the defendant creates the source of danger to the claimant; the third party who causes damage is under the control or supervision of the defendant; and the defendant has assumed a responsibility to the victim. It can be deduced that the point at which a local authority will be held to have assumed a duty of care to protect an individual from harm caused by a third party is more than merely providing services and other support to individuals. The common law has not yet recognised a duty of care, if a local authority assumes a responsibility over an individual or increases or causes the danger they face, such a duty may be found in the future.⁶¹

E International Obligations

(1) Council of Europe

4.49 In recognising the high levels of abuse perpetrated against people with disabilities, the Council of Europe introduced a Resolution in 2005 on safeguarding adults and children with disabilities against abuse.⁶² The Resolution recommends that member States invest in the prevention of abuse and give this commitment a high profile. In meeting this commitment, human rights standards need to be adhered to by States when developing primary prevention measures which would include raising awareness of rights through education and proper recruitment and training and the introduction of strong laws which act as deterrents. If, despite the introduction of these measures, abuse continues, the Resolution calls for secondary prevention measures to ensure that abuse is promptly recognised investigated and acted upon. Lastly, the Resolution outlines tertiary prevention methods to alleviate harm done as a result of being a victim of abuse and help people recover their confidence and trust in others.

⁶¹ Law Commission for England and Wales *Consultation Paper on Adult Social Care A Consultation Paper* (Consultation Paper No.192 2010) at paragraph 12.15.

⁶² *Resolution of the Committee of Ministers on safeguarding adults and children with disabilities against abuse* (Council of Europe ResAP(2005)1, 2005).

4.50 Arising from the Council of Europe 2005 Resolution, the *Council of Europe Disability Action Plan 2006-2015* was agreed in 2006.⁶³ The objective of the Action Plan is to translate the aims to the Council of Europe with regard to human rights, non-discrimination, equal opportunities, full citizenship and participation of people with disabilities into a European policy framework on disability.⁶⁴ The Action Plan highlights each member State's duty in preventing and protecting people against acts of abuse and violence. The Plan recommends the development of policies aimed at safeguarding people with disabilities against all forms of abuse and violence and ensure appropriate support for victims of abuse and violence. In fulfilling this duty, Action line no.13, entitled 'protection from abuse and violence', calls on each member State to develop a national action plan to protect people with disabilities from abuse with the aim of ensuring access to services and supports for victims. It also highlights the increased rate of abuse and violence committed against persons with disabilities than the rate for the 'non-disabled' population and higher again for women with disabilities, particularly women with severe disabilities, where the percentages of abuse far exceed those of 'non-disabled' women. The Action Plan notes that such abuse can be inflicted by strangers or persons known to the individual and can take many forms.

(2) 2006 UN Convention on the Rights of Persons with Disabilities

4.51 As previously mentioned the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD) is the first international legally binding instrument that sets down minimum standards for the protection and safeguarding of the civil, political, social, economic and cultural rights of persons with disabilities throughout the world. Article 16 of the Convention, is new in that the human rights protection it affords is applied to situations where people with disabilities may be more at risk of abuse, for instance, in institutional settings.⁶⁵ Article 16(1) of the UNCRPD imposes a duty to protect

⁶³ *Recommendation of the Committee of Ministers to member states on the Council of Europe Disability Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015* (Council of Europe Rec(2006)5, 2006). The National Disability Authority, the state agency on disability issues, has established an Expert Advisory Committee to advice on the design and implementation of a national study to identify the prevalence of abuse of people with disabilities and areas for improvements within systems for protection and redress.

⁶⁴ *Council of Europe Disability Action Plan 2006-2015*.

⁶⁵ Quinn, "Disability and Human Rights: A New Field in the United Nations" in Krause & Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) at 262.

on States Parties to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities. Of particular significance is the obligation on States Parties to take all appropriate measures to protect persons with disabilities both within and outside the home from all forms of exploitation, violence and abuse. Thus, “the explicit inclusion of ‘home’ means that States Parties will have to craft appropriate tools to investigate abuse within the family setting.”⁶⁶ The article imposes a duty on States to prevent all forms of exploitation and abuse by providing assistance and supports including information on how to recognise and report instances of abuse.⁶⁷ It puts an obligation on States Parties to set up independent bodies to effectively monitor institutions.⁶⁸ Furthermore, it requires States Parties to put in place effective measures to assist and support in the recovery of people with disabilities who are victims of abuse by introducing measures to promote the physical, cognitive and psychological recovery, rehabilitation and social integration of victims.⁶⁹ Importantly, it requires effective legislation and policies to ensure identification, investigation and prosecution of abuse. States are also obliged to introduce preventative measures to ensure that people with disabilities and their families are given information to help them avoid, recognise and report instances of abuse which is age, gender and disability-specific.⁷⁰

4.52 The obligation of the State to protect must be done on an equal basis with others. As such, Article 16 is not a mandate for the State to restrict the other provisions in the Convention and cannot encroach on consensual intimate relationships.

4.53 The provisions in Article 16 could prove extremely useful as a tool for effective prevention from sexual abuse and exploitation of persons with limited decision-making ability. The very fact that Article 16 provides for investigative powers, effective complaint mechanisms, disability awareness training for people working in the criminal justice system and cross-departmental collaboration (which currently exists for child protection) shows the importance attached to this Article within the UN Convention. Traditionally, there has been

⁶⁶ Quinn, “Disability and Human Rights: A New Field in the United Nations” in Krause & Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) at 262.

⁶⁷ This is the State’s duty to prevent under Article 16(2) of the UNCRPD.

⁶⁸ Article 16(3) of the UNCRPD.

⁶⁹ Article 16(4) of the UNCRPD.

⁷⁰ Flynn “Ireland’s compliance with the Convention on the Rights of Persons with Disabilities: Towards a Rights-Based Approach for Legal Reform” (2009) 16 DULJ 1, 357, at 10.

tension between the public and private in terms of how far investigatory powers extend to, however, as Quinn notes, Article 16 “sends a very strong signal that there are to be no more ‘no-go-areas’ for the public authorities.”⁷¹

F Protection measures in mainstream settings

4.54 In this section, the Commission outlines the current shift from institutional care to living in the community and how this movement will demand strengthening the protection framework in mainstream setting for people with disabilities.

4.55 According to the National Intellectual Disability Database Report, 25,556 people with intellectual disability were in receipt of services. This figure applies to those in receipt of day, respite or residential services. This represents 98% of the total number registered on the National Intellectual Disability Database in 2009.⁷²

4.56 There are gaps in the protection framework for people with disabilities. The absence of statutory regulations or standards for day services for people with disabilities; the absence of an inspection system for day services for people with disabilities and the absence of specific mechanisms to prevent or address abuse of people with disabilities who live in the community must be addressed if people are to be protected from abuse. With the drive towards community-based services as a result of people with disabilities choosing to live in the community there may be a need for HIQA to develop a set of standards that would apply to community services as well as extending the mandate of the Social Services Inspectorate to oversee community settings. Indeed, Article 19 of the UNCRPD explicitly recognises the right of persons with disabilities to independent living and community inclusion which requires a shift in policy away from institutions towards in-home, residential and other community support services. As noted by the Office of the High Commissioner for Human Rights, the key element in this provision is that any intervention aimed at giving effect to the right to independent living and community inclusion is the explicit legal recognition of the right of persons with disabilities to determine where and with whom they live.⁷³

⁷¹ Quinn, “Disability and Human Rights: A New Field in the United Nations” in Krause & Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) at 262.

⁷² *Annual Report of the National Intellectual Disability Database Committee 2009*, executive summary available at www.hrb.ie.

⁷³ United Nations *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of*

4.57 Cosc, the National Office for the Prevention of Domestic, Sexual and Gender-based Violence which was set up in 2007, has a remit in the development of intervention responses for groups which are seen as most at risk of abuse. The protection of people with disabilities who do not live in residential settings falls on this agency.⁷⁴ In its *National Strategy on Domestic, Sexual and Gender-based Violence 2010-2014* Cosc states that it will work closely with service providers and the National Disability Authority to look at models of best practice standards to meet the particular needs of persons with disabilities and to promote and encourage improved responses to preventing abuse.

(1) Lessons learned from other categories of vulnerable groups

4.58 In developing best practice for the prevention of abuse, parallels can be drawn from systems that have been introduced to address abuse against other categories of vulnerable people such as children and the elderly. Possible policy innovations could include coordination between the Garda Síochána and the HSE on responding to allegations of abuse. In 2010, the Garda Síochána introduced such a measure and has developed a policy document on the investigation of sexual crimes against children in which members, responding to allegations of sexual crimes involving people with a disability, are advised that such incidents may require inter-agency collaboration with the disability sector.⁷⁵ The document also advises members to be aware that disability can present itself in many forms such as physical, sensory, intellectual or a mental health difficulty.

4.59 Section 3 (1) of the *Child Care Act 1991* imposes a statutory duty on the Health Service Executive (HSE) to promote the welfare of children who are not receiving adequate care and protection. This duty lies at the centre of the Irish child protection system. It is important to bear in mind that the section imposes a positive duty on protect children at risk. This duty can be fulfilled in

the Convention on the Rights of Persons with Disabilities A/HRC/10/48 of 26 January 2009 at paragraph 50.

⁷⁴ The March 2011 Ministerial Briefing of the newly appointed Minister for Justice and Equality noted Cosc's National Strategy on Domestic, Sexual and Gender-based Violence 2010-2014 and highlighted the need to increase the recognition of sexual violence amongst the public and people working in the justice sector in particular as well as the need to raise awareness of the services available to deal with these crimes. Department of Justice and Law Reform *Ministerial Briefing March 2011* at 17 available at www.justice.ie.

⁷⁵ *Policy on the Investigation of Sexual Crime - Crimes Against Children and Child Welfare* (Garda Síochána 2010) at 31.

two ways – the identification of children not receiving proper care and the coordination of information from relevant sources, such as police and schools. This duty is broad and extends to a duty to institute court proceedings where, according to the HSE, is necessary for the protection of the child. In line with this duty and the standard reporting procedures set out in *Children First: National Guidelines for the Protection and Welfare of Children* (first published in 1999 and replacing 1996 Department of Health guidance), concerns regarding children should be reported to the HSE. Once a significant doubt arises from an investigation into an allegation of abuse, the HSE is obliged to take measures to protect the child concerned. The Children First guidelines could provide a model for dealing with suspected abuse of people with disabilities who are in receipt of services from the HSE.

4.60 In 2011, the Minister for Children and Youth Affairs stated that the Government will place the Children First guidelines on a statutory footing in 2011 in order to enhance accountability for people working with children. By placing the *Children First Guidelines* on a statutory footing, all organisations and individuals working with children will have a legal obligation to share information with authorities relating to child welfare concerns, and to follow protocols for the assessment of suspected abuse or neglect.⁷⁶ Failure to comply with aspects of the national code will give rise to criminal sanctions including jail sentences, fines, prohibition from working with children and mandatory external inspections.

4.61 The Office of the Ombudsman for Children was set up in 2004 under the *Ombudsman for Children Act 2002* to promote the rights and welfare of children and to ensure that legislation, policy and practice on matters relating to children are adequate. The Office can investigate complaints about the actions of public bodies where it appears that a child has been adversely affected and the action taken was not in line with fair or sound administrative practices. As such, the Office does not directly investigate allegations of abuse but the manner in which investigations are handled by the authorities.

4.62 The HSE has taken significant measures in recent years to combat elder abuse in particular by raising awareness about the issue.⁷⁷ As part of

⁷⁶ At the time of writing (October 2011), the Minister for Justice and Equality has referred the *Scheme of the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011* to the Oireachtas Committee on Justice so that it can give its views before the formal Government Bill is published.

⁷⁷ Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002); National Elder Abuse Steering Committee *Open Your Eyes HSE Elder Abuse*

these measures, the HSE has appointed Dedicated Officers for Elder Abuse in each HSE administrative area who are responsible for developing and evaluating the HSE's response to elder abuse. The HSE has also appointed Senior Care Workers for Elder Abuse, who are employed within Local Health Offices, and who work closely with Dedicated Officers for Elder Abuse to assess and manage cases of suspected elder abuse referred to the HSE. These initiatives have led to increase public awareness of elder abuse, and increased reporting of incidents of suspected abuse.

(2) A National Action Plan on Abuse for people with disabilities

4.63 As already mentioned, the Government has adopted a national strategic approach in relation to child protection in the form of the *Children First National Guidelines*. Significant developments have also begun in recognising the need to address elder abuse.⁷⁸ There have been calls for a similar national strategic approach on the issue of abuse of adults with disabilities.⁷⁹

(3) Mandatory reporting

4.64 Some services are obliged by the Health Service Executive to report any abuse or allegation of abuse committed against children and adults on a monthly basis. This obligation would arise where a service operates as an agent of the HSE. While there is no statutory duty to report where there is an allegation of abuse their obligation stems from their services agreements with the HSE. Some services have a designated person to whom complaints of abuse are sent to but there needs to be clear protocols on what action is taken on foot of receiving such allegations. The duty to report is part of the services agreement for HSE funded services and the duty is also included in the HIQA guidelines. Consistent rules, however, must apply across all services.

4.65 Protection and statutory immunity from liability is provided for *bona fide* reporting of child sexual abuse under the *Protection for Persons Reporting Child Abuse Act 1998*. Currently, mandatory reporting of abuse is not required. The Commission is acutely aware that this issue has been the subject of

Services 2010 (Health Service Executive 2011) and HSE Elder Abuse Policy *Responding to Allegations of Elder Abuse 2008* (Health Service Executive 2008).

⁷⁸ The HSE has taken significant measures in recent years to combat elder abuse in particular by raising awareness such as the Report on the National Study of Elder Abuse and Neglect published by the National Centre for the Protection of Older People in 2010 which looked at the prevalence of elder abuse in Ireland.

⁷⁹ The National Disability Authority has called for the establishment of a steering group to develop a National Action Plan for safeguarding children and adults with disabilities from abuse to be led by the Department of Justice and Equality.

renewed attention in the wake of the publication of the *Report by the Commission of Investigation into Catholic Diocese of Cloyne*⁸⁰ which revealed how the Church and state agencies responded to allegations against 19 clerics in the Diocese of Cloyne between 1996 and 2008. As a result of this Report, the Minister for Justice and Equality has stated that legislation is being prepared which will make it a criminal offence to withhold information relating to sexual abuse or other serious offences against a child or vulnerable adult.

4.66 The concept of mandatory reporting originated in the United States and refers to legislation that specifies who is required by law to report suspected cases of abuse or neglect. This obligation imposes a penalty, usually a fine, on any mandated individual found in breach of their reporting responsibilities.⁸¹ Immunity is provided from civil or criminal prosecution where a person submits a report of suspected abuse in good faith.

4.67 Along with the United States, Australia and Canada pursue mandatory reporting as an integral feature of their respective child protection systems. In Australia, mandatory reporting laws exist in all states and territories. Similarly, in Canada, each province, with the exception of Yukon Territory, has mandatory reporting provisions in their legislation. In general, however, voluntary reporting systems tend to be more common and are included in inter-agency protocols which emphasise information sharing and structured coordination of efforts.⁸² England, Scotland and Wales share this voluntary reporting system whereas Northern Ireland has enacted mandatory reporting legislation in its child protection laws.

4.68 Legislative arrangements for mandatory reporting can vary in relation to the scope of what is mandated which can range from full coverage requiring all citizens to report child abuse to selected mandatory reporting which focuses on specific professional groups. There are variations in terms of definitions of

⁸⁰ *Report by the Commission of Investigation into Catholic Diocese of Cloyne*, available at www.justice.ie.

⁸¹ In the United States model statutes on mandatory reporting were introduced in the early 1960s. Since then, mandatory reporting has become a strong feature in laws governing child abuse in all 50 states, including the District of Columbia, and is considered to be a crucial feature in the child protection system. *An examination of local, national and international arrangements for the mandatory reporting of child abuse: the implications for Northern Ireland* (National Society for the Prevention of Cruelty to Children 2007) at 4.

⁸² *An examination of local, national and international arrangements for the mandatory reporting of child abuse: the implications for Northern Ireland* (National Society for the Prevention of Cruelty to Children 2007) at 9.

abuse and neglect, limits of professional confidentiality as well as timeframes for reporting. As such, stark variations exist, from minimal professional coverage in the Yukon Territory in Canada to New Jersey in the US where each person is under a duty to report. In Western Australia there is a voluntary reporting system in place, however, this is buttressed by inter-agency protocols.

4.69 There is no empirical research that clearly shows that introducing a legal obligation to report decreases the incidences of abuse. It has been suggested that the context in which mandatory reporting laws are introduced will dictate their effectiveness.⁸³ While mandatory reporting has been seen to increase reporting cases of maltreatment, questions have been raised as to the quality of reporting and increased rates of unsubstantiated cases as well as the ability of a system to deal with the numbers of allegations in an appropriate manner.⁸⁴ The Irish Association of Social Workers, in response to plans to introduce mandatory reporting in respect of allegations of abuse against children and vulnerable adults⁸⁵, warned that “the child protection system is not working properly. There are significant numbers of children without social workers or care plans... I don’t see how putting additional pressure on child protection services will improve this situation.”⁸⁶ The Association, in highlighting the difficulties with mandatory reporting, pointed to Australian states where mandatory reporting has led to services being overwhelmed by reports of suspected abuse. To deal with difficulties in administering the system of mandatory reporting the “Wood Inquiry” which was set up in 2008 to investigate the deaths of 2 children in New South Wales recommended that the duty to report be limited to cases of suspected significant harm and to implement

⁸³ International comparisons suggest that in America, which has the longest established mandatory reporting laws, increases in reporting cases of abuse do not appear to have reflected a reduction in abuse related deaths. *An examination of local, national and international arrangements for the mandatory reporting of child abuse: the implications for Northern Ireland* (National Society for the Prevention of Cruelty to Children 2007) at 30.

⁸⁴ *An examination of local, national and international arrangements for the mandatory reporting of child abuse: the implications for Northern Ireland* (National Society for the Prevention of Cruelty to Children 2007) at 4-5.

⁸⁵ The Minister for Justice has referred the *Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011* to the Oireachtas Committee on Justice so that it can give its views before the formal Government Bill is published.

⁸⁶ “Mandatory child abuse report ‘could do more harm than good’” *The Irish Times* 16 July 2011.

greater focus on the referral of more minor cases to community-based services.⁸⁷

4.70 In Ireland, the move towards mandatory reporting has been positively received by child advocacy groups. Barnados, the Irish Society for the Prevention of Cruelty to Children (ISPCC) and the Children's Rights Alliance had been calling for some time for the introduction of mandatory reporting of child abuse in response of recent cases involving clerical child sex abuse.⁸⁸

4.71 The issue of mandatory reporting is not a panacea however and it has been argued, that rather than introducing mandatory reporting or other regulatory measures in the hope that services become aware of more instances of abuse, that the protection system could be better supported by providing training, skill development, supervision and capacity building to employees within a supportive framework.⁸⁹

4.72 Assuming mandatory reporting is introduced, the Commission considers it will be important to clarify what extent of abuse needs to be reported. Furthermore, the Commission believes that multidisciplinary training should be introduced alongside imposing a legal duty on those to report concerns over possible abuse.

(4) Vetting

4.73 The 2004 Report of the Working Group on Garda Vetting recommended that the *Protection of Persons Reporting Child Abuse Act 1998* should be amended so as to offer protection for persons reporting the abuse of people with mental or physical disabilities.⁹⁰ In 2011, the Draft Heads of a *National Vetting Bureau Bill* were published. The Bill will provide a statutory basis for the vetting of all applicants for employment and employees working with children or vulnerable adults. The Bill will provide for a vetting process which will provide for the identification of both 'hard' and 'soft/relevant information', in particular, information relating to the endangerment, sexual

⁸⁷ Wood *Report of the Special Commission of Inquiry into Child Protection Services NSW* (2008).

⁸⁸ Buckley "Reforming the child protection system: why we need to be careful what we wish for" 12 (2009) 2 IJFL 27, at 1. The Law Reform Commission in its *Report on Child Sexual Abuse* (LRC 32-1990) favoured the introduction of mandatory reporting laws in relation to child sexual abuse.

⁸⁹ Buckley "Reforming the child protection system: why we need to be careful what we wish for" 12 (2009) 2 IJFL 27, at 2.

⁹⁰ *Report of the Working Party on Garda Vetting* (Government Publications 2004) at paragraph 5.2.3 available at www.justice.ie.

exploitation or sexual abuse, or risk thereof, of children and vulnerable adults.⁹¹ The Bill will allow the use of information where individuals are under investigation for alleged abuse and if an organisation is concerned that an individual could place a child or a vulnerable adult at serious risk, the agency will be obliged to provide that information to the vetting bureau. This obligation will be on the HSE, faith-based organisations and groups including the Catholic Church. Organisations could face a fine and individuals could be imprisoned where job applicants or volunteers are not vetted or where concerns that they may put children at risk are not reported.

4.74 The 2011 *Draft Heads of a National Vetting Bureau Bill 2011* is modelled on the English *Safeguarding Vulnerable Groups Act 2006* which sets out the legislative basis in England and Wales for the vetting of people working with children and vulnerable adults. The Independent Safeguarding Authority (previously called the Independent Barring Board) works in conjunction with the Criminal Records Bureau, an agency of the Home Office, in delivering the vetting and barring scheme. The 2006 Act creates a list of people barred from working with children and a second list barring people from working with vulnerable adults.

(5) Whistle-blowing protection and protected disclosures

4.75 The Commission is aware of the Government's intention to propose the enactment by the Oireachtas of generally applicable legislation to prevent employers from taking action against whistleblowers.⁹² This would go beyond, for example, the provisions of section 20 of the *Criminal Justice Act 2011*, which deal with protecting any person who is penalised for providing information to Gardaí concerning specified serious "white-collar" crimes.

4.76 The Commission, in its 2009 *Consultation Paper on Legal Aspects of Carers* invited submissions on the issue of protecting people who report concerns about incidents of possible abuse of vulnerable adults by professional carers.⁹³ The Commission now turns to discuss this issue in light of renewed attention in recent times which showed the lack of legal protection currently

⁹¹ This issue was considered by the Joint Oireachtas Committee on the Constitutional Amendment on Children in its *Interim Report* recommending legislation for the vetting of all persons working in any capacity with children. See *Interim Report by the Joint Constitutional Committee on the Constitutional Amendment for Children on Children on the Twenty-Eight Amendment of the Constitution Bill 2007* available at www.oireachtas.ie.

⁹² "New whistleblower laws outlined" *The Irish Times* 11 April 2011

⁹³ Law Reform Commission *Consultation Paper on Legal Aspects of Carers* (LRC CP 53-2009) at paragraph 5.19.

afforded to so-called ‘whistle-blowers’ in the event of an action taken by employers or colleagues.

4.77 A “whistleblower” is someone who discloses information to authorities about serious concerns they have about a health or social care service which either they or someone they are in contact with receive. A “whistleblower” may also be someone who is employed by a health or social care provider, and who discloses information to the relevant authority about the care provider.⁹⁴

4.78 The *Protection for Persons Reporting Child Abuse Act 1998* introduced legal safeguards to protect persons who reported concerns about incidents of possible child abuse. Section 3(1) of the 1998 Act provides that where a person expresses his or her opinion to an appropriate person that a child is or have been abused he or she will not be liable for damages, provided that he or she acts reasonably and in good faith.⁹⁵

4.79 The 1998 Act provides that where an employee makes a communication under section 3, his or her employer shall not penalise the employee for having done so.⁹⁶ Where an employer breaches this provision, the employee may present a complaint to a rights commissioner in the Labour Relations Commission that his or her employer has contravened this provision, and the rights commissioner must give the parties an opportunity to be heard by the commissioner. Where a person makes a statement in accordance with section 3, and he or she knows the statement to be false, that person is guilty of an offence.⁹⁷

4.80 The *Health Act 2004* (which established the Health Service Executive), as amended by the *Health Act 2007*, has made extensive provision in relation to employees of relevant bodies who make disclosures of

⁹⁴ LRC CP 53-2009 at paragraph 5.16.

⁹⁵ Section 3(1)(a) of the *Protection for Persons Reporting Child Abuse Act 1998* includes where a child has been or is being assaulted, ill-treated, neglected or sexually abused. Section 3(1)(b) covers the expression of opinions that a child’s health, development or welfare has been or is being avoidably impaired or neglected.

⁹⁶ Section 4(1) of the *Protection of Persons Reporting Child Abuse Act 1998*.

⁹⁷ On summary conviction, a person shall be liable to a fine not exceeding £1,500 or a term of imprisonment not exceeding 2 months or to both. On conviction on indictment, a person shall be liable to a fine not exceeding £15,000 or a term of imprisonment not exceeding 3 years, or to both, as per section 5(2) of the 1998 Act.

information.⁹⁸ Where an employee of a relevant body⁹⁹ makes a disclosure of information to an authorised person in good faith, then this disclosure shall be deemed to be a “protected disclosure”.¹⁰⁰ Such a disclosure of information must be made in good faith, and the whistleblower must have reasonable grounds that the disclosed information will establish that the health or welfare of a person who is receiving a health or personal social service is or is likely to be at risk,¹⁰¹ that the actions of any person employed by a relevant body poses or is likely to pose a risk to the health or welfare of the public¹⁰² or that the relevant body is failing or is likely to fail to comply with any legal obligation.¹⁰³ Where an employee makes a protected disclosure regarding the conduct of his/her employer, he or she shall not be penalised,¹⁰⁴ and any contravention of this by the employer constitutes a ground of complaint by an employee to a rights commissioner.¹⁰⁵

⁹⁸ Section 103(1) of the *Health Act 2007* amended the *Health Act 2004* by inserting Part 9A into the 2004 Act. Section 55B of the 2004 Act, now provides for the protected disclosure of information by an employee of a relevant body. Sections 55E and 55G make further provisions regarding protected disclosures of information in relation to regulated professions by persons other than employees.

⁹⁹ Section 55A of the *Health Act 2004* provides that a “relevant body” includes (a) the Executive (b) service provider (c) any other person who has received or is receiving assistance in accordance with section 39 of the *Health Act 2004* or section 10 of the *Child Care Act 1991* and (d) a body established under the *Health (Corporate Bodies) Act 1961*. Under section 3 of the *Health Act 2004* a “service provider” is a person who enters into an arrangement with the HSE to provide a health or personal social service on behalf of the HSE.

¹⁰⁰ Section 55B of the *Health Act 2004*. Under section 18 of the *Defamation Act 2009* the defence of qualified privilege exists where the defendant can prove that the statement was published to a person who had a duty to receive, or had an interest in receiving the information; or the defendant believed on reasonable grounds that the person had such a duty or interest and the defendant had a corresponding duty to communicate the information to that person.

¹⁰¹ Section 55B(a) of the *Health Act 2004*.

¹⁰² Section 55B(b) of the *Health Act 2004*.

¹⁰³ Section 55B(c) of the *Health Act 2004*.

¹⁰⁴ Section 55M(1) of the *Health Act 2004*.

¹⁰⁵ Section 55M(2) of the *Health Act 2004*.

4.81 Where a person makes a protected disclosure, he or she is not liable in damages, or other forms of relief,¹⁰⁶ unless he or she knew that it was, or was reckless as to whether it was, false, misleading, frivolous or vexatious.¹⁰⁷ Where a professional carer is employed by the HSE, or another organisation that has entered into a contractual arrangement with the HSE,¹⁰⁸ and he or she makes a disclosure of information on reasonable grounds and in good faith, the disclosure will be deemed to be protected.¹⁰⁹

4.82 Section 55C of the *Health Act 2004*, inserted by the *Health Act 2007*, appears to protect employees of residential institutions not operated by the HSE or contracted to provide services on behalf of the HSE from liability for disclosing information to the chief inspector. This would occur where the information is disclosed in good faith and on reasonable grounds that it would show that (a) the actions of any person employed by the institution posed, is posing or likely to pose a risk to the health or welfare of a resident or (b) the person carrying on the business has failed to comply with the regulations and standards as prescribed under the *Health Act 2004*, as amended by the *Health Act 2007*.

4.83 Furthermore, section 103 of the *Health Act 2007* provides some protection for whistle-blowers in the health sector who bring their concerns to the Health Information and Quality Authority or the Mental Health Commission. Manning notes, however, that it is unclear to the Irish Human Rights Commission, whether this mechanism is commonly known to healthcare workers and whether the whistleblowing authorised in the legislation works in practice.¹¹⁰ It has been highlighted that there is little experience of whistleblowing in Ireland. In its 2009 annual report, the Standards in Public Office Commission indicated that it receives a surprisingly small number of complaints every year under ethics legislation.

4.84 Article 10 of the ECHR expressly provides for the right to “impart information and ideas without interference by public authorities”. Individuals who disclose information they deem to be in the interest of the public are this entitled to protection from sanctions imposed upon them by employers about whom the disclosures are made.

¹⁰⁶ Section 55L(3) of the *Health Act 2004*.

¹⁰⁷ Section 55L(2) of the *Health Act 2004*.

¹⁰⁸ Section 38 of the *Health Act 2004*.

¹⁰⁹ Section 55B of the *Health Act 2004*.

¹¹⁰ “Whistleblower law a test of State maturity” *The Irish Times* 11 April 2011.

(6) Conclusions and provisional recommendations

4.85 The Commission considers that there is a need to develop national standards concerning safeguards from sexual abuse for “at risk” adults and to develop protocols on cooperation between different agencies, including the Health Service Executive and the Garda Síochána.

4.86 In relation to the development of standards that would apply to community based services, the Commission considers that such standards should be developed by all relevant bodies. The Commission also considers that a multi-agency approach, similar to that which was adopted for the implementation of the National Guidelines for the Sexual Assault Treatment Units (SATUs),¹¹¹ could be applied to deal with sexual offences involving persons with intellectual disability. In the context of persons with an intellectual disability who have been the victim of a sexual assault the National Guidelines note the following:

“[i]f a person with an intellectual disability lacks the capacity to give consent, you should consult their parents, guardians and/or carers. Many Intellectual Disability Services now have a Designated Person structure, with nominated Organisation Designated Persons and onsite Designated Contact Persons to manage abuse incidents/allegations. The SATU should set up service level agreements with the Intellectual Disability Services locally with regard to referral processes and activating the Organisation Designated Persons system. The benefits of using Garda Specialist Interviewer’s skills should also be considered.”¹¹²

4.87 In relation to persons with mental health conditions or disorders who have been the victim of sexual assault the National Guidelines advise:

“[c]onsent in relation to a patient with a mental health condition should be obtained in the same manner as all other patients that is - they give their consent freely, following adequate information which is given in the appropriate manner. Where an adult patient is deemed to lack capacity to make the decision then steps should be made to find

¹¹¹ A Sexual Assault Treatment Unit involves the provision of health care, forensic clinical examination, Garda interview, crisis intervention, psychological support and links to longer term support services for victims of recent sexual violence aged 14 and up. A multi-agency group has developed national guidelines and continues to meet to develop protocols.

¹¹² *Recent Rape/ Sexual Assault: National Guidelines on Referral and Forensic Clinical Examination in Ireland 2nd ed* (Health Service Executive and Department of Justice and Law Reform Publication 2010) at paragraph 2:3.10

out whether any other person has legal authority to make decisions on the patient's behalf. In the case of a patient who is an inpatient through an Involuntary Admission Order to a Psychiatric Hospital, then the Consultant Psychiatrist responsible for the care and treatment of that patient assesses that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment. Local guidance on consent with regard to the Mental Health Act and the Mental Health Commission (MHC) reference guide should be available in the SATU.”¹¹³

4.88 The Commission therefore provisionally recommends that national standards be developed concerning safeguards from sexual abuse for “at risk” adults, including protocols on cooperation between different agencies such as the Health Service Executive, the Health Information and Quality Authority, the proposed Office of the Public Guardian and the Garda Síochána. The Commission also provisionally recommends that, in developing such standards, a multi-agency approach be adopted similar to that adopted for the implementation of the National Guidelines for the Sexual Assault Treatment Units (SATUs).

4.89 *The Commission provisionally recommends that national standards be developed concerning safeguards from sexual abuse for “at risk” adults, including protocols on cooperation between different agencies, including the Health Service Executive, the Health Information and Quality Authority, the proposed Office of the Public Guardian and the Garda Síochána. The Commission also provisionally recommends that, in developing such standards, a multi-agency approach be adopted similar to that adopted for the implementation of the National Guidelines for the Sexual Assault Treatment Units (SATUs).*

¹¹³ *Recent Rape/Sexual Assault: National Guidelines on Referral and Forensic Clinical Examination in Ireland 2nd ed* (Health Service Executive and Department of Justice and Law Reform, 2010) at paragraph 2:3.11.

CHAPTER 5 CAPACITY TO CONSENT IN THE CRIMINAL LAW AND SEXUAL OFFENCES: COMPARATIVE ANALYSIS

A Introduction

5.01 In this Chapter, the Commission examines options for repeal and replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993*, taking into account reform of comparable laws in other countries in recent years. Internationally, there has been considerable reform in this area, which has seen the introduction of legislation in the criminal law context aimed at empowerment of persons with intellectual disability while at the same time achieving protection from harm and exploitation. Essentially, the role of the criminal law is to supervise the line between the legitimate right of all adult persons to engage in sexual relationships and the need to protect vulnerable adults from exploitation and abuse. The Commission has already discussed how reform of the criminal law has complemented reform of mental capacity and adult guardianship laws, including a rights-based functional approach to assessing capacity. In Part B, the Commission examines the challenges posed by the assessment of capacity in the criminal law. This includes situations in which, for a variety of reasons (such as age), consent may not be regarded as legally valid.

5.02 In the remainder of the Chapter, the Commission examines how a number of different countries have sought to balance the line between the legitimate right of all adult persons to engage in sexual relationships and the need to protect vulnerable adults from exploitation and abuse. In Part C, the Commission examines recent legislative change in England and Wales in the *Sexual Offences Act 1993*, and how these have been largely replicated in Northern Ireland in the *Sexual Offences (Northern Ireland) Order 2008*. In Part D, the Commission examines developments in Scotland, culminating in the *Sexual Offences (Scotland) Act 2009*. In Part E, the Commission discusses developments in this area in Australia, while in Part F the Commission discusses relevant legislation in New Zealand. In Part G, the Commission discusses the Canadian legislation and in Part H the influence of the Model Penal Code in a number of criminal and penal codes in the United States. The Commission concludes in Part I by setting out its conclusions and preliminary recommendations.

B Decision-making capacity and sexual offences

5.03 Decision-making capacity in the context of consent to sexual relations raises difficult issues. On the one hand it is necessary that the law respects the choices made by persons with limited decision-making capacity while at the same time it should recognise that in some instances people may be vulnerable and require an added layer of protection sexual violence than the 'non-disabled' population. In providing adequate protection from harm there may be a need for a specific sexual offence concerning people with intellectual disability to reflect this reality. Arguments have been presented against the need to provide specific offences on the grounds that there is sufficient protection provided by the general law on consent and sexual offences against children; that specific offences limit the sexual freedom of people with limited decision-making capacity and that it may be discriminatory to target a group in a manner which differs from the 'non-disabled' population.¹

(1) Difficulties in prosecuting sexual offences - Consent

5.04 It is widely recognised that general provisions on sexual offences are difficult to prosecute successfully, particularly in the area of lack of consent which is the most probable defence raised by an accused to an allegation of rape or sexual assault, hence the enormous importance of consent in law governing sexual offences. Arguing that the complainant did not consent is a difficult element to prove in cases involving victims of sexual violence in general but arguably even more so where victims have limited decision-making capacity and where difficulties may arise in relation to credibility and reliability of evidence. General provisions, therefore, may not be sufficient in providing adequate protection.

5.05 Consent is not statutorily defined in this jurisdiction. Case law and legislation provide guidance on how consent is proved. From case law, it is clear that consent is absent where the victim is incapable of giving it for instance where the complainant lacks capacity or is unconscious or intoxicated. Consent can also be vitiated by the presence of force, fear or fraud. There is legislative guidance in the form of section 9 of the *Criminal Law (Rape) (Amendment) Act 1990* which implemented the Commission's recommendation in its 1988 *Report on Rape* that a complainant's failure or omission to offer resistance to the efforts of the accused does not of itself constitute consent.²

¹ Law Reform Commission for New South Wales *Report on People with an Intellectual Disability and the Criminal Justice System* (No. 80 1996) at paragraph 8.17.

² LRC 24-1988 at paragraph 17.

5.06 The defence of honest belief provides that the accused will be acquitted once it can be proven that he honestly believed that the woman was consenting. The jury can have regard to the presence or absence of reasonable grounds for this belief, however, the accused's belief does not have to be a reasonable one.

5.07 In a review of sexual offences legislation enacted in other countries the test for establishing whether an offence has been committed depends on two elements, namely capacity and exploitation. Differing tests have been adopted in making an assessment of capacity, however, a minimum standard requires that a person be able to understand and make a decision about the nature of the act at the time the sexual activity takes place. In terms of exploitation, in general, it is an offence to have a sexual relationship with someone who is unable to give free agreement to the relationship. Free agreement would not exist where there is a significant degree of limited capacity in making decisions, and evidence that the other party is in a position of trust or influence over the other person and has exploited that position.

(2) *Situations where consent is vitiated*

5.08 Comparisons can be made with the treatment of children by the *Criminal Law (Sexual Offences) Act 2006* which makes it an offence for a "person in authority" to engage in or attempt to engage in a sexual act with a child who is under the age of 17 years. If the accused is a "person in authority", the penalty increases from a term not exceeding 5 years to 10 years and for an attempt to commit a sexual act from 2 years to 4 years. A "person in authority" is defined as a parent, stepparent, guardian, grandparent, uncle or aunt of the victim; any person who is in *loco parentis* to the victim; or any person who is, even temporarily, responsible for the education, supervision or welfare of the victim.³ In terms of any subsequent conviction an accused who is a "person in authority" will receive a term of imprisonment not exceeding 7 years. The 2006 Act provides for a defence where the accused establishes that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years or 17 years respectively.⁴ The court, in considering whether the accused honestly believed that, at the time of the alleged commission of the offence, the complainant was over the relevant age, shall have regard to the

³ Section 1 of the *Criminal Law (Sexual Offences) Act 2006*. The definition of "person in authority" mirrors what was recommended by the Law Reform Commission in its *Report on Child Sexual Abuse* (LRC 32-1990) at paragraph 4.11.

⁴ Section 2(3) and 3(5) of the *Criminal Law (Sexual Offences) Act 2006*.

presence or absence of reasonable grounds for this belief as well as all other relevant circumstances.⁵

5.09 The specific power held by persons in trust or authority can act to undermine the potential for giving free consent. Care staff are in positions of power or influence over the person they care for. This power imbalance undermines the ability of the person who is cared for to give free consent and may inhibit their ability to seek help in an abusive situation. A sexual relationship between a staff member and a person with limited capacity is intrinsically unequal and this should be reflected in the law.

5.10 The Scottish Law Commission, in considering the breach of trust involving persons with a mental disorder, recommended that there should be a specific offence in relation to people with mental disorders since there are issues in respect of protecting people with mental disorder which do not arise in other case of abuse of trust such as a limit as to the age of the parties. The Commission also believed it to “be of value for people who provide and receive case services if there is provision which deals specifically with their situation.”⁶

5.11 Identifying what relationships are potentially exploitative is a complex task since it requires consideration of the power dynamic between parties. In recognition of this, laws have been introduced which prohibit sexual relationships with certain groups of people, such as carers, which avoid tests of capacity and consent and which lead to higher penalties for the accused. In a review of literature on this issue, provisions specifically vitiating consent in this context have been justified on the basis that people with limited decision-making capacity may not want the sexual relationship but find it difficult to refuse as a result of the clear power differentials between them and their carer. One possible option would be to limit the offence to people who have a duty of care over their client while an alternative would be the introduction of a “carer’s offence” where consent is not a defence.⁷ The issue of abuse within the family must also be provided for when legislating on this issue.

5.12 Certain jurisdictions have introduced an “exploitation offence” which is primarily concerned with the exploitative intentions of the accused. Some abusers actively seek out situations in which they have access to people with limited capacity with the intention of abusing that person. Abusers may use

⁵ Section 2(4) and 3(6) of the *Criminal Law (Sexual Offences) Act 2006*.

⁶ Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No.209 2007) at paragraph 4.121.

⁷ Law Reform Commission for New South Wales *Report on People with an Intellectual Disability and the Criminal Justice System* (No. 80 1996) at paragraph 8.31.

their position of power to coerce or deceive a person into participating in sexual activity or threaten the person or indeed “groomed” a person with limited capacity and inappropriately induce them into performing a sexual act.

5.13 It is widely accepted that persons living in institutional settings are at increased vulnerability to abuse. The Commission is conscious that this Consultation Paper coincides with the various reports published since 2005 in response to institutional settings and abuse in such settings which had occurred in the latter half of the 20th Century.⁸ Over the past twenty years there have been major changes in the delivery of services to people with limited decision-making capacity. Closure of large institutions and the move to community living has allowed people with intellectual disabilities enjoy greater freedom in their lives. This has been assisted with the so-called normalisation movement and the growth and development of the self-advocacy movement. This transition has also seen the introduction and development of community based models of service delivery based on the principle of social inclusion with a focus on ensuring that people have choices and opportunities in how they want to live their lives. The 2011 Report of the HSE Working Group on Congregated Settings revealed however that over 4,000 people with disabilities continue to live in congregated settings in Ireland, many of whom isolated from any community and their families. The Report also identified that many experience institutional living conditions where they lack basic privacy and dignity.”⁹

5.14 Additional difficulties arise where the decision-making capacity of both parties is limited as well as situations where one party's capacity to consent is more in doubt than their partners. On this point the Scottish Millan Report noted that

“there will be some people with severe learning disabilities who could not be said to have legal capacity to consent to sexual relationships, yet who may be involved in sexual activity which they enjoy and

⁸ See for example *Time to Move on from Congregated Settings. A Strategy for Community Inclusion* Report of the Working Group on Congregated Settings HSE June 2011 available at www.hse.ie; the *Ferns Inquiry Report* (Government Publications, 2005), *Report of the Commission to Inquire into Child Abuse* (2009) available at www.childabusecommission.com and *Dublin Archdiocese Commission of Investigation Report* (2009) available at www.dacoi.ie.

⁹ A congregated setting is a residence where they live with ten or more people. See *Time to Move on from Congregated Settings. A Strategy for Community Inclusion* Report of the Working Group on Congregated Settings (HSE 2011) available at www.hse.ie.

which is not exploitative. It would be wrong to seek to proscribe such activity by the operation of the criminal law.”¹⁰

5.15 Arguably, these issues should be left to the discretion of the DPP, notwithstanding the need to provide clear guidelines for staff in identifying exploitative relationships in conjunction with the provision of sex education and support services for service users so that people are aware of how to deal with potentially exploitative situations.¹¹

5.16 Some people’s level of impairment might be so severe that they could not be regarded as having the capacity to consent to sexual activity in any circumstances. In such cases, people would not understand what was being asked of them or to communicate their consent, or lack of it. A specific offence that related to sexual abuse of a person with no capacity to consent is a necessary legal safeguard and is justified on the grounds of protecting the interests of “at risk” or vulnerable individuals. Once it is established that an individual is not able to understand the nature of the sexual act, the consequences of the act and communicate that decision, it cannot be a defence that the accused thought the individual gave their consent.

(3) Comparisons with Criminal Law (Sexual Offences) Act 2006

5.17 The *Criminal Law (Sexual Offences) Act 2006* may be informative for sexual acts among people with limited decision-making capacity which are non-exploitative. Section 3(9) of the 2006 Act provides that no proceedings under section 3 shall be brought against a child who is under the age of 17 years except by or with the consent of the Director of Public Prosecutions (DPP). The intention behind section 3(9) was to ensure consistency in prosecution policy and that the DPP’s common law discretion not to prosecute in cases where it would be unjust or inappropriate to do so would be preserved in its entirety.¹² Section 3(10) provides that a person who has been convicted of an offence under section 3 and is not more than twenty-four months older than the child under the age of 17 years with whom he or she engaged or attempted to engage in a sexual act shall not be subject to the provisions of the *Sex Offenders Act 2001*.

¹⁰ *New Directions Report on the Review of the Mental Health (Scotland) Act 1984* (Millan Committee 2001) at paragraph 43.

¹¹ The Millan Report recommended that guidelines on sexual activity between adults with “mental disorders” and sex education for people with “learning disabilities” be issued by the Crown Office. *New Directions Report on the Review of the Mental Health (Scotland) Act 1984* (Millan Committee 2001) Recommendation 21.9.

¹² Vol. 621 No.1 Dáil Éireann Parliamentary Debates 2 June 2006 Col.12.

5.18 In Parts C to F, below, the Commission examines how a number of different countries have sought to balance the line between the legitimate right of all adult persons to engage in sexual relationships and the need to protect vulnerable adults from exploitation and abuse. The Commission begins in Part C by examining recent legislative change in England and Wales in the *Sexual Offences Act 1993*, and how these have been largely replicated in Northern Ireland in the *Sexual Offences (Northern Ireland) Order 2008*. In Part D, the Commission examines developments in Scotland, culminating in the *Sexual Offences (Scotland) Act 2009*. In Part E, the Commission discusses developments in this area in Australia, while in Part F the Commission discusses relevant legislation in New Zealand. In Part G, the Commission discusses the Canadian legislation and in Part H the influence of the Model Penal Code in a number of criminal and penal codes in the United States. The Commission concludes in Part I by setting out its conclusions and preliminary recommendations.

C Background to recent legislative change in England, Wales and Northern Ireland

(1) *Sexual Offences in England and Wales*

5.19 In England and Wales, the law in relation to rape and sexual offences has received considerable attention in recent years. The focus of much of the reform has been on the substantive issues involved and in particular the vexed issue of consent. To be guilty of rape, the accused must lack a reasonable belief that there is consent. There can be no defence of consent where sexual activity is alleged in relation to a child aged under 13 years. The burden of proving the absence of consent lies with the prosecution. The factors establishing a rape case, regardless of the complainant's capacity, involve penetration (including partial penetration) and the lack of consent which does not need to be proved through the use of force. Consent can be negated through threat, duress, or apprehension of fear and mere submission does not equate to consent although the dividing line may on occasion be difficult to delineate.¹³

5.20 In 1999, the UK Home Office embarked on a review of the law of sexual offences aimed at providing coherent guidelines on specific offences. The review followed several publications which provided the backdrop for an examination of the inter-relationship between the civil and criminal law in the area of capacity and decision-making.¹⁴ The objective of the Home Office

¹³ See *R v Olugboja* [1981] 3 WLR 585, at 585-593.

¹⁴ Lord Chancellor's Department *Who Decides? Making decisions on behalf of mentally incapacitated adults* (CM 3808) (The Stationary Office 1997); *Making*

Review was to look at how the legislature could protect individuals, especially children and vulnerable adults, from abuse and exploitation and at the same time punish abusers in line with fair and non-discriminatory practices in accordance with the ECHR and the UK *Human Rights Act 1998*.¹⁵ To complement this revision, the English Law Commission submitted a Report to the Home Office Sex Offences Review in 2002 which noted that:

“[a]ny protective criminal legislation aimed at discharging the responsibilities of the state under Articles 1 and 3 will need to recognise the right to private life under Article 8, and to limit any interference with this right to that which is “necessary in a democratic society... for the protection of health or morals, or for the protection of the rights and freedoms of others”. ”¹⁶

5.21 As such, any interference with the right to respect for private and family life under Article 8 of the ECHR is permissible under certain circumstances and where it is proportionate to the need which it seeks to address. Decisions of the European Court of Human Rights suggest that Article 1 together with Article 3 of the European Convention of Human Rights impose a positive obligation on the state to enact laws aimed at protecting children and other vulnerable groups from abuse.¹⁷ This positive duty on contracting State parties to the Convention involves taking:

“measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals... Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity”.¹⁸

5.22 Indeed, the Commission, in its 1990 *Report on Sexual Offences Against the Mentally Handicapped*, noted that an alleged victim’s “mental handicap” may make it difficult for the prosecution to prove the absence of

Decisions (CM 4465) (1999); Consultation Paper *Making Decisions - Helping people who have difficulty deciding for themselves* (2002) and the Law Commission for England and Wales *Report on Mental Incapacity* (No. 231 1995).

¹⁵ Law Commission for England and Wales *Consent in Sex Offences. A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.26.

¹⁶ Law Commission for England and Wales *Consent in Sex Offences. A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.27.

¹⁷ *A v UK* (1999) 27 EHRR 611 (100/1997/884/1096).

¹⁸ *A v UK* (1999) 27 EHRR 611 (100/1997/884/1096), at paragraph 22.

consent in rape cases and that this consideration provided a further “pragmatic” justification for interference in a person’s right to sexual activity.¹⁹

5.23 The English Law Commission’s Report noted that in a situation where a sexual relationship existed between a person of full capacity and one with severe learning disabilities such a relationship had the possibility of involving an abusive element which would call on the criminal law to proscribe such relationships, particularly where there is a “care” or trust relationship.²⁰ A sexual relationship between two people both of whom have limited capacity presents more complex issues. Such a relationship may not intrinsically involve any abuse although, depending upon the circumstances, these relationships can also be potentially abusive.²¹

5.24 The English Law Commission endorsed the functional approach as the correct method for assessing capacity in both the civil law context, culminating in the enactment of the *Mental Capacity Act 2005* and the criminal context which resulted in the 2003 *Sexual Offences Act*.

(2) Sexual Offences Act 2003

5.25 The *Sexual Offences Act 2003* made far-reaching changes to the law on sexual offences in England and Wales. These changes included the widening of rape to include oral penetration and the introduction of a statutory definition of consent.²² Section 74 of the *Sexual Offences Act 2003* states that “a person consents if he agrees by choice and has the freedom and capacity to make that choice”. The 1999 Home Office Review identified that problems associated with the offence of rape were a result of a lack of clear defining criteria in which to determine whether consent existed and therefore proposed to overcome this difficulty by defining consent as “free agreement” as well as setting out a non-exhaustive list of examples illustrating the circumstances in which consent would not present which would form the basis of directions for judges when deciding whether the complainant freely agreed to the sexual act.

¹⁹ Law Reform Commission *Report on Sexual Offences against the Mentally Handicapped* (LRC 33-1990) at paragraph 29.

²⁰ Law Commission for England and Wales *Consent in Sex Offences. A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.27.

²¹ Law Commission for England and Wales *Consent in Sex Offences. A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.27.

²² The *Sexual Offences Act 2003* made three important provisions relating to consent. The Act provides a statutory definition of consent; a test of reasonable belief in consent and evidential and conclusive presumptions about consent and the defendant’s belief in consent.

The 2003 Act also abolished the *Morgan* defence of a genuine though unreasonably mistaken belief as to the consent of the complainant.²³ This was based on the recommendation made by the UK Home Office Review that the:

“defence of honest belief in free agreement should not be available where there was self-induced intoxication, recklessness as to consent, or if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at the time.”²⁴

5.26 This now means that the defendant has the responsibility to ensure that the person consents to the sexual activity at the time in question.

5.27 There is no definition of capacity in the *Sexual Offences Act 2003*, but the Court of Appeal has made clear that the common law and criminal tests of capacity to consent to sexual activity should be essentially the same.²⁵ In addition, the 2003 Act states that a person may lack capacity to consent “for any other reason”.²⁶ In an appeal to the House of Lords, Baroness Hale of Richmond held that these words

“are clearly capable of encompassing a wide range of circumstances in which a person’s mental disorder may rob them of the ability to make an autonomous choice, even though they may have sufficient understanding of the information relevant to making it.”²⁷

²³ Ireland does not have the *Morgan* defence.

²⁴ *Setting the Boundaries Reforming the Law on Sexual Offences* (Home Office Consultation Paper 2000) Recommendation 9 at paragraph 2.13.14. This is based on section 273.2 of the *Canadian Criminal Code*.

²⁵ *R v C* [2008] EWCA Crim 1155, relying on the observations of Mr. Justice Munby in *Local Authority X v MM, KM* [2007] EWHC 2003 (Fam), at paragraphs 88-89; *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, at paragraph 84. However, the House of Lords has since cast doubt on some aspects of Munby J’s approach in the common law context: *R v C* [2009] UKHL 42, at paragraphs 24-27. According to the British Medical Association and the Law Society “it is not entirely clear... whether the observations of the Court of Appeal in *R v C* remain good. Once the Court of Protection has had cause to consider this question (as it will do in the near future) the authors consider it likely the Court will conclude that the criminal and common law do indeed march in step in this regard.” See *The British Medical Association and the Law Society Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* 3rd ed (Law Society Publishing 2010) at 120 fn 3.

²⁶ Section 30(2)(a) of the *Sexual Offences Act 2003*.

²⁷ *R v C* [2009] UKHL 42, at paragraph 25.

5.28 The 2003 Act makes it clear that where the accused intentionally deceived the complainant as to the nature or purpose of the sexual act, or intentionally induced the complainant to consent to it by impersonating someone known personally to the complainant, consent will conclusively be presumed to be absent.²⁸ A series of situations are also set out in the Act where it will be presumed that no consent exists unless there is evidence to the contrary. These include situations of violence, fear of violence, or unlawful detention, and where the complainant had been asleep or unconscious or unable to communicate whether or not they consent, due to physical disability.²⁹

(3) Capacity to consent to sexual activity in England and Wales

5.29 The shift towards the adoption of a contextual approach in making an assessment of capacity is a recent development in the law governing sexual relations in England and Wales. The English courts have not always applied a high threshold for assessing the capacity of persons with limited capacity to consent to sexual relations.

5.30 In *R v Jenkins*³⁰ a care worker was acquitted of the rape of a woman with severe learning disabilities who became pregnant as a result of the sexual contact. The woman had no understanding of her pregnancy although the accused argued she consented to the act. The Crown Prosecution Service had two options available; either to charge the accused under section 7 of the *Sexual Offences Act 1956* with having sex with a mental “defective” or to charge him with rape. They charged the accused with rape³¹ as the offence under the 1956 Act only carried a 2 year sentence (as was the case under the Irish 1935 Act, replaced by section 5 of the 1993 Act). It therefore had to be proved whether the victim had the capacity to consent to sexual intercourse and whether or not she had actually consented to the act. An assessment by the expert witness for the prosecution showed that the woman did not have the capacity to consent to sexual relationships, as defined by the British Medical Association and Law Society guidelines, since she could not identify many basic body parts and could not tell the difference between pictures of sexual intercourse and other pictures. The expert witness for the defence argued that the woman had capacity to consent to sexual relationships because she seemed to like the accused.

²⁸ Section 76 of the *Sexual Offences Act 2003*.

²⁹ Section 75 of the *Sexual Offences Act 2003*.

³⁰ *R v Jenkins* 2000 (unreported). The case was heard at the Central Criminal Court, 10-12 January 2000.

³¹ Capacity to consent to the act became the main issue.

5.31 The trial judge, Coltart J, agreed with the defence and ruled that the complainant had consented as it was not necessary to understand the consequences of sexual intercourse. All that was required, according to Coltart J was an understanding of the act itself. *Jenkins* raises serious questions that someone with such limited capacity could be regarded as capable of consenting to sexual activity under such circumstances. The 2000 case illustrated the significance of the need to have a clear definition of capacity to consent to sexual relations, and the need for an adequate level of protection of vulnerable persons with limited capacity. The Law Commission for England and Wales compared the test applied in *Jenkins* to the low threshold developed by the Australian Model Criminal Code Officers Committee (MCCOC) and noted that a similar result would be possible if the MCCOC test was applied. The Commission felt that such a low test for assessing capacity to consent would not offer sufficient protection for vulnerable adults and in situations like *Jenkins* the law should hold that there is no capacity to consent.³²

(4) Sexual offences involving people with mental disorders or learning disabilities

5.32 The *Sexual Offences Act 2003* introduced a range of offences specific to victims with a 'mental disorder' or 'learning disability'. The offences are committed by sexual activity with,³³ or in the presence or view of,³⁴ someone who is unable to refuse because they are suffering from mental disorder or learning disability, or by intentionally causing or inciting such a person to engage in sexual activity.³⁵ The accused must know or could reasonably be expected to know, of the complainant's condition and that this is likely to make them unable to refuse. The 2003 Act creates three sets of offences where the complainant is a person with a mental disorder. The legislation draws a distinction between three types of offences on the basis of:

- persons who have a mental disorder, impeding choice, and persons whose mental functioning is so impaired at the time of the sexual activity that they are unable to make any decision about their involvement in that activity;

³² Law Commission for England and Wales *Consent in Sex Offences. A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.67.

³³ Section 30(1) of the *Sexual Offences Act 2003*.

³⁴ Sections 32(1) and section 33(1) of the *Sexual Offences Act 2003*.

³⁵ Section 31(1) of the *Sexual Offences Act 2003*.

- persons who have the capacity to consent to the sexual activity but who have a mental disorder that makes them vulnerable to inducement, threat or deception; and
- persons who have the capacity to consent to sexual activity but who have a mental disorder and are in a position of dependency upon the carer. (the 'care workers' offence)

5.33 The 2003 Act provides that the test of capacity to refuse is whether the person "lacks the capacity to choose whether to agree to the touching (whether because she/he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done or any other reason)" or is unable to communicate such a choice.³⁶ Capacity to consent is articulated in terms of a functional capacity to understand the nature and consequences of the act and a person with a mental disorder's ability to communicate his or her choice.

5.34 According to the British Medical Association and Law Society even where there is some element of capacity to consent there may still be the potential for exploitation and in such instances there may be grounds for the criminal law to intervene for public policy reasons should that person be under the professional care of the other person involved.³⁷ To provide for these situations the *Sexual Offences Act 2003*, as already mentioned above, created a group of offences which can be committed only by 'care workers'.³⁸ This includes workers in NHS bodies, independent medical agencies, care homes, community homes, voluntary homes, and children's homes, independent clinics and independent hospitals, who have had or are likely to have regular face-to-face contact with the victim in the course of their employment.³⁹ It also includes those who, whether or not in the course of employment, provide care, assistance, or services to the victim in connection with the victim's learning disability or mental disorder, where they have regular face-to-face contact with

³⁶ Section 30 of the *Sexual Offences Act 2003*. This is similar to section 17 of the *Sexual Offences (Scotland) Act 2009* where capacity to consent to conduct is determined where "a person is unable to do one or more of the following: (a) understand what the conduct is; (b) form a decision as to whether to engage in the conduct (or whether the conduct should take place), (c) communicate any such decision."

³⁷ The British Medical Association and the Law Society *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* 3rd ed (Law Society Publishing 2010) at 118.

³⁸ Sections 38-41 of the *Sexual Offences Act 2003*.

³⁹ Section 42 of the *Sexual Offences Act 2003*.

the victim.⁴⁰ Where it is proved that the other person had a mental disorder, it is to be taken that the accused knew or could reasonably have been expected to know that the person had a mental disorder, unless sufficient evidence is produced to show the contrary.

5.35 The 2003 Act also introduced a new offence of ‘obtaining sexual activity by inducement, threat or deception with a person who has a learning disability or mental disorder’. This offence is aimed at individuals who both deliberately and repeatedly target people with learning disabilities because of their vulnerability to sexual exploitation. This offence is intended to protect individuals with learning disabilities who may feel induced because of possible power imbalances in the relationship. For these offences, there is no need to prove that the person is unable to refuse.

(5) *Developments in case law arising from the Sexual Offences Act 2003*

5.36 In *Hulme v Director of Public Prosecutions*⁴¹ the complainant suffered from cerebral palsy and had a mental age below her actual age of 27 years. The accused was charged under section 30 of the 2003 Act. The court noted that the question to be determined, under section 30 of the 2003 Act, was whether the complainant was able to understand that she could choose to agree or refuse to the sexual activity and communicate that choice. If the court was satisfied that complainant did not have the capacity to make that choice it would then be considered whether the incapacity was related to her mental disorder under section 30(2)(a) of the 2003 Act. In *Hulme*, the court found that the complainant understood the nature of the sexual activity but did not have the capacity to understand that she could refuse to be touched in a sexual manner and communicate that decision. Accordingly, the court found that an offence had been committed under section 30 of the 2003 Act.

5.37 The approach in the 2003 Act parallels the protective offences relating to children between the age of 13 and 16⁴² and applies where a person has a mental disorder which impedes choice. This approach seems to overlap with offences where there is no consent by the person with a mental disorder rather than cases where the person consents but where consent is induced.⁴³ A

⁴⁰ The British Medical Association and the Law Society *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* 3rd ed (Law Society Publishing 2010) at 118.

⁴¹ *Hulme v Director of Public Prosecutions* [2006] EWHC 1347.

⁴² Sections 9-12 and sections 30-33 of the *Sexual Offences Act 2003*.

⁴³ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.99.

positive development in striking an appropriate balance between sexual rights for persons with limited capacity and protection from sexual violence would take into consideration the situational aspects of capacity, where people with limited capacity could consent to sexual activity with certain persons, but not with others such as the circumstances and the type of relationships where consent is negated under sections 34-41 of the 2003 Act.

(6) *Guidelines of the British Medical Association and Law Society of England and Wales on assessing capacity to consent*

5.38 The British Medical Association and the Law Society of England and Wales have developed guidelines on assessing capacity to consent to sexual relationships.⁴⁴ They note that the courts, in recent years, have had to consider this issue and have developed the following principles from the case law:

- the civil and criminal tests for capacity to consent to sexual intercourse should be essentially the same;⁴⁵
- capacity to consent to sexual intercourse relates to sexual intercourse with a particular partner in a specific situation;⁴⁶
- capacity to consent to sexual intercourse relates to particular sexual activity;⁴⁷
- there are different tests of capacity to consent to sexual intercourse and capacity to contract.⁴⁸

5.39 The BMA and Law Society have noted the following factors some of which have derived from court decisions⁴⁹ that may be relevant in an assessment of an individual's capacity to consent to sexual relations⁵⁰:

⁴⁴ The British Medical Association and the Law Society *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* 3rd ed (Law Society Publishing 2010).

⁴⁵ *Local Authority X v MM & Anor* [2007] EWHC 2003 (Fam), at paragraphs 88-89.

⁴⁶ *R v C* [2009] UKHL 42, at 27. The 'issue-specific' test was set down in this case.

⁴⁷ *Local Authority X v MM, KM* [2007] EWHC 2003 (Fam), at paragraphs 86-87 relying on *X City Council v MB, NB and MAB (by his litigation friend of the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, at paragraph 84.

⁴⁸ *Local Authority X v MM, KM* [2007] EWHC 2003 (Fam), at paragraph 94-95.

⁴⁹ *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, at paragraph 8; *The London Borough of Ealing v KS, LU, MHAS and SR* [2008] EWHC 636 (Fam); and *R v C* [2009] UKHL, at paragraphs 27, 29.

- their understanding of the nature and character of sexual intercourse;
- their understanding of the reasonably foreseeable consequences of sexual intercourse (including their knowledge, even if at a basic level) of the risks of pregnancy and sexually transmitted diseases;
- the kind of relationship they have (for example, if there is a power imbalance);
- the pleasure (or otherwise) which they experience in the relationship;
- their ability to choose or refuse intercourse;
- their ability to communicate their choice to their partner.

5.40 According to the BMA and Law Society a lack of capacity to consent formally to sexual relations should not necessarily mean that the relationship should be prevented or even discouraged. The main issue is that both individuals “appear willing and content” for the activity to continue.⁵¹ Where there are signs that either person is being sexually abused or exploited, they advise that the issue be immediately reported to the police which would trigger the protection afforded by the criminal law and also to the relevant authority responsible for the care of the individual in order to take the necessary procedures as laid out by the Department of Health.⁵² They note that where individuals benefit and enjoy non-exploitative relationships, their best interests should be promoted in terms of providing contraception and protection from sexually transmitted infections. This implies that at a minimum people would need to understand what sexual intercourse was and that pregnancy and/or sexually transmitted diseases were risks. It would also recognise the particular circumstances of the individuals involved, whether for instance, one person is in a position of power which may influence the ability of the other to consent in freely negotiated manner.

⁵⁰ The British Medical Association and the Law Society *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* 3rd ed (Law Society Publishing 2010) at 108.

⁵¹ The British Medical Association and the Law Society *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* 3rd ed (Law Society Publishing 2010) at 109.

⁵² Department of Health *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* (2000); *Safeguarding Adults. Review on the consultation on the review of ‘No Secrets’* (2009).

(7) Capacity to consent to sexual activity in Northern Ireland

5.41 The *Sexual Offences (Northern Ireland) Order 2008* closely follows the format and detailed content of the England and Wales *Sexual Offences Act 2003*. Articles 43 to 46 of the 2008 Order correspond precisely with sections 30 to 33 of the 2003 Act concerning people who cannot legally consent to sexual activity because of a mental disorder impeding choice. Similarly, Articles 51 to 54 of the 2008 Order correspond to sections 38 to 41 of the 2003 Act on protecting people with mental disorders from sexual abuse by people with whom they are in a relationship of care. The exemptions in the 2003 Act for married persons, civil partners and similar situations are also replicated in the 2008 Order. As to capacity to consent, the 2008 Order,⁵³ like the 2003 Act, provides that a person is deemed unable to refuse if he or she lacks the capacity to choose whether to agree to the touching (whether because he or she lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or if he or she is unable to communicate such a choice.

5.42 These offences are designed to give protection to persons with a mental disorder. This would occur where the victim is unable to agree to sexual activity because of a mental disorder which impedes their capacity to make an informed choice, or where it might appear that the victim had agreed to the sexual activity but because of a mental disorder which makes them vulnerable to inducements, threats or deceptions, or because they are in a relationship of care, their consent was not or could not be deemed to have been freely given.

5.43 The *Sexual Offences Act 2003* and the *Sexual Offences (Northern Ireland) Order 2008* have both moved from the “diagnostic” or “status” approach contained in the *Sexual Offences Act 1956* and *Sexual Offences Act 1967* which determined capacity by reference simply to whether the person has a “mental disorder”, and this is also the approach in section 5 of the 1993 Act. By contrast, the 2003 Act and the 2008 Order apply a functional or contextual approach to capacity to consent based on whether the person understands the nature and consequences of the act and their ability to communicate their choice. The legal shift is that the severity of the learning disability is not the determining factor of whether an offence is committed, but the ability of the person to give a legally effective consent to sexual contact.

⁵³

Section 43 of the *Sexual Offences (Northern Ireland) Order 2008*.

D Background to recent legislative developments in Scotland

(1) Capacity to consent to sexual activity in Scotland

5.44 The *Mental Health (Care and Treatment) (Scotland) Act 2003* created two offences in respect of sexual activity involving persons with “mental disorder”. Section 311 of the 2003 Act makes it an offence for someone to engage in a sexual act with a “mentally disordered” person if at the time of the act the person does not consent to the act or was by reason of the mental disorder incapable of consenting to it. The offence is separate from rape, but is based on the lack of consent by the “mentally disordered” person, who at that time did not, or could not, give consent to the sexual activity.

5.45 Section 311(3) of the 2003 Act introduced a statutory definition of consent which is more detailed than that set out in common law.⁵⁴ The section states that a person is regarded as not consenting if the person purports to consent as a result of being placed in such a state of fear; or subject to threats; intimidation; deceit; or persuasion. Section 311(4) sets out that a person is incapable of consenting to an act where that person is unable to understand what the act is; form a decision as to whether to engage in the act or whether the act should take place; or communicate any such decision.

5.46 Section 311 of the Act was based on foot of a recommendation by the Millan Committee which was established to examine the law on mental disorder.⁵⁵ The Committee based its justification on having a separate offence relating to “mentally disordered” victims on the difficulties in applying the general definition of consent in prosecuting the sexual abuse of mentally disordered adults.⁵⁶ The Scottish Law Commission also considered that there may be weak protection for people who have a mental disorder in situations where sexual activity is ostensibly consensual but exploitative and which does not involve a breach of trust.⁵⁷ The Committee noted that an alternative to making provision for a separate offence:

“would be to redefine consent generally in relation to sexual behaviour to something closer to ‘free agreement’. This approach could avoid the need for special offences to protect people with

⁵⁴ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.90.

⁵⁵ Scottish Executive, *Review of the Mental Health (Scotland) Act 1984* (2001).

⁵⁶ Maher “Rape and Other Things: Sexual Offences and People with Mental Disorder” (2010) 14 Edin LR, 129, at 133.

⁵⁷ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.97.

mental disorders, by bringing abuse of this group within the definition of generally applicable crimes such as rape.”⁵⁸

5.47 Although the Millan Committee 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, the Committee did not recommend pursuing such an approach as it

“would involve a radical reform to general sexual offences, which would have consequences for a wider group than people with mental disorders... If the law concerning sexual offences is reviewed in future, we would hope that consideration would be given to how it applies to people with mental disorders. In the meantime, however, reform to the special offences appears to us to be a more practical way forward.”⁵⁹

5.48 In 2006 the Scottish Law Commission embarked on an examination of the law relating to rape and sexual offences on foot of concerns voiced “as a consequence of certain high-profile decisions of the High Court of Justiciary.”⁶⁰ In its *Discussion Paper on Rape and Other Sexual Offences*⁶¹ the Scottish Law Commission acknowledged that the challenge in making provision for people with mental disorder to engage in sexual relations is to recognise their right to sexual autonomy. The Commission noted, however, that this right must be balanced with the need to protect vulnerable persons from sexual exploitation and to recognise that in some situations the degree of mental disorder might act as a barrier to being fully capable of understanding the act in question and thereby being unable to give a valid consent to sexual activity. The Scottish Law Commission together with the Millan Committee recommended the introduction of a specific offence in relation to persons with a “mental disorder” as well as changes to the definition of prohibited sexual activity. The outcome was the *Sexual Offences (Scotland) Act 2009*. The Scottish Law Commission’s 2007 *Report on Rape and Other Sexual Offences* agreed with the Millan Report in recommending that if the definition of consent in sexual offences was

⁵⁸ Scottish Executive, *Review of the Mental Health (Scotland) Act 1984* (2001) at paragraph 21.55.

⁵⁹ *New Directions* Report on the Review of the *Mental Health (Scotland) Act 1984* (Millan Committee 2001) at paragraph 57.

⁶⁰ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 1.3.

⁶¹ Scottish Law Commission *Discussion Paper on Rape and Other Sexual Offences* (No. 131 2006).

something similar to “free agreement” it would not be necessary to provide for a specific offence of engaging in sexual activity with a person with a “mental disorder”. The Commission felt that having separate definitions of consent where one would be used for general application while the other would be applied in situations where the person has a “mental disorder” would be confusing and therefore recommended the repeal of section 311 of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.⁶² At the same time the Commission took the view that there would be value in making provision for situations where an individual with a “mental disorder” could give consent and recommended a provision for defining the capacity of a person with a “mental disorder” to consent to sexual activity. The Commission felt that:

“[c]learly where a person lacks such a capacity then any sexual activity is done without his or her consent. In such a situation there is no need to apply the consent model. The fact that someone has a mental disorder does not mean that he or she necessarily or always lacks the capacity to give consent. Much depends on the nature of the disorder at the relevant time. We are therefore in favour of restating the 2003 Act provisions which define the capacity of a mentally disordered person to consent to sexual activity.”⁶³

5.49 The Commission endorsed the time-specific functional approach in recommending reform by acknowledging that a “mental disorder” does not automatically preclude an individual from consenting to sexual activity and recommended the introduction of a definition of capacity to consent to sexual activity by a person with a “mental disorder”.⁶⁴

(2) Classification of prohibited relationships

5.50 The Report of the Millan Committee proposed that the law should prohibit sexual relationships between:

- a patient with a mental disorder, whether inpatient or outpatient of a hospital, and a member of staff, whether paid or unpaid;
- a mentally disordered person in residential care and a member of staff, whether paid or unpaid;

⁶² Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) Recommendation 39 at paragraph 4.96.

⁶³ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.95.

⁶⁴ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.95.

- a mentally disordered person and a person employed to deliver care services in the community to that person;
- a mentally disordered person and a doctor or therapist involved in a professional relationship with that person.

5.51 In such situations, according to the Millan Committee, it would not be necessary to prove lack of consent, or incapacity to consent. The position of trust would be breached by a sexual relationship which is sufficient to justify treating such relationships as criminal offences.

5.52 Section 313 of the *Mental Health (Care and Treatment) (Scotland) Act 2003* prohibits a person who is in a position of care over a person who suffers from a mental disorder to engage in a sexual act with that person. Section 313(2) classifies the prohibited relationships where the victim has a mental disorder as defined by section 328(1) of the Act.⁶⁵ A person is guilty of an offence under section 313(2) where he or she provides care services to the mentally disordered person; is employed in, or contracted to provide services; or is a manager of a hospital in which the mentally disordered person is receiving medical treatment.⁶⁶ Section 313(3) lists the defences available to the accused. It is a defence for the accused to prove that at the time of the intercourse or act that he or she did not know, and could not reasonably have been expected to know, that the other person was mentally disordered⁶⁷; or where the mentally disordered person was a spouse of the accused.⁶⁸ It is also a defence for the accused to prove that a sexual relationship existed prior to the provision of care services by the accused⁶⁹ or where such a relationship existed immediately before the victim was admitted to a hospital in which the accused was an employee, contracted to provide services or a manager of the hospital in which the victim was a patient.⁷⁰

⁶⁵ Section 328(1) of the 2003 Act defines mental disorder as “mental illness; personality disorder; or learning disability, however caused or manifested”.

⁶⁶ Section 313(2)(a)-(b) of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

⁶⁷ Section 313(3)(a)(i) of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

⁶⁸ Section 313(3)(a)(ii) of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

⁶⁹ Section 313(3)(b)(i) of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

⁷⁰ Section 313(3)(b)(ii) of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

(3) Sexual Offences (Scotland) Act 2009

5.53 The Scottish Law Commission felt that:

“there are issues in respect of protecting people with mental disorder which do not arise in other cases of abuse of trust (such as a limit of the ages of parties)... it would be of value for people who provide and receive care services if there is a provision which deals specifically with their situation.”⁷¹

5.54 The 2009 Act provides for a consent model and provides a general definition of consent as “free agreement” to conduct which can be withdrawn at any point before or during the conduct and is supplemented with a non-exhaustive list of circumstances in which conduct takes place without free agreement.⁷²

(4) Capacity to consent to sexual activity

5.55 Section 17(2) of the *Sexual Offences (Scotland) Act 2009* states that a person is incapable of giving consent to sexual activity where by reason of the mental disorder the person is unable to understand what the conduct is, form a decision as to whether to engage in the conduct or as to whether the conduct should take place, or communicate any such decision.⁷³ This provision, however, does not create a separate offence. According to Maher “It is expressly linked to the general sexual offences, which are defined in terms of lack of consent and it functions to supplement the consent model in some (but not all) cases where the complainant has a mental disorder.”⁷⁴

(5) Classification of prohibited relationships

5.56 The 2009 Act provides for an offence of sexual abuse of trust of a mentally disordered person.⁷⁵ An offence is committed where a person engages in sexual activity with a mentally disordered person where that person

⁷¹ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.121. The Commission’s recommendation repeated much of what already was provided for in section 313 of the *Mental Health (Care and Treatment) (Scotland) Act 2003* with changes to the definition of the prohibited sexual activity.

⁷² Section 13-14 of the *Sexual Offences (Scotland) Act 2009*.

⁷³ This sub-section is similar to Section 30 of the England and Wales *Sexual Offences Act 2003* and section 43 of the *Sexual Offences (NI) Order 2008*.

⁷⁴ Maher “Rape and Other Things: Sexual Offences and People with Mental Disorder” (2010) 14 *Edin L.R.*, 129, at 133.

⁷⁵ Section 46 of the *Sexual Offences (Scotland) Act 2009*.

provides care services to the mentally disordered person or works in, or is a manager of, a hospital where the mentally disordered person is being given medical treatment.⁷⁶ This offence does not involve proving lack of consent on the part of the mentally disordered person. The offence is the sexual conduct between the parties, where, had the sexual activity been consenting, was prohibited based on the nature of the relationship.

5.57 The Scottish Law Commission, in its *Discussion Paper on Rape*, asked in addition to offences based on the abuse of trust, whether there should also be a separate offence of taking advantage of the condition of a person with a mental disorder which prevents that person from guarding against sexual exploitation. The Commission, in its subsequent *Report on Rape*, decided not to introduce such an offence and noted that:

“We are of the view that there are considerable difficulties in identifying the precise mischief that the offence is to remedy. Where a person with a mental disorder is subject to threats or deceptions, the offences based on lack of consent, including attempts to commit those offences, will provide protection. Moreover, if the criminal law were to intervene where a person with a mental disorder receives inducements to have sex, which result or may result in that person consenting to sex, the outcome would be diminish the sexual autonomy of people with mental disorders.”⁷⁷

E Australia

(1) Recommendations of the Model Criminal Code Officers Committee

5.58 Where Ireland has adopted a strong paternalistic approach in assessing capacity to consent by persons with limited capacity in the form of section 5 of the *Sexual Offences Act 1993*, Australia has favoured strong individual autonomy and is probably most evident at federal level. The Model Criminal Code Officers Committee (MCCOC), in its 1999 *Report on Sexual Offences Against the Person*, took a narrow view of the scope of legal paternalism.⁷⁸ The Committee recommended that the general offences of rape

⁷⁶ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) Recommendation 47 at paragraph 4.122.

⁷⁷ Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.100.

⁷⁸ These recommendations have been developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General which was set up to develop a model criminal code for Australian jurisdictions. Model

and indecent assault be applied to victims of “impaired mental functioning” where appropriate. They also recommended specific offences to be included in the Model Criminal Code designed to protect “mentally impaired” persons from sexual exploitation. The Committee was particularly drawn by offences in New South Wales and Victoria which prohibit sexual contact between a carer and a person with “impaired mental functioning” and advocated that offences should be limited to such relationships. The MCCOC noted

“There are powerful arguments for prohibiting sexual activity within this particular type of relationship. One is that a person with impaired mental functioning may not want sexual contact with his or her carer but, due to power imbalance or institutional setting, may find it difficult to refuse. Other concerns include the psychological harm which may result from such a relationship as well as the breach of trust put in the carer by, say, the victim’s family.”⁷⁹

5.59 The overarching justification of adopting such a narrow view was to prevent the legislation from arbitrarily restricting the sexual autonomy of the “mentally impaired” person.⁸⁰ The Committee adopted a broad definition of carer which is not restricted to those who fulfil a professional role for “mentally impaired” persons.

5.60 The Committee recommended that consent should not be a defence unless the person with the “mental impairment” consented to the act and the giving of that consent was not unduly influenced by the caring relationship. In addition, there is a marriage and a “de facto partner” defence available. This is against the background of a statutory definition of consent as “free and voluntary agreement.”⁸¹ There can be no consent where “the person is incapable of understanding the essential nature of the act.”⁸² Consent would, therefore, “not necessarily be lacking if a person has sufficient knowledge or

Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code-Chapter 5 Sexual Offences Against the Person Report* (1999).

⁷⁹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code-Chapter 5 Sexual Offences Against the Person Report* (1999) at part 5.2.

⁸⁰ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code-Chapter 5 Sexual Offences Against the Person* (1999) at paragraph 5.2.32.

⁸¹ section 5.2.3(1) of the Code

⁸² Section 5.2.3(2)(d) of the Code.

ability to comprehend the physical nature of the sexual act, and to understand the difference between that act and an act of another character, such as bathing of the body or a medical examination.”⁸³ This test would therefore not require an understanding of concepts associated with sexuality such as an understanding of the risks involved in sexual activity. The MCCOC, in agreeing with the Victorian Law Reform Commission, stated:

“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”

5.61 In doing so, it recommended a narrow test of capacity which is the position taken in the majority of jurisdictions in Australia, with the exception of South Australia.⁸⁴

(2) General Consent

5.62 In Australia, the subjective *Morgan* test for determining consent has been adopted in the Australian Capital Territory, Victoria, New South Wales and South Australia. In Victoria and New South Wales the jury, in deciding whether belief was genuinely held, can take into account whether the accused’s belief was reasonable in the circumstances.⁸⁵ The Model Criminal Code proposals favoured retaining the subjective test of honest belief.

5.63 Specific offences have been enacted to address the particular vulnerabilities to sexual assault of people with a “cognitive impairment” across all six jurisdictions in Australia.⁸⁶ Such offences involving victims with a

⁸³ Law Commission for England and Wales *Consent in Sex Offences. A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.14.

⁸⁴ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code-Chapter 5 Sexual Offences Against the Person* (1999).

⁸⁵ Section 37(c) of the *Crimes Act 1958* (Vic); *Saragozza* [1984] VR 187; *McEwan* [1979] 2 NSWLR. See the codified states including Northern Territory, Tasmania, Queensland and Western Australia.

⁸⁶ Section 66F of the *Crimes Act 1900 (as amended)* (NSW); sections 51-52 of the *Crimes Act 1958* (Vic); section 216 of the *Criminal Code* (Qld); section 49(6) of the *Criminal Law Consolidation Act 1935*; section 330 of the *Criminal Code* (WA); section 126 of the *Criminal Code* (Tas); section 130 of the *Criminal Code* (NT). See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code-Chapter 5 Sexual Offences Against the Person* (1999) at part 5.2, division 5, as discussed below.

“cognitive impairment” is an aggravating factor which supplements other sexual offences.

(3) Capacity to consent to sexual activity

5.64 In Australia most jurisdictions require that the person understands the nature of the act in order to consent to sexual activity but it is not a requirement to know the consequences of the act.⁸⁷ This is the test laid down in *R v Morgan*⁸⁸ where the Supreme Court of Victoria stated that for incapacity to consent to sexual activity to be proved it must be shown that the person does not have:

“sufficient knowledge or understanding to comprehend (a) that what is proposed to be done is the physical fact of penetration of her body by the male organ or, if that is not proved, (b) that the act of penetration proposed is one of sexual connexion as distinct from an act of a totally different character.”⁸⁹

5.65 In *R v Mueller*⁹⁰ the New South Wales Court of Criminal Appeal approved the *Morgan* test and added that knowledge or understanding need not be a sophisticated one. All that is required is a “rudimentary” knowledge of what the act comprises, and of its character, to enable an individual to decide whether to give or withhold consent.⁹¹ The *Morgan* test is lower than the test applied in most American states, which require understanding of the nature and consequences of the act and to which the Commission returns later in this Chapter.⁹²

⁸⁷ The exception to this is South Australia, where the nature and consequences of the act must be understood. See section 49(6) of the South Australian *Criminal Law and Consolidation Act 1935*. Interestingly, the question of capacity is part of the Queensland definition of consent. Section 348(1) of the *Criminal Code* (Qld) defines consent as “consent freely and voluntarily given by a person with the cognitive capacity to give the consent.”

⁸⁸ *R v Morgan* [1970] VR 337, Vic SC. *Morgan* sets a noticeably lower standard of knowledge required for consent to therapeutic treatment where the person must understand the nature and character of the act but also the risks, harms and benefits of both permitting and refusing the act.

⁸⁹ *R v Morgan* [1970] VR 337, Vic SC, at 341.

⁹⁰ *R v Mueller* (2005) NSWCCA 47 BC200500740.

⁹¹ *R v Mueller* (2005) NSWCCA 47 BC200500740, at 5.

⁹² Section 49(6) of the South Australian *Criminal Law Consolidation Act 1935* sets a similar test to those employed in most American states. For charges to be proved for the crime of knowingly having sexual intercourse with a “mentally deficient”

(4) Abuse of position of authority or trust and the available defences

5.66 In Australia, sexual offences governing the abuse and exploitation of people with a “cognitive impairment” regulate conduct depending on the nature of the relationship of the individuals involved in the sexual activity, for example those who provide care for the person,⁹³ or are providers of medical or therapeutic services,⁹⁴ or provide special programmes.⁹⁵ Consent is negated where the accused person is in a position of authority or trust over the complainant. Consent is also not a defence to a charge where sexual intercourse was conducted with the intention of taking advantage of that person by the person in authority.⁹⁶ In this section, the Commission looks at how the Australian States have legislated in this area.

(i) New South Wales

5.67 The NSW Law Reform Commission, in its 1996 *Report on People with an Intellectual Disability and the Criminal Justice System*⁹⁷ made several recommendations relating to sexual offences and persons with limited capacity. The Report noted that the majority of people with an intellectual disability would have the capacity to consent in that they would have sufficient knowledge or understanding to comprehend the physical nature of the sexual act and appreciate the difference between that act and an act of a different character.⁹⁸ The Commission recommended that consensual relationships should only rarely be prohibited and that people with an intellectual disability should not have greater restrictions on their sexual lives than other people, where they have capacity to consent. The Commission, however, considered that

person under that section, it must be shown that the person was unable to understand the nature or consequences of sexual intercourse.

⁹³ Section 66F(2) of the *Crimes Act 1900 (as amended)* (NSW); section 126(1) of the *Criminal Code Act 1924* (Tas).

⁹⁴ Section 51 of the *Crimes Act 1958* (Vic).

⁹⁵ Section 52 of the *Crimes Act 1958* (Vic); section 130 of the *Criminal Code Act 1983* (NT).

⁹⁶ Section 66F(3) of the *Crimes Act 1900 (as amended)* (NSW). This is known as the “exploitation offence”.

⁹⁷ Law Reform Commission for New South Wales *Report on People with an Intellectual Disability and the Criminal Justice System* (No. 80 1996).

⁹⁸ Law Reform Commission for New South Wales *Report on People with an Intellectual Disability and the Criminal Justice System* (No. 80 1996) at paragraph 8.4

consensual relationships with carers raise concerns and in light of this recommended that the carer's offence in section 66F(2) of the *Crimes Act 1900 (NSW)* be redrafted to reflect all relevant carers, including volunteers and staff providing home-based care, but not to prohibit sexual relations between two service users.⁹⁹

5.68 Section 66F of the *Crimes Act 1900 (NSW)* was designed to prevent the sexual exploitation of people with intellectual disability, not just by their carers, but by other people who have knowledge of the person's intellectual disability and who could potentially take advantage of their vulnerability to sexual exploitation. It was noted in the NSW Law Reform Commission *Report on People with an Intellectual Disability and the Criminal Justice System* that this provision had been used in a limited number of cases since its introduction in 1987.¹⁰⁰ Rather than focusing on the issue of consent, the section prohibited certain consensual and exploitative sexual relationships.

5.69 The *Crimes Amendment (Cognitive Impairment-Sexual Offences) Act 2008*¹⁰¹ made several changes to the law governing sexual offences and persons with limited capacity. The amendments made to section 66F of the *Crimes Act 1900 (as amended)* replaced the term "intellectual disability" with "cognitive impairment".¹⁰² The 2008 Act created two specific offences. The first offence is having sexual intercourse with a person who has a "cognitive impairment" where the accused was responsible for the care of that person

⁹⁹ Law Reform Commission for New South Wales *Report on People with an Intellectual Disability and the Criminal Justice System* (No. 80 1996) at paragraph 8.35.

¹⁰⁰ According to the Judicial Commission of New South Wales' Sentencing Information System, between January 1990 and August 1995, there were only six successful cases under section 66F(3) of the *Crimes Act 1900* relating to exploitation and no cases under section 66F(2) relating to the prohibition of sexual relations based on caring relationship. In each case the defendant pleaded guilty, and in four of the six cases, received a custodial sentence. Law Reform Commission for New South Wales *Report on People with an Intellectual Disability and the Criminal Justice System* (No. 80 1996) at paragraph 8.20 fn 38.

¹⁰¹ The *Crimes Amendment (Cognitive Impairment-Sexual Offences) Act 2008* No.74 was commenced on 1 December 2008.

¹⁰² Under section 61H(1A) a person is cognitively impaired if he or she has an intellectual disability; a developmental disorder including autism spectrum disorder; a neurological disorder; dementia; severe mental illness or a brain injury that results in the person requiring supervision or social habilitation in connection with daily life activities.

either generally or at the time of the sexual intercourse.¹⁰³ The care of a person with a “cognitive impairment” includes voluntary care, health professional care, education, home care and supervision and includes care provided “in the course of a program” at a facility or at home.¹⁰⁴

5.70 The second offence introduced by the 2008 Act is having sexual intercourse with a person who has a “cognitive impairment” with the intention of taking advantage of that person’s cognitive impairment.¹⁰⁵ This offence is primarily concerned with the exploitative intentions of the accused. It is not concerned with whether the victim has actually been exploited, rather the focus is on the intention of the accused and such an intention “may be extremely difficult, if not impossible, to prove and may make the section unworkable.”¹⁰⁶ The Commission noted that there is little judicial guidance about the section and the only case which reached the Court of Criminal Appeal involved a guilty plea.¹⁰⁷

5.71 Where the accused is responsible for the care of a person with a cognitive impairment consent cannot be relied on in a number of offences or engaged in conduct with the intention of taking advantage of that person’s cognitive impairment.¹⁰⁸ There is no consent where the person engages in the sexual act as a result of intimidatory or coercive conduct or other threats which need not involve threats of force.¹⁰⁹ The Act does not place a limit to the grounds under which it may be established that a person does not consent to sexual intercourse.¹¹⁰

¹⁰³ Section 66F(2) of the *Crimes Act 1900 (as amended)* (NSW).

¹⁰⁴ Section 66F(1) of the *Crimes Act 1900 (as amended)* (NSW).

¹⁰⁵ Section 66F(3) of the *Crimes Act 1900 NSW (as amended)* (NSW).

¹⁰⁶ Law Reform Commission for New South Wales *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (1994 Discussion Paper 35) at paragraph 9.18.

¹⁰⁷ *R v Parsons* (Court of Criminal Appeal, NSW, 17 December 1990, CCA 600014/90 unreported) at 5 quoted in New South Wales *Report on People with an Intellectual Disability and the Criminal Justice System* (No 80 1996) Chapter 8 footnote 61.

¹⁰⁸ Section 66F(6)(b) of the *Crimes Act 1900 (as amended)* NSW.

¹⁰⁹ Section 61HA(6) of the *Crimes Act 1900 (as amended)* NSW.

¹¹⁰ Section 61HA(7) of the *Crimes Act 1900 (as amended)* NSW.

5.72 It is a defence where the accused did not know of the impairment, where the accused was married or the de-facto partner of the person to whom the charge relates to, or where the act was for medical purposes.¹¹¹

(ii) Victoria

5.73 The Victoria Law Reform Commission noted that the rationale for introducing a specific offence for persons with cognitive impairment was that the general law of rape did not adequately protect such people from sexual abuse. The Commission acknowledged that sexual abuse of people with a cognitive impairment by carers or people involved in service provision is relatively common. It felt that the operation of section 52 of the *Crimes Act 1958* which prohibits sexual acts between people with a “cognitive impairment” and workers in a residential facility achieves an appropriate balance between these goals and sets out clear standards of behaviour for those who work in service provision.¹¹² They recommended that section 52 of the *Crimes Act 1958* be amended and extended to cover persons “working or volunteering at a facility or in a program which provides services to people with cognitive impairment, who takes part in a sexual act with a person whom he or she knows has cognitive impairment, should be guilty of an indictable offence.”¹¹³

5.74 The Commission, while accepting the need for a “carer’s offence”, specifically rejected a general “exploitation offence”, on the grounds that:

[t]here is too great a risk that an offence of that type would unduly restrict expression of the sexual rights of people... The offence should be confined... to specified situations in which people... are particularly dependent - and therefore particularly vulnerable. It should be targeted at specified caregivers, as it is reasonable to impose a special prohibition on those people who are responsible for the care and welfare of others.”¹¹⁴

5.75 Following the Commission’s 1988 Report, sections 50-52 of the *Crimes Act 1958* (Vic) was amended by the *Crimes (Sexual Offences) Act*

¹¹¹ Section 66F of the *Crimes Act 1900* (as amended) NSW.

¹¹² Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* 2004 at paragraph 6.55.

¹¹³ Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* 2004 Recommendation 1.65.

¹¹⁴ Law Reform Commission of Victoria *Report on Sexual Offences Against People with Impaired Mental Functioning* (No. 15 1988) at paragraph 64.

2006.¹¹⁵ Section 16 of the 2006 Act substituted section 51 of the 1958 Act and now makes it an offence for a person who provides medical or therapeutic services to a person with a “cognitive impairment” to engage in an act of sexual penetration with that person¹¹⁶ or to commit or be in any way a party to the commission of an indecent act with that person.¹¹⁷ Consent to such acts is not a defence unless the accused was married to, or was in a de facto relationship with, the alleged victim.¹¹⁸ The defence of reasonable belief that the other person did not have a “cognitive impairment” or that the person was the spouse or domestic partner is available to the accused and must be proven on the balance of probabilities.¹¹⁹ This is to cover the rare situation where a person providing services relating to the impairment is not aware that the person had a “cognitive impairment”.¹²⁰ Consent cannot be implied and relied upon where an individual did not say or do anything to indicate free agreement.¹²¹ The lack of physical resistance or injury is also not to be taken as free agreement as well as evidence of instances where the individual consented to previous sexual acts with the accused or other person.¹²²

5.76 The Commission discussed the issue of allowing a defence of consent, with the onus on the accused to demonstrate that consent was not obtained through the abuse of trust or professional authority such as health

¹¹⁵ Section 15(a) of the *Crimes (Sexual Offences) Act 2006* substituted the term “impaired mental functioning” in section 50(1) of the *Crimes Act 1958* for the term “cognitive impairment”. Amendments were also made to the *Evidence Act 1958* and *Criminal Trials Act 1999* dealing with people with cognitive impairments.

¹¹⁶ Section 16(1) of the *Crimes (Sexual Offences) Act 2006*.

¹¹⁷ Section 16(2) of the *Crimes (Sexual Offences) Act 2006*.

¹¹⁸ Section 16(5) of the *Crimes (Sexual Offences) Act 2006*.

¹¹⁹ Sections 16(3) and 16(5) of the *Crimes (Sexual Offences) Act 2006*.

¹²⁰ Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report 2004* at paragraph 6.48. The VLC gives the example of a physical therapist who may conduct an exercise class with a group of people with various disabilities, but may be unaware of the nature of their disabilities. The therapist might engage in a sexual act with a person with a cognitive impairment without being aware that the person had in fact a cognitive impairment. In these circumstances the VLC felt it appropriate for the accused to be able to raise the defence of honest and reasonable belief.

¹²¹ Section 37 of the *Crimes (Rape) Act 1991*.

¹²² Section 37 of the *Crimes (Rape) Act 1991*.

professionals and workers in residential facilities¹²³ and considered that the defence of consent in such circumstances would be inconsistent with the policy goal of protecting people with “cognitive impairment” from sexual abuse. Allowing a defence of consent would invariably raise the issue of capacity, which would make the offence more difficult and lengthy to prosecute. In recognising the difficulties involved in prosecuting sexual offences, the Commission noted that:

“The number of prosecutions under these sections of the Act is very small compared to the estimated number rates of sexual abuse. We therefore do not support adopting a definition that would make it harder to prosecute those who sexually exploit people with a cognitive impairment.”¹²⁴

5.77 The Commission argued that a capacity-based definition could result in a wide range of experts being called to testify about whether or not the complainant had the capacity to make a choice about whether or not to participate in sexual acts with people in positions of power. If experts presented conflicting opinions on whether or not the person had capacity to make an informed choice to participate in sexual acts, a situation could arise where a jury might not convict an accused who claimed that he believed the complainant had made such a choice. The Commission therefore recommended that a capacity-based definition should not be adopted in relation to these offences which would apply regardless of whether the individual consented.¹²⁵

(iii) Tasmania

5.78 Section 126 of the *Criminal Code Act 1924* provides a blanket ban on sexual intercourse with a person with a “mental impairment” by a person responsible for the care of that person. It is a defence to an offence under the section where the accused can prove that at the time of the act the person with the “mental impairment” consented to the act and the giving of consent was not unduly influenced by the fact that the person was responsible for that person’s care; or at the time of the act, the person was married to, or was in a significant relationship, within the meaning of the *Relationships Act 2003*, with the person with the “mental impairment”.

¹²³ Sections 51 and 52 of the *Crimes Act 1958* as amended by the *Crimes (Sexual Offences) Act 2006*.

¹²⁴ Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report 2004* Executive Summary, xxxv-xxxvi.

¹²⁵ Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report 2004* at paragraph 6.58.

(iv) Northern Territory

5.79 Section 130 of the *Criminal Code Act 1983* provides an offence of sexual intercourse or gross indecency by a provider of services to a “mentally ill” or “handicapped person”. It is a defence if the accused was, at the time of the alleged crime, the husband or wife, or a de facto spouse of the “mentally ill” or “handicapped person” or did not know that the person was a “mentally ill” or “handicapped person”.¹²⁶

(v) Australian Capital Territory

5.80 There can be no consent under section 67(1) of the *Crimes Act 1900* where the sexual act is induced by a person in a position of authority held by the accused or where the relationship is of a professional or trusting nature.

(vi) Queensland

5.81 Section 216 of the *Criminal Code Act 1899* provides specific protection for “intellectually impaired” persons.¹²⁷ The legislation places a blanket prohibition on unlawful sexual or indecent acts with a person with “impaired mental functioning”. Section 348 of the *Criminal Code Act* defines consent as that which is freely and voluntarily given by a person with the cognitive capacity to give the consent. There can be no consent where it is induced by the exercise of authority.¹²⁸ It is a defence where the accused did not know of the “mental impairment”. It is also a defence if the act was not “sexual exploitation”.¹²⁹

(vii) Western Australia

5.82 In Western Australia section 330 of the *Criminal Code Act 1913* provides for sexual offences against an incapable person. An “incapable” person is a person who is so mentally impaired as to be incapable of understanding the nature of the act of which the accused is charged with, or of guarding himself or herself against sexual exploitation.¹³⁰ The section provides that a person who sexually penetrates a person who the offender knows or

¹²⁶ Section 130(3) of the *Criminal Code Act 1983*.

¹²⁷ Chapter 1 Interpretation to the *Criminal Code* defines a person with an impairment of the mind as a person with a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and, results in a substantial reduction of the person’s capacity for communication, social interaction or learning; and the person needing support.

¹²⁸ Section 348(d) of the *Criminal Code Act 1899*.

¹²⁹ Section 216(4)(b) of the *Criminal Code Act 1899*.

¹³⁰ Section 330(1) of the *Criminal Code Act 1913*.

ought to have known was an incapable person is guilty of a crime or where the accused procures, incites, or encourages a person who the offender knows or ought to know is an incapable person to engage in sexual behaviour is liable to a term of imprisonment of 14 years.¹³¹ It is an aggravating factor where the accused provides care, supervision, or holds a position of authority.¹³² Accused persons in these positions are liable to imprisonment for 20 years.

5.83 A third offence covered by the section applies to situations where the accused indecently deals with a person¹³³, or procures, incites, or encourages a person to do an indecent act¹³⁴ or, lastly, indecently records a person who the offender knows or ought to know is an incapable person.¹³⁵ These offences carry a term of imprisonment of 10 years.¹³⁶ Again, if the incapable person is under the care, supervision, or authority of the offender, the offender is liable to imprisonment for 10 years.¹³⁷ It is a defence, under the section, if the accused can prove he or she is married to the incapable person.¹³⁸

F New Zealand

(1) General Consent

5.84 Section 128 of the *Crimes Act 1961* was amended in significant respects in the *Crimes Amendment Act (No.3) 1985* concerning sexual crimes. The 1985 Act modified the definition of consent by reversing the subjective *Morgan* test of determining consent by statute introducing the defence of ‘honest belief’ to an objective test of reasonableness.¹³⁹ The 1985 Act also created two separate offences; the offence of “sexual violation” and “sexual connection by coercion” in place of the offence of rape.

¹³¹ Section 330(7)(a) of the *Criminal Code Act 1913*.

¹³² Section 330(7)(b) of the *Criminal Code Act 1913*.

¹³³ Section 330(4) of the *Criminal Code Act 1913*.

¹³⁴ Section 330(5) of the *Criminal Code Act 1913*.

¹³⁵ Section 330(6) of the *Criminal Code Act 1913*.

¹³⁶ Section 330(7)(a) of the *Criminal Code Act 1913*.

¹³⁷ Section 330(7)(b) of the *Criminal Code Act 1913*.

¹³⁸ Section 330(9) of the *Criminal Code Act 1913*.

¹³⁹ Section 128 of the *Crimes Act 1961*, as amended by section 2 *Crimes Amendment Act (No.3) 1985*. New Zealand has developed a subjective and objective test in that the accused can hold a subjective but honest belief but that belief is subject to an objective test of reasonableness.

5.85 The offence of sexual violation requires the prosecution to prove that the physical act took place without the consent of the other person and without the accused believing on reasonable grounds that the other person was consenting to that sexual act. Section 128A of the 1985 Act provides that where the person does not protest or offer physical resistance to the sexual connection this, by itself, does not constitute consent. Consent is also not present where the person acquiesces as a result of actual or threatened force to that person or another person, or fear of application of such force, or where the person consents by reason of mistake as to the identity of the accused or mistake as to the quality or nature of the act.

5.86 The offence of inducing sexual connection by coercion is committed where the person has been induced to consent as a result of an express or implied threat in a set of given circumstances.

(2) Capacity to consent to sexual activity

5.87 Section 138 of the *Crimes Amendment Act 2005* explicitly provides an offence prohibiting the “sexual exploitation of a person with a significant impairment”. A person exploitatively carries out an indecent act on a person with a “significant impairment” where the accused has knowledge that the other person has a “significant impairment” and has obtained the acquiescence of the person by taking advantage of the impairment.¹⁴⁰ The Act defines “significant impairment” as:

“as an intellectual, mental, or physical condition or impairment (or a combination of 2 or more intellectual, mental, or physical conditions or impairments) that affects a person to such an extent that it significantly impairs the person’s capacity (a) to understand the nature of sexual conduct; or (b) to understand the nature of decisions about sexual conduct; or (c) to foresee the consequences of decisions about sexual conduct; or (d) to communicate decisions about sexual conduct.”¹⁴¹

5.88 Consent is negated in a situation where the victim is affected by an impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity for the reasons listed in section 138(6). There can also be no consent where the individual with the “significant impairment” allows the act because he or she is mistaken about its nature and quality; or if the person is mistaken as to the identity of the offender.¹⁴² Consent is not implied where a

¹⁴⁰ Section 138(3) of the *Crimes Amendment Act 2005*.

¹⁴¹ Section 138(6) of the *Crimes Amendment Act 2005*.

¹⁴² Section 128A(5) of the *Crimes Act 1961* was substituted by section 7 of the *Crimes Amendment Act 2005*.

person does not protest or offer physical resistance or permits the activity because of the application of force, threats or the fear of the application of force.¹⁴³

G Canada

(1) General Consent

5.89 Section 244(3) of the Canadian *Criminal Code* 1985 provides that no consent is obtained where the complainant acquiesces to the sexual act as a result of force, threats thereof or fraud or a result of the position of authority which the accused holds. The section has been described as “partially a codification of common law principles and partially a reflection of former statutory provisions.”¹⁴⁴

(2) Capacity to consent to sexual activity

5.90 The sexual offences contained in the 1985 Code were amended in 1998 which created an explicit offence of “sexual exploitation of a person with a disability”.¹⁴⁵ It is an offence to have sexual contact with a person with a disability¹⁴⁶ in circumstances in which there is a relationship of authority or dependency between the accused and the person with a disability, and where the person with the disability does not consent to the contact.

5.91 Consent is defined in terms of the “voluntary agreement of the complainant to engage in the sexual activity in question”.¹⁴⁷ Consent to sexual activity is contingent on the complainant being legally capable of giving consent.¹⁴⁸ Proof of non-consent is required for an offence to be committed¹⁴⁹

¹⁴³ Section 128(A)(1) and (2) of the *Crimes Act* 1961.

¹⁴⁴ Bryant “The issue of consent in the crime of sexual assault” (1989) 68 *Canadian Bar Review*, at 103.

¹⁴⁵ The new offence created in section 153.1 of the *Criminal Code* is modelled on the offence of sexual exploitation of a young person in sections 151-153 of the *Criminal Code* with the exception that proof of non-consent is required. At the same time some procedural changes were made to the Canada *Evidence Act* RSC 1985 to address the needs of witnesses with disabilities.

¹⁴⁶ The term “disability” is not defined in the section.

¹⁴⁷ Section 273.1(1) of the *Canadian Criminal Code* RSC 1985.

¹⁴⁸ In *R v RR* [2001] 151 OAC 1 the Ontario Court of Appeal held that capacity is integral to determining whether consent was present and the extent of capacity depends on the circumstances of each case. See *R v RR* [2001] 151 OAC 1, at paragraph 52.

however there can be no consent where the complainant is incapable of consenting.¹⁵⁰ Incapacity to consent can therefore be seen as a substitute element for non-consent.¹⁵¹ The *Criminal Code* does not elaborate on the assessment of capacity to consent.

(3) Abuse of position or trust/authority

5.92 Consent is not present where the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority or where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity or where the complainant expresses, by words or conduct, a lack of agreement to continue to engage in the activity.¹⁵² The defence of mistaken belief in consent excludes situations in which the accused “did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.”¹⁵³

¹⁴⁹ In Canada, there are several cases where a failure to express non-consent explicitly is taken to mean consent by the trial judges which led to the acquittal of the accused. See *R v Parsons* (1999) 170 Nfld & PEIR 319; *R v Harper* [2002] YKSC 18; *R v Brown* [2003] OJ No.5341 and *R v B.M.* [1994] OJ No.2242. Arguably this can be seen as contrary to the decision taken by the Supreme Court of Canada in *R v Ewanchuk* [1999] 1 SCR 330 that passivity, acquiescence or physical resistance does not imply consent.

¹⁵⁰ Section 273.1(2)(b) of the *Canadian Criminal Code RSC 1985*. This incapacity provision ostensibly applies to all sources of incapacity for example intoxication and unconsciousness as well as to incapacity as a result of mental disability.

¹⁵¹ Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243, at 269.

¹⁵² Section 273.1(2) of the *Canadian Criminal Code RSC 1985*. In *R v Kiared* [2008] AJ No.1459 the judge was unable to conclude that the accused was in a position of trust, authority or in a relationship of dependency with the complainant because the accused was not acting in his capacity as the complainants’ bus driver when the offence was committed and having only met once before the incident, there was no “evolution of the relationship” to constitute one of trust or dependency. *R v Kiared* [2008] AJ No.1459, at paragraph 70. Arguably, the narrow interpretation taken by the Court in *Kiared* points to possible difficulties in protecting vulnerable adults from sexual exploitation.

¹⁵³ Section 273.2(b) of the *Canadian Criminal Code RSC 1985*. It is not a defence to section 271, 272 or 273 of the *Criminal Code* where the accused’s belief that the complainant consented to the activity arose from the accused’s self-induced

5.93 There is a presumption that the complainant is capable of giving consent unless there is evidence of a severe mental disability.¹⁵⁴ Expert evidence may be given in such cases but is not required. Literature suggests that capacity to consent is viewed by Canadian judges as a “static and absolute condition: one is capable of consenting to any sexual activity or to none at all.”¹⁵⁵ Arguably, the lack of clear criteria on how to assess capacity to consent is unhelpful. The virtual complete failure to use section 153.1 of the *Criminal Code*, according to some commentators, is unsurprising, “since the provision tries to satisfy both the goals of protection from harm and the promotion of sexual autonomy in contradictory ways.”¹⁵⁶ It has been suggested that including the requirement of non-consent in section 153.1 means that the offence does not provide additional protection for persons with limited capacity¹⁵⁷ since:

“The crime of sexual assault in the Canadian Criminal Code already criminalizes sex without consent, without requiring proof of “disability” plus one of the listed power relationships. Since the maximum penalty in section 153.1 (five years) is actually lower than the penalty for sexual assault under section 271 (ten years), there is little incentive to lay charges under the section... Both in the House of Commons and in committee, members raised concerns that ‘the current section 271, which refers to sexual assault for anyone, is much broader and calls for a stronger sentence of [up to] ten years as opposed to five.’ If section 153.1 had simply criminalized sex with a person with a disability where one of the specified power relationships existed, as is the case with the sexual exploitation of a young person offence, it would have added something to the Code.

intoxication or recklessness or wilful blindness”. See Section 273.2(a)(i)(ii) of the *Criminal Code*.

¹⁵⁴ See for example *R v Parrott* [2001] 1 SCR 178, at paragraph 10. The adult complainant had Down Syndrome with cognitive impairments that left her with mental abilities and communication facility similar to a pre-school child.

¹⁵⁵ Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243, at 269.

¹⁵⁶ Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243, at 250.

¹⁵⁷ Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243, at 250.

However, it might also have limited the sexual autonomy of some women with disabilities.”¹⁵⁸

5.94 In *R v R.R.*¹⁵⁹ the Ontario Court of Appeal noted that:

“The issue of whether a person did or did not consent to a particular action or event is a question of fact to be determined in each individual case. It is not sufficient to simply determine whether an individual said yes when asked if they would submit to or engage in a particular activity. It must be determined whether that individual made such a decision of their own free will, fully aware of or apprised of the proposed activity and its consequences.”¹⁶⁰

5.95 This judgment is of particular importance since it affirmed the 1999 decision of the Supreme Court of Canada in *R v Ewanchuk* that silence, compliance or acquiescence on the part of the complainant does not constitute consent in Canadian law.¹⁶¹ In *R.R. Abella J* stated that, under the 1985 *Criminal Code*, in every situation involving sexual activity there is a responsibility on the participants to ascertain consent.¹⁶² The threshold of

¹⁵⁸ Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243, at 250.

¹⁵⁹ *R v R.R.* [2001] 151 OAC 1.

¹⁶⁰ *R v R.R.* [2001] 151 OAC 1, at paragraph 44. In this case the Ontario Court of Appeal upheld that the complainant did not have the capacity to consent to sexual activity. The Court based its decision on expert evidence of a psychologist who had been involved with the complainant for over 12 years. The defences’ expert witness argued, however, that “it seems to be going rather far to suggest that she can’t be capable of appreciating that she may have sexual feelings which, after all, are pretty basic to human nature and that simply by reason of not being too smart doesn’t mean that you don’t know you have sexual feelings and you want to do something to satisfy those feelings.... does she understand that she has sexual feelings and would like to do something about them in terms of gratification; it seems pretty clear that she does... if the issue is is she capable of understanding that she has these feelings and wants to act on them, and that she’s capable of giving voluntary agreement to participate in them, I don’t see any persuasive evidence that that’s not the case.” See *R v R.R.* [2001] 151 OAC 1, at paragraph 49.

¹⁶¹ *R v Ewanchuk* [1999] 1 SCR 330. The Court held that an explicit or positive expression consenting to the act must be present.

¹⁶² Section 273.2(b) of the *Criminal Code*.

responsibility escalates exponentially in circumstances where one of the participants has “demonstrable mental limitations” which “requires that prior caution be exercised to avoid the exploitation of an exceptionally vulnerable individual.”¹⁶³

H United States

5.96 In the United States, criminal law is largely a matter of state law, and states have adopted different standards for determining capacity to consent to sexual relations in the context of those with limited capacity. As with many other common law jurisdictions, there is a general presumption that an individual has capacity to engage in a sexual relationship once he or she has reached the age of consent. While the wording of statutes vary across states, most criminal laws use terms such as “mentally defective” to describe a person with a diagnosis of mental impairment which essentially nullifies the person’s ability to consent to engage in sexual activity.

(1) *The US Model Penal Code*

5.97 The offence of rape in the Model Penal Code occurs where a man has sexual intercourse with a woman, who is not his wife, if he compels her to submit to such an act by force or by threatening imminent death, serious bodily injury, extreme pain or kidnapping, which can be inflicted on anyone. The offence is also committed where the man substantially limits the woman’s power by administering drugs, intoxicants, or other methods. Unconsciousness or engaging in sexual intercourse with a female younger than 10 years of age will also trigger the offence.¹⁶⁴ The notion of meaningful consent is the unifying principle that negates consent.

5.98 In terms of incapacity to consent, section 231(2)(b) of the Penal Code proscribes intercourse with a “mentally incompetent” person. Under this section a male who has sexual intercourse with a female who is not his wife commits a felony of the third degree if “he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct”. As noted by the American Law Institute, “The critical issue is to define the degree of mental disease or deficiency that suffices to make noncoercive intercourse a crime.”¹⁶⁵

¹⁶³ *R v R.R.* [2001] 151 OAC 1, at paragraph 57.

¹⁶⁴ Section 231(1) of the Model Criminal Code.

¹⁶⁵ American Law Institute *Model Penal Code and Commentaries*” Part II sections 210.0 to 213.6 (1980) at 321.

5.99 US courts have adopted three different headings with variations in determining competency to consent to sexual activity under state statutes. The first is whether the woman was capable of expressing any judgment on the act; whether she had the ability to understand the moral nature of the act and whether she had the capacity to understand the character and likely consequences of intercourse.¹⁶⁶ The American Law Institute, in their analysis of the differing standards, felt the first test was too narrow while the second test too expansive. In rejecting the moral aspect to having the requisite capacity to consent, the Institute noted that:

“Emphasis on ability to assess the moral nature of the act of intercourse implies a focus on the female’s comprehension of ‘appropriate’ value judgments. One can imagine many instances in which a woman is not mentally incompetent in any ordinary sense but, by reason of background or sociopathic development, is incapable of appreciating fully the community’s notions of intercourse as an event of moral or ethical significance. A standard of this sort is plainly unsuited for imposition of criminal liability on the male.”¹⁶⁷

5.100 The standard adopted by the Model Criminal Code is similar to the third test of understanding the character and likely consequences of the act as developed by the US courts. Section 231(2)(b) creates the offence where the actor “knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct.” According to the American Law Institute, this offence limits liability for sexual intercourse with “a mentally incompetent woman to cases of severe defect or impairment precluding ability to understand the nature of the act itself.”¹⁶⁸

(2) Capacity to consent to sexual activity

5.101 In general terms, variations of 6 tests have been applied in the criminal codes of the 50 US states.¹⁶⁹ In 13 states, the criminal codes require

¹⁶⁶ American Law Institute *Model Penal Code and Commentaries*” Part II sections 210.0 to 213.6 (1980) at 321.

¹⁶⁷ American Law Institute *Model Penal Code and Commentaries*” Part II sections 210.0 to 213.6 (1980) 321-322.

¹⁶⁸ American Law Institute *Model Penal Code and Commentaries*” Part II sections 210.0 to 213.6 (1980) at 322.

¹⁶⁹ Denno “Sexuality, rape and mental retardation” (1997) 2 UILL Rev 315, at 415-424. The 50 states, with the exception of Illinois, use one of the six tests in reviewing cases of sexual abuse. Illinois uses both the morality test and the totality of circumstances test. See Morano “Sexual abuse of the mentally retarded

an understanding of the nature of the sexual activity and the potential consequences of sexual activity, such as pregnancy and disease.¹⁷⁰ This can be described as a compromise in seeking to protect vulnerable adults from sexual exploitation while balancing the rights of persons with a disability to sexual autonomy. In 7 states, an understanding of the nature and consequences of sexual conduct is required, with the additional element of understanding the moral dimension of sexual conduct.¹⁷¹ While appreciating the moral aspect of engaging in sexual activity might be considered an onerous task which could negate capacity in situations that otherwise appear to be consensual, it appears that courts “stress that the complainant need only understand that society has these views; she need not adhere to them herself.”¹⁷² A majority of states require an understanding of the sexual nature of the conduct and an understanding of the voluntary aspect of participation. There is no obligation to understand the morality or the nature and consequences of the act in this test.¹⁷³ In *State v Sullivan*¹⁷⁴, the Iowa Supreme Court, in referring to the Iowa statute which proscribes a sexual act with a person who suffers from a “mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong in sexual matters”,¹⁷⁵ held that:

“The moral “right” and “wrong” test is... an unfit tool in determining the mental competency of a person to consent to a sexual act... Application of the “right” and “wrong” dichotomy in the legal context

patient: medical and legal analysis for the primary care physician” (2001) 3(3) *Primary Care Companion Journal of Clinical Psychiatry* 126, at 132.

¹⁷⁰ The states which use this test in assessing capacity to consent to sex are Alaska, Arizona, Arkansas, Indiana, Iowa, Kansas, New Mexico, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia and Wyoming.

¹⁷¹ These states are Alabama, Colorado, Hawaii, Idaho, Illinois, New York, Washington.

¹⁷² Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243, at 272.

¹⁷³ These states are California, Delaware, Florida, Kentucky, Louisiana, Maine, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas and Utah.

¹⁷⁴ *State v Sullivan* 298 NW 2d 267 (S.Ct. Iowa 1980).

¹⁷⁵ Section 709.4, subdivision 2 of the Iowa Code Annotated.

would require the victim to analyze his or her own mental capacity to assent to a sex act.”¹⁷⁶

5.102 The totality of circumstances test is particular to the state of Illinois. This test, while considering the morality issue, also considers factors other than the sexual act, including the nature, and the consequences due to the special context of the act or the perpetrator’s intent. In 9 states, the court can consider evidence of a disability which affects an individual’s ability to consent to the sexual activity.¹⁷⁷ Finally, two states, Georgia and Minnesota, apply a judgment test which is used to ascertain whether an individual can exercise judgment with regard to giving consent to sexual activity.

(i) New York Test

5.103 The “morality” test is applied in New York and six other states. This test was best illustrated by the New York Court of Appeals decision in *People v Easley*,¹⁷⁸ where the court affirmed a rape conviction involving a moderately disabled woman who engaged in sexual intercourse. The psychologist assessed the woman and found her to be able to respond to sexual stimulation, participate in the act of intercourse and comprehend that it could result in pregnancy “but was incapable of thinking beyond the act in terms of what the consequences could be.”¹⁷⁹ In addition to understanding the physiological nature of sexual activity and its consequences, the court ruled that an individual must also have the ability to understand and appreciate how the conduct will be “regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored.”¹⁸⁰ This high standard was reaffirmed in the later case *People v Cratsley*.¹⁸¹ The New York Court of Appeals in *Cratsley* asserted that the law does not presume that a person with intellectual disabilities is unable to consent to sexual intercourse and proof of incapacity must come from facts other than intellectual disability alone.¹⁸² Arguably, the

¹⁷⁶ *State v Sullivan* 298 NW 2d 267, 272 (S.Ct. Iowa 1980).

¹⁷⁷ These states are Connecticut, Maryland, Massachusetts, Michigan, Mississippi, Missouri, South Dakota, West Virginia and Wisconsin.

¹⁷⁸ *People v Easley* 42 NY 2d 50 (1977).

¹⁷⁹ *People v Easley* 42 NY 2d 50 (1977), at 53.

¹⁸⁰ *People v Easley* 42 NY 2d 50 (1977), at 56.

¹⁸¹ *People v Cratsley* 86 NY 2d 81 (1995).

¹⁸² New York State Penal Law section 130.25(1) states that a person is guilty of rape in the third degree when he or she engages in sexual intercourse with another

restrictive standard laid down in *Easley* and *Cratsley* which require the individual to understand the social mores associated with sexual behaviour sets too high and ambiguous a threshold. Setting the threshold too low, however, would run the risk of failing to protect people with mental disabilities from exploitative sexual behaviour.

(ii) New Jersey Test

5.104 In New Jersey, a person must understand the sexual nature of an act and the decision to engage in the sexual behaviour must be voluntary. This test is followed in a majority of states. There is no requirement that the individual shows an understanding of the potential risks and consequences of engaging in the sexual act. The Supreme Court of New Jersey in *People v Olivio*¹⁸³ noted that only an understanding of the sexual nature of the act and a voluntary decision to participate in the act is required to have the requisite capacity to give consent. The court made it clear that an understanding of the risks and consequences associated with sexual intercourse, such as pregnancy or the risk of acquiring a sexually transmitted disease, is not required in determining capacity to consent. The court held that the test of giving consent by a “mentally defective” is whether:

“at the time of the sexual activity, the mental defect rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another.”¹⁸⁴

5.105 The Supreme Court’s formulation in *Olivio* would result in a finding that many more people with limited capacity would be found to have the capacity to consent than under the New York Court of Appeals decision in *Easley* and *Cratsley*.

5.106 Courts in the United States have taken a more active role than their Canadian counterparts in making declarations of incapacity to consent to sexual relations.¹⁸⁵ While this may be applauded as evidence of the courts seeking to protect vulnerable adults from sexual violence it might also tip the balance in encroaching on the sexual rights of persons with limited capacity.

person who is incapable of consent by reason of some factor other than being less than seventeen years old.

¹⁸³ *People v Olivio* 123 NJ 550, 589 A2d 597 (S. Ct. NJ 1991).

¹⁸⁴ *People v Olivio* 123 NJ 550, 589 A2d 597 (S. Ct. NJ 1991), at 564.

¹⁸⁵ Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243.

5.107 Benedet and Grant contend that a problem with US case law is that the inquiry into the nature of a woman's disability and associated limited capacity can prevent any inquiry into whether there was evidence of nonconsent. In some cases, evidence of force and nonconsent is ignored once the complainant is deemed capable of giving consent, the accused is acquitted since nonconsent is not an element of the specific offence. The authors argue that US law may have developed this focus on incapacity because the understanding of nonconsent in the US is not advanced to the level expressed on the Canadian case of *R v Ewanchuk*, but rather still requires proof of a clear expression of resistance in the face of force before reaching a finding of rape. *R v Ewanchuk* confirmed that mere compliance does not amount to consent and that there must be some positive evidence of consent. The authors observed that consent, therefore, cannot be implied from silence, passivity or ambiguous behaviour, because it is the complainant's state of mind that is at issue. The authors note that this is particularly important and relevant for people with limited capacity as it is typical in these cases to see compliance in sexual activity along with no real affirmative consent.

I Concluding comments and provisional recommendations

5.108 The common law jurisdictions discussed by the Commission in this Chapter have each approached the issue of vulnerability in a similar manner. States have legislated for a specific offence dealing with sexual offences involving persons with intellectual disability. Most jurisdictions provide a defence of reasonable honest mistake that can be raised where the accused did not know or could not have reasonably been expected to know that the complainant had limited capacity to such a degree that made their consent ineffective. Many jurisdictions have created a specific offence prohibiting certain relationships between persons with positions of trust or authority with a person with limited capacity. Many jurisdictions have also created an offence where the sexual act was committed through inducement, threat or deception which is aimed at individuals who both deliberately and repeatedly target people with the intention of taking advantage of that person's vulnerability.

5.109 The defence of reasonable belief on the balance of probabilities exists for the circumstances where the accused can prove the parties were married or in a de-facto relationship or where the accused did not know that the complainant had limited capacity. In jurisdictions which have provided a specific offence prohibiting relationships between persons in authority or trust and those in their care, a defence of reasonable mistake is not available for the accused.

5.110 The Commission has therefore concluded, and provisionally recommends, 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. Consistently with this, therefore, 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, including the consequences;
- (b) to retain that information;
- (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).

5.111 The four elements of this definition are based on the functional test of capacity recommended by the Commission in its 2006 *Report on Vulnerable Adults and the Law*¹⁸⁶ and have been adapted from the definition in section 3 of the English *Mental Capacity Act 2005*.¹⁸⁷ The definition used here has been tailored to the context of capacity to consent to sexual acts.

5.112 The Commission has also concluded, and therefore provisionally recommends, 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.

5.113 The Commission provisionally recommends that there should be a strict liability offence for sexual acts committed by a person who is in a position of trust or authority with another person who has an intellectual disability. 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 loco parentis to the victim; or any person who is, even temporarily, responsible for the education, supervision or welfare of the victim.

5.114 The Commission also provisionally recommends that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should cover all forms of sexual acts including sexual offences which are non-penetrative and sexual acts which exploit a person’s vulnerability.

¹⁸⁶ LRC 83-2006.

¹⁸⁷ The definition in section 3 of the English *Mental Capacity Act 2005* was also used in Head 2 of the *Scheme of the Mental Capacity Bill 2008* published by the Department of Justice and Equality in 2008.

5.115 The Commission provisionally recommends that a defence of reasonable mistake should apply, which would mirror that applied to sexual offences against children but that the defence should not be available to persons in positions of trust or authority.

5.116 The Commission provisionally recommends that the fact that the sexual offences in question occurred within a marriage or a civil partnership should not, in itself, be a defence.

5.117 The Commission invites submissions as to whether any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should provide a specific offence of obtaining sex with a person with intellectual disability by threats or deception.

5.118 The Commission provisionally recommends that the maximum penalty on conviction on indictment for the sexual offences involving a person with an intellectual disability should be 10 years imprisonment. The Commission also provisionally recommends that the consent of the Director of Public Prosecutions be required for any prosecution of such offences, as is currently the case under section 5 of the *Criminal Law (Sexual Offences) Act 1993*, bearing in mind that where a prosecution is brought the ultimate assessment of capacity will be matter for the jury in a trial on indictment.

5.119 *The Commission provisionally recommends 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. Consistently with this, therefore, 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, including the consequences;*
- (b) to retain that information;*
- (c) to use or weigh up that information as part of the process of deciding to engage in the sexual act; or*
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CHAPTER 6 CRIMINAL PROCEDURE ISSUES

A Introduction

6.01 In this Chapter the Commission discusses a number of related procedural issues concerning persons with disabilities and the criminal justice system. The Commission examines the range of special measures which are currently available to eligible witnesses and complainants in Ireland. The Commission also explores what measures are available to witnesses and complainants in other countries. The position of defendants who may require assistance and support to enhance their participation in the criminal trial process is also examined.

6.02 A number of countries have enacted legislation enabling extra assistance to be given to “special witnesses” based on a number of criteria. These include:

- the witness’s persons characteristics (such as physical or mental condition, age and cultural background);
- the nature of the offence;
- the relationship between the witness and defendant;
- the nature of the evidence the witness is required to give; and
- the defendants’ characteristics (particularly dangerousness).

6.03 For the purposes of this Consultation Paper, the focus is on complainants and defendants who may require accommodation in the criminal trial process.

6.04 As already discussed, sexual offences, when reported, are difficult to prove.¹ For vulnerable complainants or witnesses there is the additional layer of evidentiary and procedural rules that create even more difficulties for such persons in accessing the criminal justice system. Despite the over-representation as victims of sexual assault, there are few prosecutions under current legislation designed to protect people with limited capacity from sexual

¹ Elliott *Vulnerable and intimidated witnesses: A review of the literature* (Home Office Research and Statistics Directorate 1998) at 167.

abuse.² Several reasons have been attributed for this. People with an intellectual disability are generally less likely to report cases of abuse and if abuse is reported they are less likely to be believed. Communication difficulties may make it difficult for someone to tell others if they are unhappy, hurt or afraid. Living in an isolated environment may mean someone does not have free communication with someone they can trust. These barriers can be confounded by feelings of fear of losing a person's service, retaliation from an abuser or fear of being reprimanded if a person reports a case of abuse.³ Furthermore, deficits in memory, problems with communication which can be particularly relevant in a legal culture which relies heavily on oral communication, and an inability to estimate time or place events in sequence have been identified as difficulties which the criminal trial might pose for the complainant.⁴

6.05 These difficulties require particular accommodations in the criminal trial process in order to effectively provide access to justice for survivors of sexual violence while maintaining the accused's right to a fair trial. The following have been identified as measures aimed at improving the criminal justice process for witnesses with disabilities:⁵

- encouraging reporting - failure to define an incident as criminal and an ethos that all discussions with clients should be treated confidentially have been seen as reasons for low reporting rates of crimes against people with disabilities;
- identifying vulnerability;
- facilitating communication;
- recognising that a crime has occurred which can be done through improved education, informing service professionals about the relevant piece of legislation and having formal policies for professional carers and service providers;

² The low level of prosecutions of sexual offences against people with limited capacity was highlighted by the Victorian Law Reform Commission in its Final Report on Sexual Offences. See Victorian Law Reform Commission *Sexual Offences: Final Report* (2004).

³ Voice UK, Respond and Mencap UK *Behind closed doors: preventing sexual abuse against adults with a learning disability* (2001) at 8.

⁴ Benedet and Grant "Hearing the sexual assault complaints of women with mental disabilities: evidentiary and procedural issues" (2007) 52 McGill LJ 515, at 548.

⁵ Elliott *Vulnerable and intimidated witnesses: A review of the literature* (Home Office Research and Statistics Directorate 1998) at 104.

- providing support; and
- preventing future offences.

6.06 It has been suggested that an excessive number of cases involving witnesses with disabilities are lost at the early stage of deciding whether or not to go ahead with a case.⁶ In the UK, of 167 cases of alleged sexual abuse against people with learning disabilities reported between 1989 and 1990, only 10-15% resulted in a court appearance despite three-quarters being accompanied by corroborative evidence.⁷ The Commission now turns to discuss the reasons which may explain the high number of cases which do not reach prosecution stage.

6.07 There are a number of reasons for deciding not to prosecute including the following:

- lack of evidence following delayed reporting or internal investigations by service providers;
- credibility of witnesses; and
- competence to give evidence.⁸

6.08 Sanders *et al* observed that in the UK although the police often liaised with the Crown Prosecution Service (CPS) before this stage on cases involving the 'non-disabled' population, the evidence showed that the CPS and the police rarely consulted experts on disability issues.⁹

(1) *Statistics on sexual offences against persons with limited capacity*

6.09 The Commission has learned that there is a lack of data on both the incidence and characteristics of sexual assault of people with limited capacity arguably impedes legal and policy development in this area. The Victorian Law Reform Commission recommended that a working group be convened by the Department of Justice in Victoria to establish an integrated process for the collection of statistics relating to sexual offences and that cognitive impairment

⁶ Elliott *Vulnerable and intimidated witnesses: A review of the literature* (Home Office Research and Statistics Directorate 1998) at 142.

⁷ Elliott *Vulnerable and intimidated witnesses: A review of the literature* (Home Office Research and Statistics Directorate 1998) at 142.

⁸ Elliott "Vulnerable and intimidated witnesses: A review of the literature" (Home Office Research and Statistics Directorate 1998) at 142.

⁹ Sanders *et al Victims with Learning Disabilities: Negotiating the Criminal Justice System* (Oxford: University of Oxford 1997) at 35-36.

be a particular focus of this endeavour. This working group was made up of representatives from the Victoria Police, the Office of the Director of Public Prosecutions, the courts and other relevant stakeholders.¹⁰ The Commission is aware that over the past number of years the Prosecution Policy Unit of the Office of the Director of Public Prosecutions in Ireland has undertaken a detailed file analysis project in respect of a statistically significant sample of investigation files received from the Garda Síochána.¹¹ This cohort represented over 90% of the files concerning a complaint of rape¹² received by the Office during this period. The primary objective of this project was an examination of the prosecutorial decision-making processes involved with a view to the development of internal policy guidelines to assist professional officers in this task. The study recorded the particular circumstances of the complainants and of relevance to this Consultation Paper is the mental health and intellectual disability status of the complainants identified in the study.

6.10 The Prosecution Policy Unit of the Office of the Director of Public Prosecutions in Ireland, in its sample of investigation, noted that out of 17 cases involving persons with an intellectual disability a prosecution rate of 24% was identified which compared with a total prosecution rate of 27.68% when measured as a proportion of 'prosecutable cases'.¹³

6.11 As for complainants presenting with a psychiatric illness the sample size for 2005 was again small at 11 cases, but, by contrast, the prosecution rate in respect of cases involving such complainants was 0%. The complainant's psychiatric illness was not the determining factor and in 2 of the 11 cases additional reasons for not prosecuting were advanced. In 3 of the 11 cases the complaint was withdrawn before the Office received the file. The level of withdrawal, at 27%, reflects the overall level of withdrawal identified generally in the sample surveyed and as such it would not necessarily seem to be connected to the complainant's psychiatric history. The fact of the withdrawal,

¹⁰ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) at paragraph 6.62-3.

¹¹ 801 files received over a three year period 2005-2007 were received by the Office of the Director of Public Prosecutions. The Commission is extremely grateful to the Office of the Director of Public Prosecutions for providing the Commission with the results of this analysis.

¹² A broad definition of rape was used including 'rape and attempted rape' under the *Criminal Law (Rape) Act 1981* and section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*.

¹³ This refers to cases where complainant withdrawals, deceased accused and false complaints have been removed.

coupled with other evidential difficulties which were unrelated to the complainant's psychiatric illness, resulted in a decision not to prosecute in these cases. The reason for not prosecuting in a further 2 of the 11 cases was in part the issue of the complainant's 'recovered' memory and again the issue of the complainant's mental illness did not appear to have been specifically relevant to the decision not to prosecute. The remaining 4 cases shared similar features to the 'no prosecution' decisions in the general sample and included a combination of no forensic evidence, no corroboration, no evidence of the absence of consent, delayed reporting, intoxication at the time of the allegation and inconsistencies in the complainant's statements.

B The criminal trial process

6.12 In Ireland a series of measures have been enacted specifically with respect to victims of sexual crimes. A person has a right to be accompanied to court.¹⁴ Legal aid is also available for complainants of the most serious sexual offences.¹⁵ Section 34 of the *Sex Offenders Act 2001* provides victims with a right of separate legal representation in respect of applications to introduce evidence relating to their previous sexual history.

6.13 Article 13.1 of the UNCRC states that:

"States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."

6.14 As Benedet and Grant note the criminal trial process was not designed to facilitate the testimony of persons with limited capacity. An inability to operate within the confines of the traditional trial process can result in a finding of diminished credibility as regards the testimony of persons with limited capacity. Further difficulties arise particularly in cases involving sexual violence where a complainant's prior sexual history may be introduced by the defence and the complainant is subjected to rigorous cross-examination.¹⁶

¹⁴ Section 6 of the *Criminal Law (Rape) Act 1981*, as inserted by section 11 of the *Criminal Law (Rape) (Amendment) Act 1990*.

¹⁵ Section 26 (3)(b) of the *Civil Legal Aid Act 1995*.

¹⁶ Benedet and Grant "Hearing the sexual assault complaints of women with mental disabilities: evidentiary and procedural issues (2007) 52 McGill LJ 515, at 524.

6.15 Research exploring the issue of sexual offences against persons with limited capacity in England and Wales showed that court users, both in criminal and civil proceedings, with mental health conditions and learning disabilities experience particular difficulties when giving evidence in court.¹⁷ Many court users found the legal terminology barriers to their understanding of the court process while a number stated that they experienced problems in understanding questions when asked in court. The report concluded that this lack of understanding resulted in confusion for the court users which had a negative impact on their demeanour in court.¹⁸ Those involved in the study reported that difficulties with understanding were improved by awareness of their particular mental health issue or learning disability amongst legal representatives as this resulted in the court taking steps to ensure that proceedings were explained in an easily understood manner.¹⁹ When asked, court users with a mental illness or learning disability stated that they would benefit from being able to use special measures when giving evidence in court, particularly, if screens or intermediaries were made available to them.²⁰

6.16 In this Part, the Commission discusses some of the main issues facing adults who may require extra supports in the criminal justice process. The Commission examines the difficulties that can face a complainant with limited capacity such as their competency as reliable witnesses and credibility to give evidence which have tended to create difficulties for securing convictions for complainants of sexual offences. The Commission briefly examines whether existing safeguards in the criminal justice process are sufficient to protect complainants from unnecessary distress and whether additional safeguards should be introduced. The Commission also discusses whether such safeguards should be available for vulnerable defendants in line with fair procedures.

(1) Competency to give evidence

6.17 Where the competency of a witness is put in question it becomes a matter for the trial judge to determine whether the witness is competent to give

¹⁷ McLeod *et al.* *Court experience of adults with mental health conditions, learning disabilities and limited mental capacity*, Ministry of Justice Research Series (London: Ministry of Justice, July 2010)

¹⁸ McLeod *et al.* *Court experience of adults with mental health conditions, learning disabilities and limited mental capacity*, (Ministry of Justice 2010) at 8.

¹⁹ McLeod *et al.* *Court experience of adults with mental health conditions, learning disabilities and limited mental capacity*, (Ministry of Justice 2010) at 9.

²⁰ McLeod *et al.* *Court experience of adults with mental health conditions, learning disabilities and limited mental capacity*, (Ministry of Justice 2010) at 36.

evidence. A witness is competent if he or she has the capacity to provide an intelligible account in a trial process. Generally, if a witness is capable of understanding the nature of the oath and can convey his/her evidence in a manner which enables the jury to follow it, that person is deemed competent.²¹ The assessment of competency to give evidence, as to whether the witness understood the nature of the oath, is already framed in the context of a functional assessment, however, traditionally the evidence of some groups of witnesses who may require extra supports to facilitate them in giving their testimony has been considered unreliable.²² Under the proposed mental capacity legislation however the presumption of capacity to give evidence will require that the person asserting lack of competency must disprove this presumption in line with the functional approach.

(2) Credibility

6.18 The credibility of the complainant or witness is closely intertwined with the evidentiary issues. Sexual assault prosecutions often contest credibility because there are rarely other witnesses to corroborate the complainants testimony and such cases are often based on the issue of consent which generally is given or not given in private between the two parties. In the context of a criminal trial and the requirement of proof beyond a reasonable doubt, the accused need not be believed to be successful. If the trier of fact has a reasonable doubt that the accused is telling the truth, the accused is entitled to an acquittal.

6.19 There are several ways in which disability itself can be misinterpreted to undermine credibility. The complainant may have difficulty forming long-term memories, communicating information to people in authority or communicating effectively on the witness stand. The pressures of cross-examination may also result in conflicting testimony.²³ As Benedet and Grant note “the fact of disability itself can be used in a discriminatory manner to cast doubt on the

²¹ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 856.

²² For example children’s testimony is considered untrustworthy because “children do not have adequate cognitive skills to either understand or accurately describe what they witnesses; children have no ethical sense and are prone to fabricate; and children have difficulty differentiating fact from fantasy.” Ontario Law Reform Commission Report on Child Witnesses 1991. In Ireland, for example, in 2006, a 23 year woman, Laura Kelly, was prohibited from testifying about her alleged sexual assault by a judge who deemed she did not have the capacity to testify in court.

²³ Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: evidentiary and procedural issues” (2007) 52 McGill LJ 515, at 543.

complainant's credibility... if she cannot be sworn, her testimony carries less weight. In other cases, memory or communication problems may raise a reasonable doubt about the believability of the complainant."²⁴ Section 14 of the *Criminal Evidence Act 1992* provides that questions, but not responses, may be put through an intermediary. The section provides that on the application of prosecution or the accused the court may, if satisfied that justice requires it, direct that questions be put to the witness through an intermediary. The questions are put either in the words used by the questioner or so as to convey to the witness in a way appropriate to their age and mental condition the meaning of the questions being asked.

(3) Availability of Special Measures: Part III of the Criminal Evidence Act 1992

6.20 The inherent difficulties in the prosecution of offences involving witnesses with limited capacity have prompted suggestions for how the process can be improved for these witnesses while protecting the right to a fair trial for the accused.²⁵ Internationally, the rise in reporting of sexual offences particularly against children and the "mentally impaired" in the latter half of the 20th Century and the influence of the *Report of the UK Home Office Advisory Group on Video Evidence*²⁶ prompted calls for the examination of the means by which witnesses could be assisted to give evidence without the right of the accused to a fair trial being put in jeopardy. In an attempt to facilitate the giving of evidence in court in the context of trials for sexual and violence offences, Part III of the *Criminal Evidence Act 1992* introduced a series of measures designed to assist witnesses in the trial process. The Act was introduced following the recommendations of the Commission in its *Report on Child Sexual Abuse*²⁷ and *Report on Sexual Offences against the Mentally Handicapped*.²⁸

²⁴ Benedet and Grant "Hearing the sexual assault complaints of women with mental disabilities: evidentiary and procedural issues" (2007) 52 McGill LJ 515, at 542.

²⁵ Delahunt "Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992" (2011) 16 *The Bar Review*, 1, at 2.

²⁶ Report of the Home Office Advisory Group on Video Evidence (chaired by Judge Thomas Pigot). The 1989 Report proposed that video recorded interviews conducted by a police officer or social worker be used as a substitute for the child's live testimony at trial. The English *Criminal Justice Act 1991* implemented this recommendation for examination-in-chief evidence. As amended by sections 27 and 28 of the *Youth Justice and Criminal Evidence Act 1999* this now applies to examination in chief and cross-examination.

²⁷ LRC 32-1990.

²⁸ LRC 33-1990.

6.21 The 1989 Home Office Report recommended that video-recorded evidence would relieve some of the difficulties faced by child witnesses. The Report recommended that the accused should not be allowed to cross-examine a child witness as the process was seen as potentially damaging the child. The Report also recommended that the changes brought in to facilitate children should also be extended to adult witnesses if certain criteria made them eligible. The test for determining eligibility would be on the basis of age, physical or mental condition; the nature and seriousness of the offence and the nature of the evidence which the witness was to give. The 1989 recommendations on video-recorded evidence were implemented in England and Wales by the *Criminal Justice Act 1991*.

6.22 The Commission in its 1990 *Report on Child Sexual Abuse* recommended that the court should continue to make the ultimate decision as to the competence of children to give evidence. The test of competency of children should be the capacity of the child to give an intelligible account of events which he or she has observed.²⁹ The Commission also recommended that the requirement to warn a jury before they can convict on the sworn evidence of a child and the requirement of corroboration of the unsworn evidence of a child should be abolished.³⁰ On the issue of giving evidence on oath the Commission recommended that section 30 of the *Children Act 1908* be repealed and replaced by a provision enabling the court to hear the evidence of children under the age of 14 without requiring them to give evidence on oath or affirm where the court is satisfied that the children are competent to give evidence in accordance with the criteria as to competency already proposed.³¹

6.23 The Commission in its 1990 *Report on Sexual Offences against the Mentally Handicapped* recommended that any special legislative arrangements facilitating the giving of evidence by children by the use of closed circuit television, video recordings and skilled examiners should apply also in cases of sexual offences against persons with 'mental handicap' or suffering from 'mental illness'.³²

6.24 The Commission also recommended that, in the case of persons with 'mental handicap', the requirements as to giving evidence on oath or affirmation should be the same as for other witnesses. Where appropriate, however, the court should satisfy itself that a person with 'mental handicap' is capable of

²⁹ LRC 32-1990 at paragraph 5.18.

³⁰ LRC 32-1990 at paragraph 5.28.

³¹ LRC 32-1990 at paragraph 5.36.

³² LRC 33-1990 at paragraph 38.

giving an intelligible account of events which he or she has observed. There should be no requirement of corroboration.³³

6.25 As already mentioned, many of the Commission's recommendations in its 1990 Report were implemented in the *Criminal Evidence Act 1992* including pre-trial recording of examination in chief testimony. These measures included the introduction of video link evidence,³⁴ the use of an intermediary,³⁵ the abolition of the need for the testimony to be given on oath or by affirmation as long as the witness was capable of giving an intelligible account³⁶ and the elimination of mandatory corroboration of the witness' testimony.³⁷ These measures were aimed at children under a certain age³⁸ and persons with a 'mental handicap' who did not meet the age requirement.

6.26 Section 19 of the *Criminal Evidence Act 1992* allows persons with a 'mental handicap' to avail of support measures which apply to appropriate child witnesses. The 1992 Act refers to 'mental handicap' whereas the 1993 Act applies to persons with a 'mental impairment' defined as a "disorder of the mind, whether through mental handicap or mental illness". This would suggest that the 1992 Act only applies to persons with an intellectual disability rather than persons with a mental illness.

(i) Recent developments

6.27 Section 16(1)(b) of the *Criminal Evidence Act 1992* which came into force in 2008, provides protection to witnesses who are eligible under the Act and who have been the victims of sexual and violent offences. It provides for the admission of a video recorded statement to be taken close in time to the alleged incident which will in turn allow greater detail to be recorded. It may also serve to minimise trauma for the witness in the trial process however the

³³ LRC 33-1990 at paragraph 37.

³⁴ Section 13 of the *Criminal Evidence Act 1992*.

³⁵ Section 14 of the *Criminal Evidence Act 1992*.

³⁶ Section 27 of the *Criminal Evidence Act 1992*.

³⁷ Section 28 of the *Criminal Evidence Act 1992*. Section 7 of the *Criminal Law (Rape) (Amendment) Act 1990* gives the trial judge discretion to decide, in light of the evidence, if a warning is required. A corroboration warning should now only be given to the jury if there is an evidential basis for believing that the complainant's testimony is unreliable.

³⁸ Section 257 of the *Children Act 2001* raised the qualifying age from 17 to 18 in the appropriate sections of Part III of the *Criminal Evidence Act 1992*, i.e. 13(1)(a), 14(1)(b), 15(1)(b) and 16(1)(a).

witness must be available in court from cross-examination.³⁹ Section 16(1)(b) of the Act states that the complainant must be under 14 or suffer from a 'mental handicap', and the interview may be taken by a member of An Garda Síochána or "a person who is competent for the purpose".⁴⁰ It only applies to those in respect of whom such an offence is alleged to have been committed and is therefore confined to complainants. Section 16(1)(b) was drafted specifically for the most vulnerable witnesses with a presumption that complainants who allege certain sexual or violent offences were committed against them will be available for cross examination. There is a legislative presumption that the video-recording will not be admitted into evidence unless it is not in the interests of justice to do so or would run the risk of unfairness to the accused.

6.28 Section 16(1)(b) of the *Criminal Evidence Act 1992* was applied for the first time in *The People (DPP) v XY*⁴¹ in which White J admitted a DVD recording of an interview of an eligible complainant as evidence. As Delahunt notes this was the first time a DVD recording of a witness statement was admitted in such a case which marks a particular shift in the perception of how the testimony of more eligible witnesses may be heard at trial. The application highlighted issues such as training of Gardaí and legal practitioners in taking evidence from eligible witnesses, the right of the accused to a fair trial and whether admitting the recording of the interview would compromise this right, undefined terms and lacunae in the legislation and lastly technical difficulties in the editing and playing of the recording.⁴²

6.29 In *The People (DPP) v XY* the accused was alleged to have forced a female with an intellectual disability into performing the act of oral sex with him. As a 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*. It is notable that section 4 of the 1990 Act does not have regard to any mental

³⁹ Section 16(1)(b) of the *Criminal Evidence Act 1992*.

⁴⁰ The Minister for Justice and Equality, Deputy Alan Shatter, in response to a parliamentary question on 18 May 2011, noted that "[d]edicated interview suites have... been established in six strategically chosen locations throughout the State, which are used by An Garda Síochána to record interviews with such victims. Work is also near completion on the establishment of a further facility". See Dáil Éireann Parliamentary Debates Vol.732 No.4, 18 May 2011 at 37.

⁴¹ "Jury directed to find man not guilty of sex assault on mentally disabled woman" *The Irish Times* 16 November 2010.

⁴² "Improved measures needed for vulnerable witnesses in court" *The Irish Times* 7 December 2010.

impairment a complainant may have. 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.” In directing the jury to acquit the defendant, he stated that the judiciary could not fill “a lacuna in the law” and having regard to case law, he had come to the conclusion 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 that the jurors had heard the complainant use the word “force” in her evidence on the DVD, 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. White J therefore directed that it was “with great reluctance” that the accused be acquitted on the basis that there was no evidence of assault or hostile act on his part and as such he directed the jury to return a verdict of not guilty.

(ii) The argument in favour of full pre-trial evidence

6.30 It could be argued that if the complainant’s evidence-in-chief is recorded before the trial, it would be desirable for her to be cross-examined at the same time, and that pre-recording of cross-examination could limit the distress associated with the experience. The Victorian Law Reform Commission noted, however, that time limits in trials involving sexual offences may weaken the argument that pre-recording of cross-examination provides a means by which complainants can be cross-examined while events are fresh in their minds.⁴³

6.31 Delahunt notes that as the courts move towards pre-trial deposition, legislation is required which will remove witnesses who are eligible for special measures under the Act from the trial process altogether by giving all of her evidence pre-trial.⁴⁴ She notes that:

“[f]or the complainant, having his or her testimony deposed soon after the alleged incident will mean not having to endure the considerable delay waiting for the case to come to court. For both the prosecution and defence, the knowledge that the evidence has been fully adduced will allow them to prepare their cases, and this will increase the choices open to the accused.”⁴⁵

⁴³ Victorian Law Reform Commission *Sexual Offences: Discussion Paper* (2001) at paragraph 8.21.

⁴⁴ “Improved measures needed for vulnerable witnesses in court” *The Irish Times* 7 December 2010.

⁴⁵ “Improved measures needed for vulnerable witnesses in court” *The Irish Times* 7 December 2010.

6.32 Delahunt suggests that:

“[w]e have legislation here which is 20 years out of date, which is limited in respect of the offences to which it applies, which contains archaic, undefined terms, which does not provide statutory guidelines for Gardaí or courts to work within, and which does little to safeguard the interests of either the complainant or defendant. We continue to endure a situation where our adversarial system risks imposing a secondary trauma on the complainant.”⁴⁶

6.33 The Commission has not yet come to any conclusion at this stage on this matter and therefore invites submissions on whether the *Criminal Evidence Act 1992* should be amended to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act to special measures in the criminal trial process.

6.34 *The Commission invites submissions on whether the Criminal Evidence Act 1992 should be amended to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act to special measures in the criminal trial process.*

(4) Training for personnel working in the criminal justice system

6.35 In order to ensure effective access to justice for persons with disabilities Ireland is obliged under Article 13(2) of the UNCRPD to promote appropriate training for those working in the field of administration of justice, including police and prison staff.

6.36 At present Gardaí receive training in relation to engaging with people with mental health difficulties as part of their overall training in the Garda College which includes input from external experts.⁴⁷ As submitted by Delahunt, there is an expectation on the Garda to gather all the information which will ground the offence at an early stage in the proceedings which places an undue burden on him/her to conduct full examination in chief questioning while taking a witness statement.⁴⁸ Delahunt asserts this is an unreasonable demand of the Garda Síochána for which they receive specialised training that

⁴⁶ “Improved measures needed for vulnerable witnesses in court” *The Irish Times* 7 December 2010.

⁴⁷ *Report of the Joint Working Group on Mental Health Services and the Police* (Mental Health Commission and An Garda Síochána 2009).

⁴⁸ Delahunt “Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992” 16 *The Bar Review* 1 February 2011, at 5.

no legal practitioner receives in this jurisdiction as of yet.⁴⁹ This point, according to Delahunt, was highlighted by prosecution counsel in *The People (DPP) v XY*. As she put it:

“[g]ardaí who conduct the section 16(1)(b) interviews are now more specifically trained than senior legal practitioners in the techniques of interviewing children and persons with an intellectual disability. Specific advocacy training for legal practitioners in this area is recognised as an ongoing need in respect of the advocacy training provided by the Honourable Society of Kings Inns and the Law Society.”⁵⁰

6.37 The provision of training for those working in the criminal justice process could cover the nature of disabilities and illnesses and how one's impairment might be better accommodated in the process. In doing so it could examine the methods by which the participation of eligible adults in court proceedings could be enhanced.⁵¹ Such efforts have already begun in the UK. The Bar Council has, for example, set up a network of barristers who have some experience and knowledge of cases involving people with learning disabilities.⁵²

(5) Concluding comments

6.38 The law must provide a robust and comprehensive framework for the redress of grievances. In providing an accessible criminal justice framework the law must take into account both the bio-medical diagnosis and the social construction of disability in order to tailor it to meet the individual needs of complainants. As recommended by the Commission in its 2005 Consultation Paper on Capacity, and proposed mental capacity legislation should ensure that a determination of a person's legal capacity complies with procedural fairness by ensuring that the person has appropriate assistance in terms of information, access to representation and other reasonable assistance which will enable them to understand the implications of the process and to make submissions in

⁴⁹ Delahunt “Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992” 16 *The Bar Review* 1 February 2011, at 5.

⁵⁰ Delahunt “Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992” 16 *The Bar Review* 1 February 2011, fn 32, at 5.

⁵¹ Elliott *Vulnerable and intimidated witnesses: A review of the literature* (Home Office Research and Statistics Directorate 1998) at 145.

⁵² Elliott *Vulnerable and intimidated witnesses: A review of the literature* (Home Office Research and Statistics Directorate 1998) at 145.

relation to their capacity.⁵³ The Commission considers that it is necessary that concerns over the reliability and credibility of evidence are seen as part of the overall objective in advocating a functional, situational assessment of capacity. In line with this approach, the Commission considers there is a presumption of capacity to give evidence which can only be rebutted if the complainant does not understand the nature of the oath and the consequences of taking the oath at the specific time when the decision to take the oath is made. The current definition of “mental impairment” which is based on a static assessment of capacity has made securing a prosecution under section 5 of the 1993 Act difficult. While there may need to be some reasonable accommodations made for people with disabilities this should not infer a lack of capacity to give evidence. The Commission considers that rules of evidence and procedure need to be sufficiently flexible in order to hear the accounts of complainants in a manner which recognises the individual circumstances of the complainant’s disability while ensuring the right to a fair trial and fair procedures for the accused.

6.39 The Commission therefore provisionally recommends the development of guidelines for those working in the criminal justice process in identifying current obstacles and examining methods by which the participation of eligible adults in court proceedings could be enhanced in consultation with the proposed Office of Public Guardian, to be established under the proposed mental capacity legislation, and the National Disability Authority.

6.40 *The Commission provisionally recommends the development of guidelines for those working in the criminal justice process in identifying current obstacles and examining methods by which the participation of eligible adults in court proceedings could be enhanced in consultation with the proposed Office of Public Guardian, to be established under the proposed mental capacity legislation, and the National Disability Authority.*

6.41 In the next Part, the Commission considers ways of enhancing the participation of witnesses and complainants in the criminal trial process through the assistance of support persons or intermediaries.

C Support persons

6.42 There are several ways of assisting witnesses which may be used to increase the reliability of relevant evidence by reducing the witness’s distress.

⁵³ LRC CP 37-2005 at paragraph 4.55.

Supports can be through the use of support persons and intermediaries.⁵⁴ The Law Reform Commission of Western Australia, in its *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* describes the role of support persons in the following way:⁵⁵

“[s]upport” can, of course, cover a wide range of activities. At its minimum it would usually involve accompanying a child to court and sitting near him or her either in court (or in a monitor room) when he or she is giving evidence. In the United States, where some very young children have given evidence, the support person has been the child’s mother who has held the child on her lap while the child was questioned. The role of the support person is to give the child some emotional security in a strange situation, thereby enhancing the child’s ability to withstand the ordeal of giving evidence. This is valuable for both child and prosecution. It is not the part of a support person to coach or prompt the child in what he or she has to say, but the role should not preclude a gently encouragement to “tell the judge what happened” when a child seems to freeze, or giving a soothing pat to a distraught witness. Experience will obviously determine acceptable limits to such support and provide guidelines for support persons.”

6.43 In Ireland, the National Advocacy Service for People with Disabilities which was formally launched on 30th March 2011 and provides independent, representative advocacy services for people with disabilities including where they are involved in court proceedings. The Personal Advocates as legislated for in the *Citizens Information Act 2007* assist people with disabilities in accessing essential social services and include making applications for services and submitting formal complaints if services to which the person is entitled are not provided. As already discussed in Chapter 3, the Commission is aware that Personal Advocates have accompanied parents with limited capacity to court where an application for a care order has been made.

(1) Intermediaries

6.44 An intermediary is an independent third party who may act as a “go-between” to facilitate communication between a witness who may require

⁵⁴ These options were examined by the New Zealand Law Commission in its *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996).

⁵⁵ Law Reform Commission of Western Australia *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Project No.87 1990) at paragraph 4.83.

supports and the court.⁵⁶ The role of an intermediary is to identify and address the needs of the witness and represent such needs at pre-trial plea and case management hearings as well as at trial. Essentially their role is to effectively liaise with the court as to how best the witness can communicate his or her testimony.⁵⁷

6.45 In Ireland section 14 of the *Criminal Evidence Act 2009* provides that:

“(1) Where -

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 17 years of age is giving, or is to give, evidence through live television link,

the court may, on the application of the prosecution or accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions be put to the witness be put through an intermediary, direct that such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

(3) An intermediary referred to in *subsection* (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.”

6.46 Recent initiatives have been undertaken in England and Wales to determine the efficacy of intermediaries. In 2007 pilot projects were carried out in six areas in order to assess the use of intermediaries in the criminal justice process with the aim of establishing a model for national implementation.⁵⁸ There were a number of difficulties identified with the implementation of the projects; namely:

- implementation suffered initially from insufficient national and local leadership across criminal justice organisations;

⁵⁶ Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011) at paragraph 3.44

⁵⁷ Delahunt “Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992” (2011) 16 *The Bar Review* 1, fn 35, at 6..

⁵⁸ Plotnikoff and Woolfson *The Go-Between: evaluation of intermediary pathfinder projects* (June 2007) as cited in Northern Ireland Law Commission *Consultation Paper on Vulnerable Witnesses in Civil Proceedings* (NILC 4 2010) at paragraph 6.34.

- few problems were encountered with recruitment of intermediaries, although some skill-gaps were identified;
- it was not possible to determine what influence the use of intermediaries had on case outcomes, however, respondents to the evaluation considered that at least half of the cases in the pilot project would not have reached trial stage without the use of an intermediary;
- respondents considered that intermediaries' contribution at the investigative stage was greatest when they had adequate time for witness assessment and for assisting the police in planning;
- the number of requests for intermediaries was lower than expected. Reasons for a lack of usage included: poor levels of awareness, misinterpretation of eligibility criteria; over-estimation of advocates' competence; and under-estimation of the extent of communication difficulties;
- operational difficulties and cultural resistance were identified amongst some in the criminal justice system;
- it was not possible to assess the demand for intermediaries but overall the pilot projects indicated positive contributions of the use of intermediaries in facilitating vulnerable witnesses to access justice and to furthering the government's objectives for the criminal justice system.

6.47 Despite the difficulties encountered the evaluation identified a number of benefits. Feedback from witnesses and carers in trial cases was positive with carers considering that intermediaries not only facilitated communication but also helped witnesses cope with the stress of giving evidence. Appreciation of the role was almost unanimous across the judiciary and the criminal justice personnel. Furthermore, the following, as identified by the Northern Ireland Law Commission,⁵⁹ were considered as positive in the evaluation:

- potential assistance in bringing offenders to justice - 13 cases (involving 15 witnesses for whom intermediaries were appointed) ended in a conviction, five after trial;
- increasing access to justice - participants in the projects estimated that at least half of 12 trial cases would not have reached trial without the use of an intermediary;

⁵⁹

Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011) at paragraph 3.49.

- potential cost savings - it was considered that the use of an intermediary had the potential to save court time by keeping witnesses focused, reducing the time that might otherwise have been needed to question them;
- benefits at trial - participants reported a number of benefits during the trial stage, including: facilitating communication in a neutral way, through informative reports and appropriate interventions; and ensuring that witnesses understood everything said to them, including explanations and instructions.

Deciding to roll-out the use of intermediaries nationally, it was decided to adopt the following measures in order to avoid the difficulties identified in the evaluation. It was suggested that:

- central guidance should be provided, together with a clear allocation of local responsibility for implementation;
- links between implementation of intermediaries and other initiatives should be highlighted;
- awareness raising needed to take place amongst the criminal justice community and “mind-set” obstacles to intermediary use tackled;
- eligible witnesses should be identified at the earliest opportunity; and
- improvements should be made to pre-trial planning and it should be ensured that ground rules for intermediary use are discussed before trial.⁶⁰

(i) Concluding comments

6.48 Facilitated communication is undoubtedly controversial in nature. The Commission considers that the use of intermediaries can have great importance in the trial process in making the judicial system more accessible for witnesses considered eligible under the Act. At the same time the Commission also considers that care should be taken to ensure that methods employed by intermediaries are effective. The use of intermediaries must also be balanced with the defendant’s right to a fair trial under Article 6 of the ECHR while ensuring that witnesses who give evidence are enabled to do so in a manner which enables their full participation in the trial process. The Commission therefore invites submissions on the current use of intermediaries under section 14(1) of the *Criminal Evidence Act 1992* and their efficacy as a special measure in criminal proceedings.

⁶⁰ Plotnikoff and Woolfson *Measuring Up? Evaluating implementation of government commitments to young witnesses in criminal proceedings* (National Society for the Prevention of Cruelty to Children 2009) at 14.

6.49 *The Commission invites submissions on the current use of intermediaries under section 14(1) of the Criminal Evidence Act 1992 and their efficacy as a special measure in criminal proceedings.*

(2) Comparative overview of support measures

(1) England and Wales

6.50 In June 1998, the UK Government published the Report *Speaking Up for Justice* which made 78 recommendations to assist vulnerable or intimidated witnesses to give evidence in court to facilitate their right to access justice.⁶¹ The Report acknowledged that some individuals, such as children, adults living with a mental disorder or significant impairment of intelligence or social functioning, adults living with a physical disability or disorder and people who are suffering fear or distress because they must give evidence, experience particular difficulties while giving evidence in court. Such difficulties might dissuade people from engaging in court proceedings and the justice system in general.

6.51 Amongst the recommendations in the Report was the use of “special measures” which is a model of giving oral evidence in a non-traditional manner. The types of “special measures” recommended in the Report included:

- the use of live television link to allow a witness to give evidence without having to appear in person;⁶²
- allow a witness to be accompanied by a supporter when giving evidence by television link,⁶³
- creating a statutory basis for the use of screens in court proceedings;⁶⁴
- giving the court the power to restrict the press from reporting details of a case,⁶⁵

⁶¹ *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998).

⁶² *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) Recommendation 36 at paragraph 8.7.

⁶³ *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) Recommendation 37 at paragraph 8.10.

⁶⁴ *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) Recommendation 38 at paragraph 8.17.

- allowing for video-recordings of a witness's evidence-in-chief;⁶⁶
- the use of methods to assist the witness to communicate whilst in court, including interpreters, communication aids, techniques and intermediaries;⁶⁷ and
- creating a statutory basis for the court to have the power to require the removal of wigs and gowns in appropriate circumstances.⁶⁸

(i) The Youth Justice and Criminal Evidence Act 1999

6.52 The need to offer effective support and assistance in giving evidence to those who may be particularly vulnerable was addressed in Part II of the *Youth Justice and Criminal Evidence Act 1999* which enables the court to order one or more of a range of measures to assist the witness in court. Vulnerable witnesses are defined by section 16 of the 1999 Act. Children are defined as vulnerable by reason of their age⁶⁹ while other vulnerable witnesses include witnesses who have a mental disorder as defined by section 1(2) of the *Mental Health Act 1983*,⁷⁰ witnesses significantly impaired in relation to intelligence and social functioning⁷¹ and physically disabled witnesses.⁷² Intimidated witnesses are defined by the 1999 Act as those suffering from fear or distress in relation to

⁶⁵ *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) Recommendation 39 at paragraph 8.24.

⁶⁶ *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) Recommendation 41 at paragraph 8.48.

⁶⁷ *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) Recommendation 47 at paragraph 8.77.

⁶⁸ *Speaking Up for Justice: Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) Recommendation 49 at paragraph 8.80.

⁶⁹ Section 16(1)(a)(i) of the *Youth Justice and Criminal Evidence Act 1999*.

⁷⁰ Section 16(2)(a)(i) of the *Youth Justice and Criminal Evidence Act 1999*.

⁷¹ Section 16(2)(a)(ii) of the *Youth Justice and Criminal Evidence Act 1999*.

⁷² Section 16(2)(b) of the *Youth Justice and Criminal Evidence Act 1999*.

testifying in the case.⁷³ Complainants, for example, in sexual assault cases are considered intimidated witnesses.⁷⁴

6.53 The special measures available to vulnerable and intimidated witnesses which correspond to the recommendations made by the 1998 Home Office Report, include:

- screens, to shield the witness from the accused;⁷⁵
- giving evidence by live-link;⁷⁶
- evidence given in private;⁷⁷
- removal of wigs and gowns;⁷⁸
- video-recorded evidence in chief;⁷⁹
- video- recorded cross-examination or re-examination;⁸⁰
- examination of witness through an intermediary for vulnerable witnesses;⁸¹
- aids to communication;⁸²
- clearing the public gallery in sex offence cases and cases involving witness intimidation.

6.54 It is possible in some circumstances for all of the complainant's evidence, their evidence-in-chief, cross-examination and any re-examination, to be recorded at a special hearing prior to the trial.

6.55 The 1999 Act also amended the law on competency. This provides that as a general rule, all people, whatever their age, are competent to act as witnesses unless they cannot understand questions asked of them in court or

⁷³ Section 17(1) of the *Youth Justice and Criminal Evidence Act 1999*.

⁷⁴ Section 17(4) of the *Youth Justice and Criminal Evidence Act 1999*.

⁷⁵ Section 23 of the *Youth Justice and Criminal Evidence Act 1999*.

⁷⁶ Section 24 of the *Youth Justice and Criminal Evidence Act 1999*.

⁷⁷ Section 25 of the *Youth Justice and Criminal Evidence Act 1999*.

⁷⁸ Section 26 of the *Youth Justice and Criminal Evidence Act 1999*.

⁷⁹ Section 27 of the *Youth Justice and Criminal Evidence Act 1999*.

⁸⁰ Section 28 of the *Youth Justice and Criminal Evidence Act 1999*.

⁸¹ Section 29 of the *Youth Justice and Criminal Evidence Act 1999*.

⁸² Section 30 of the *Youth Justice and Criminal Evidence Act 1999*.

cannot answer them in a way that can be understood, with, if necessary the assistance of any of the special measures above. This enables the witness to receive assistance from an intermediary in explaining questions and communicating answers “so far as is necessary to enable them to be understood by the witness or person in question”.⁸³ In 2008 there was full roll out of the use of intermediaries in England and Wales. As Delahunt notes the criminal courts in England and Wales introduced the use of intermediaries in order to resolve the difficulties inherent in protecting the rights of the witness and the accused.

(ii) Directions for special measures

6.56 Section 19(1) of the *Youth Justice and Criminal Evidence Act 1999* obliges the court to take into account the manner in which witnesses are enabled to give their best evidence and imposes an obligation on judges and magistrates to raise their own motion as to whether special measures should be used if the party has not applied for them. The 1999 Act lists a number of factors that the court must, or should, take into account when assessing whether the witness qualifies for any of the special measures. These include:

- the nature and alleged circumstances of the offence;
- the age of the witness;
- the social and cultural background and ethnic origins of the witness;
- any religious beliefs or political opinions of the witness;
- the domestic and employment circumstances of the witness; and
- any behaviour towards the witness on the part of the accused, their family or associates, or any other witnesses or co-accused.

6.57 When deciding eligibility, the court must consider the witnesses’ own views about the need for special measures. The court must also take into account the circumstances of the case and whether or not the special measures are likely to inhibit the evidence being effectively tested by any part to the proceedings.⁸⁴

6.58 Section 32 of the *Youth Justice and Criminal Evidence Act 1999* provides that where on a trial on indictment evidence has been given in accordance with a special measures direction, the judge may give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

⁸³ Section 29(2) of the *Youth Justice and Criminal Evidence Act 1999*.

⁸⁴ Section 19(3) of the *Youth Justice and Criminal Evidence Act 1999*.

(iii) Criminal Procedure Rules 2011

6.59 The English *Criminal Procedure Rules 2011*, which came into force in England and Wales in October 2011, affect procedures used in magistrates' courts, the Crown Court, the Court of Appeal and the Criminal Division. The 2011 Rules consolidated with amendments the *Criminal Procedure Rules 2010*, as amended by the *Criminal Procedure (Amendment) Rules 2010* and the *Criminal Procedure (Amendment No.2) Rules 2010*. The 2011 Rules amended the time limits for making applications, and giving notices in connection with, special measures for vulnerable witnesses. The time limits in rule 29.3 in making an application for a direction or order for special measures to assist a witness or defendant to give evidence were also extended.

(iv) The Coroners and Justice Act 2009

6.60 The *Coroners and Justice Act 2009* made a number of amendments which came into force in June 2011 to the special measures provisions in the *Youth Justice and Criminal Evidence Act 1999*. Section 98 extends automatic eligibility for special measures to witnesses under the age of 18 as opposed to 17. Section 100 amends section 21 of the 1999 Act by removing the category of child witnesses in need of 'special protection'. The effect of this change is to place all child witnesses in the same position regardless of the offence and as such there will be a presumption that they will give their evidence-in-chief by a video-recorded statement and any further evidence by live link unless the court is satisfied that this will not improve the quality of the child's evidence. In addition, subject to the agreement of the court, child witnesses may 'opt out' of giving their evidence by either a video-recorded interview as evidence-in-chief or by means of live link or both. If they do wish to 'opt out' there is a presumption that they will give their evidence in the court room from behind a screen. Should they not wish to use a screen, they may also be allowed to 'opt out' of using it, subject to the agreement of the court. Section 105 amends the definition of a child in section 35 of the 1999 Act to mean a person under the age of 18 years as opposed to 17 years.

6.61 Section 101 inserts a new section 22A into the 1999 Act and makes special provision for adult complainants in sexual offence trials in the Crown Court. It provides, on application by a party to the proceedings, for the automatic admissibility of a video-recorded statement as evidence-in-chief under section 27 of the 1999 Act, unless this would not be in the interests of justice, or would not maximise the quality of the complainant's evidence. Witnesses are eligible for this assistance⁸⁵ if they suffer from a mental disorder

⁸⁵ Section 16(2) of the *Youth Justice and Criminal Evidence Act 1999*.

within the meaning of mental health legislation⁸⁶ or otherwise have “significant impairment of intelligence and social functioning”. Section 102 amends section 24 of the 1999 Act. When the court directs a live link special measure it can also direct that a person specified by the court which is essentially someone who supports a witness, can accompany the witness when the witness is giving evidence by live link. Section 103 amends section 27 of the 1999 Act which relaxes the restrictions on a witness giving additional evidence-in-chief after the witness’s video-recorded statement has been admitted.

6.62 In England and Wales, section 28 of the *Youth Justice and Criminal Evidence Act 1999*, if implemented, will introduce pre-recorded cross-examination and re-examination in all cases where examination-in-chief is being provided by means of video recording.⁸⁷ The recording must be made in the absence of the defendant but in circumstances where he can see and hear the witness being examined and communicate with his legal representative.⁸⁸ Once with witness has been cross-examined, they may not be called back for further cross-examination without leave of the court.⁸⁹ Leave may be granted only if a new matter has arisen which the party seeking further cross-examination could not have discovered with reasonable diligence before the original recording, or if for some other reason the proposed cross-examination is in the interests of justice.⁹⁰ Pre-recorded cross-examination is currently not available and so witnesses who have made a recording suitable for use as evidence-in-chief must still attend court to be cross-examined, unless the parties agree to the admission of evidence⁹¹ or their evidence can be admitted in statement-form under the hearsay provisions of the *Criminal Justice Act 2003*.⁹²

(2) Northern Ireland

6.63 In Northern Ireland the provision of supporters have been put on a statutory footing in criminal proceedings. In its *Consultation Paper on Vulnerable Witnesses in Civil Proceedings*, the Northern Ireland Law Commission noted that the “use of supporters appears to be a useful method of

⁸⁶ Mental disorder is defined as “any disorder or disability of the mind” in section 1(2) of the *Mental Health Act 1983*, as amended by the *Mental Health Act 2007*.

⁸⁷ Section 28(1) of the *Youth Justice and Criminal Evidence Act 1999*.

⁸⁸ Section 28(2) of the *Youth Justice and Criminal Evidence Act 1999*.

⁸⁹ Section 28(5) of the *Youth Justice and Criminal Evidence Act 1999*.

⁹⁰ Section 28(6)(a) or (b) of the *Youth Justice and Criminal Evidence Act 1999*.

⁹¹ Section 27(4)(ii) of the *Youth Justice and Criminal Evidence Act 1999*.

⁹² Rook and Ward on *Sexual Offences Law & Practice* 4th ed (Sweet & Maxwell 2010) at 790.

assisting witnesses in civil proceedings, though it should be noted that there may be a financial impact in making a recommendation of this nature if supporters were to be provided by agencies or organisations.”⁹³

6.64 The provisions of the *Youth Justice and Criminal Evidence Act 1999* in England and Wales have been replicated in the *Criminal Evidence (Northern Ireland) Order 1999*. Adults are eligible for special measures in two circumstances. Under Article 4, witnesses other than the accused who suffer from a mental disorder within the meaning of the *Mental Health (Northern Ireland) Order 1986* or otherwise have a significant impairment of intelligence or social functioning or who suffer from a physical disability or a physical disorder may be eligible for special measures. The types of special measures available to eligible adults under the Act are the same as those for children which include screening the witness from the accused; giving evidence by live-link; giving evidence in private; video-recording of evidence in-chief; video-recording of cross-examination and re-examination (the provision of which has yet to be commenced); using an intermediary to examine the witness and using aids to assist communication. Under Article 5, witnesses other than the accused whose evidence may be compromised by fear or distress caused by testifying are also eligible for all types of special measures excluding the use of intermediaries and the use of aids of communication. In a trial of indictment, under Article 20, the judge must give the jury a warning if he or she feels necessary to ensure that the fact that the special measures were used does not prejudice the accused's right to trial in any way.

6.65 As noted above, in criminal proceedings in Northern Ireland, provision has been made under Article 16 of the *Criminal Evidence (Northern Ireland) Order 1999* for certain witnesses to give their evidence during cross-examination and re-examination by way of video-recording if they have given their evidence-in-chief by way of video-recording. This provision has yet to be brought into force. The Northern Ireland Law Commission in its *Report on Vulnerable Witnesses in Civil Proceedings* noted that the fact that the provision has yet to be successfully implemented in criminal proceedings, considered that it would be unwise to recommend that video-recorded cross-examination and re-examination is made available for eligible witnesses in civil proceedings but advised that it would reconsider this position should the provision be commenced in the criminal context.⁹⁴

⁹³ Northern Ireland Law Commission *Consultation Paper on Vulnerable Witnesses in Civil Proceedings* (NILC 4 2010) at paragraph 6.45.

⁹⁴ Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011).

6.66 Under Article 18 of the *Criminal Evidence (Northern Ireland) Order 1999*, the court may authorise the use of communication aids to help witnesses overcome difficulties when being asked or answering questions. The measure is available to witnesses based on their eligibility under article 4 of the Order. As such it is available to children, people who are living with a mental disorder or significant impairment of intelligence and social functioning, or those living with a physical disability or disorder. The Northern Ireland Law Commission, in, its *Consultation Paper on Vulnerable Witnesses in Civil Proceedings* referred to a case in which a man was convicted of sexually abusing severely disabled residents in a care home upon the evidence of residents who communicated by blinking or by indicating symbols on a computer. In the case, one resident blinked her eyes in response to yes or no questions put to her by the lawyers, while another resident used a pointer on a computer screen, operated by a joystick on her wheelchair to identify the accused and to indicate what he had done to her by using symbols of body parts.⁹⁵ The Northern Ireland Law Commission, in its Report, recommended that aids be included as a special measure for witnesses in civil proceedings.⁹⁶

(3) Scotland

6.67 In Scotland 'supporters' have been put on a statutory footing for attending court with a witness in order to provide support.⁹⁷ Video-recorded cross-examination or re-examination is not included as a special measure in Scotland. Intermediaries are not explicitly provided for in the *Vulnerable Witnesses (Scotland) Act 2004*, but the Act provides for Scottish Ministers to make secondary legislation to make provisions for additional special measures.⁹⁸ In 2007, the Scottish Government consulted on the possible use of intermediaries which was published in 2008 with the result that no action was taken on the issue due to the lack of consensus amongst those consulted.⁹⁹

⁹⁵ Northern Ireland Law Commission *Consultation Paper on Vulnerable Witnesses in Civil Proceedings* (NILC 42010) at paragraph 6.42.

⁹⁶ Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011) at paragraph 3.56.

⁹⁷ Section 22 of the *Vulnerable Witnesses (Scotland) Act 2004*.

⁹⁸ Section 271H of the *Criminal Procedure (Scotland) Act 1995* as inserted by section 1 of the *Vulnerable Witnesses (Scotland) Act 2004* in relation to criminal proceedings and section 18(1)(e) in respect of civil proceedings.

⁹⁹ *Consulting on intermediaries as a special measure for vulnerable witnesses in Scotland* (Government of Scotland Publication 2007) and *Consulting on intermediaries as a special measure for vulnerable witnesses: the use of intermediaries for vulnerable witnesses in Scotland: report on the analysis of*

(4) New Zealand

6.68 As noted by the Law Reform Commission of New Zealand, it would seem unlikely that the presence of support persons would either hinder the ascertainment of facts or impinge on the right of the accused to a fair trial. The Commission, in its *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses*, put forward that it would be useful to include a provision giving a presumptive entitlement to a support person for all complainants subject to the court's discretion.¹⁰⁰ The Commission advised that the judge in each case would decide on what role the support person could take in particular circumstances, depending on, for example, the age of the witness, the nature of the proceedings or offence, and the relationship between the witness and the defendant in a criminal case.¹⁰¹

6.69 In New Zealand, the introduction of intermediaries was rejected as a result of divided views by the legal profession and concerns over the effectiveness of communicating a witness's answers to the court. There is, however, a provision for a limited kind of intermediary in the *Evidence Act 1908* but this applies only to complainants in sexual offence cases who are children or "mentally handicapped".¹⁰² Section 23E(4) of the 1908 Act provides that where a witness is to give evidence from out of court by closed-circuit television or from behind a partition by audio-link, the judge may direct that questions be put to the witness through a person approved by the judge. The provision does not permit the intermediary rephrase the questions or interpret the witness's answer. The Law Commission of New Zealand, however, put forward that witnesses should be able to use intermediaries whenever their assistance is required. The Commission proposed that in any case where the

"rational ascertainment of facts would be assisted by use of an intermediary, the judge should have a discretion as to who may act as intermediary. In many cases communication difficulties can be best addressed by lawyers and judges being sensitive to the

responses to the consultation (Government of Scotland Publication 2008) available at www.scotland.gov.uk.

¹⁰⁰ New Zealand Law Commission *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996) at paragraph 163.

¹⁰¹ New Zealand Law Commission *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996) at paragraph 164. See section 79(2) of the *Evidence Act 2006*.

¹⁰² Section 23E(4) of the *Evidence Act 1908*.

characteristics of particular witnesses, but in some cases the assistance of a specialist intermediary may be more effective.”¹⁰³

6.70 Furthermore the Law Commission of New Zealand recommended that intermediaries be allowed rephrase questions in line with the principles of the law of evidence to assist witness comprehension as they would have the skills to enable them to communicate with people who may have real difficulties understanding questions put to them in court. At the same time, the Commission did not recommend that intermediaries interpret the witness’s response to the court.¹⁰⁴

6.71 The Commission noted that procedural fairness should govern the use of intermediaries and in doing so put forward that it would be the judge’s role to give guidance to the intermediary on how they are to perform their function in a particular case and to oversee the fairness and accuracy if rephrased question.¹⁰⁵

6.72 Video-recorded cross-examination or re-examination is not included as a special measure in New Zealand.

(5) Australia

6.73 In Australia the use of a support person exists in Victoria¹⁰⁶ and Queensland,¹⁰⁷ South Australia,¹⁰⁸ the Northern Territory¹⁰⁹ and Western Australia.¹¹⁰ The Law Reform Commission of New South Wales, in its *Report on People with an Intellectual Disability and the Criminal Justice System*, proposed that a support person should be available to a witness with an intellectual disability, subject to the court’s leave and made reference to the submission of the Intellectual Disability Rights Service which stated that people who had a support person in court thought that it was very important and that

¹⁰³ New Zealand Law Commission *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996) at paragraph 172.

¹⁰⁴ New Zealand Law Commission *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996) at paragraph 173.

¹⁰⁵ New Zealand Law Commission *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996) at paragraph 175.

¹⁰⁶ Section 37C(3)(c) of the *Evidence Act 1958* (Vic).

¹⁰⁷ Section 21A(2)(d) of the *Evidence Act 1977* (Qld).

¹⁰⁸ Section 13(2)(c) of the *Evidence Act 1929* (SA).

¹⁰⁹ Section 21A(2)(c) of the *Evidence Act 1939* (NT).

¹¹⁰ Section 106R(4)(a) of the *Evidence Act 1906* (WA).

the role should be extended to include sitting with their clients in the witness box and being able to tell the judge and magistrate if the witness did not understand a question posed.¹¹¹

6.74 The Victorian Law Reform Commission, in its *Final Report on Sexual Offences*, recommended the following measures:

- abolishing the right to cross-examine complainants with a cognitive impairment;¹¹²
- establishing a specialist list in the Magistrates' Court to handle summary offences against people who have a cognitive impairment and committals in cases involving indictable sexual offences against these people;¹¹³
- assigning a designated judge in the County Court to list and manage all sexual offence cases involving offences against complainants with a cognitive impairment;¹¹⁴
- increasing the use of video and audio recording so that fewer complainants with a cognitive impairment have to give oral evidence-in-chief;¹¹⁵
- allowing all complainants (including complainants with a cognitive impairment) to give evidence by closed circuit television;¹¹⁶
- introducing a process for pre-recording evidence-in-chief and cross-examination of people who have a cognitive impairment;¹¹⁷ and

¹¹¹ New South Wales Law Reform Commission *Report on People with an Intellectual Disability and the Criminal Justice System* (1996) at paragraph 7.16.

¹¹² Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) recommendation 42.

¹¹³ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) recommendation 53.

¹¹⁴ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) recommendation 50.

¹¹⁵ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) recommendation 113.

¹¹⁶ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) recommendation 59.

¹¹⁷ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) recommendation 43.

- preventing the accused in a sexual offence case from cross-examining the complainant.¹¹⁸

6.75 The Victorian Law Reform Commission, in facilitating people with a cognitive impairment, also recommended that the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible in the case of questions asked of people with a cognitive impairment, that neither the context of a question nor the manner in which it is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and that the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.¹¹⁹

6.76 In terms of training, the Victorian Law Reform Commission noted a submission from the Disability Discrimination Legal Services 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.¹²⁰ The provision of such training would assist them to assess whether the person with the disability understands the questions being put to them. The Commission made a recommendation for prosecutor training, training of defence lawyers and judicial education programmes on issues that are central to sexual offence cases. The Commission recommended that such training include information on the problems which are common to people with a cognitive impairment in participating in the criminal justice process and how such difficulties might be overcome. Such training materials, according to the Victorian Law Reform Commission, should be developed with input from the Office of the Public Advocate.¹²¹

(6) Canada

6.77 At the same time that section 153.1 was added to the *Canada Criminal Code* in 1998 to create the specific offence of sexual exploitation of a

¹¹⁸ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) at paragraph 6.35.

¹¹⁹ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) recommendation 158.

¹²⁰ Victorian Law Reform Commission *Sexual Offences Final Report* (2004) at paragraph 6.38.

¹²¹ Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) at paragraph 6.39.

person with a disability, changes were made to the *Canada Evidence Act*¹²² and to the *Code*¹²³ to address the needs of persons with disabilities when they testify as witnesses. The purpose of these changes was to ensure the full and equal participation of persons with disabilities in the justice system and in particular in the criminal trial process. These changes included permitting persons with disabilities to testify behind a screen or with assistance from a support person or interpreter.¹²⁴ Changes also allow for a complainant with a disability to testify outside the courtroom or from behind a screen blocking her view of the accused yet allowing the accused and other participants to view her.¹²⁵ They also affirmed a presumption of testimonial competence for all adult witnesses. Furthermore, there is now the use of a screen device to block the view of the accused, but complainants are still expected to give evidence in the standard form of examination-in-chief and cross-examination.

D Special measures for defendants

6.78 In this section, the Commission examines the position of defendants who may require special assistance to ensure their full and equal participation in the criminal trial process. In Ireland defendants who may require special assistance in the trial process do not have the same statutory entitlement to the same range of supports as witnesses. The Commission considers that this could potentially be in breach of the right to a fair trial enshrined in the Constitution and in Article 6 of the ECHR.

6.79 Research suggests that defendants, like witnesses, who may have particular impairments face difficulties when confronted with the criminal justice process. Defendants who may require extra support may be:

- less likely to understand information about the caution and legal rights;
- more likely to make decisions which would not protect their rights as suspects and defendants, and

¹²² Sections 6 and 6.1 of the *Criminal Code 1985*, as amended by section 1 of *An Act to amend the Canada Evidence Act 1998*.

¹²³ Section 715.2 of the *Evidence Act 1985*, as amended by section 8 of *An Act to amend the Canada Evidence Act 1998*. This section provides for the admission of a video-taped interview made within a reasonable time after the alleged offence where a complainant is unable to testify because of a disability.

¹²⁴ Section 486(1.2) of the *Criminal Code 1985*.

¹²⁵ Section 486(2.1) of the *Criminal Code 1985*.

- more likely to be acquiescent and more likely to be suggestible.¹²⁶

(1) Article 6 of the ECHR

6.80 Article 6 of the ECHR sets out the accused's right to a fair trial. It states that everyone charged with a criminal offence should be presumed innocent until proved guilty by law,¹²⁷ and establishes five minimum rights for the defendant. These are:

- (a)** to be informed properly, in a language which he or she understands and in details, of the nature and cause of the accusation against him;¹²⁸
- (b)** to have adequate time and facilities for the preparation of his defence;¹²⁹
- (c)** to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;¹³⁰
- (d)** to examine or to have examined witnesses against him and to obtain the attendance and examination of witnesses on behalf under the same conditions as witnesses against him;¹³¹
- (e)** to have the free assistance of an interpreter if he cannot understand or speak the language used in court.¹³²

6.81 The minimum rights as set out in Article 6 of the ECHR are arguably violated where a defendant's impairment significantly inhibits his understanding and involvement in the trial and where the necessary supports to assist him in participating in the trial process are not provided. The UK's Joint Committee on Human Rights concluded that:

“[w]e are concerned that the problems highlighted by... [the] evidence could have potentially very serious implications for the

¹²⁶ Jacobson and Talbot *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Prison Reform Trust 2009) at 5.

¹²⁷ Article 6(2) of the *European Convention on Human Rights*.

¹²⁸ Article 6(3)(a) of the *European Convention on Human Rights*.

¹²⁹ Article 6(3)(b) of the *European Convention on Human Rights*.

¹³⁰ Article 6(3)(c) of the *European Convention on Human Rights*.

¹³¹ Article 6(3)(d) of the *European Convention on Human Rights*.

¹³² Article 6(3)(e) of the *European Convention on Human Rights*.

rights of people with learning disabilities to a fair hearing, as protected by the common law and by Article 6 ECHR. Some of this evidence also suggests that there are serious failings in the criminal justice system, which give rise to the discriminatory treatment of people with learning disabilities.”¹³³

(2) England and Wales

6.82 The current availability of Special Measures to vulnerable defendants in England and Wales when giving evidence is based on the inherent discretion of the Crown Court. The inherent powers under section 19(6) of the *Youth Justice and Criminal Evidence Act 1999* must be considered in the context of Article 6 of the ECHR which ensures a right to a fair trial for the accused which could mean that comparable Special Measures should be made available to a vulnerable defendant when testifying.

6.83 Defendants in general cannot give evidence in England and Wales by way of live link, and the courts do not have an inherent power to order the use of this particular means of giving evidence. However, for a limited class of vulnerable defendants where the use of a live link would enable them to participate effectively in their trial, the court may order the use of a live link. Section 33A-C of the *Youth Justice and Criminal Evidence Act 1999*, as inserted by section 47 of the *Police and Justice Act 2006*, is limited to accused persons under the age of 18 years where their ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by their level of intellectual ability or social functioning. For defendants over the age of 18 the courts may direct the use of a live link if he/she is unable to participate effectively in the proceedings as a witness because he/she suffers from a mental disorder within the meaning of the *Mental Health Act 1983*, or has a significant impairment of intelligence or social functioning.

6.84 As noted above, when implemented sections 33BA and 33 BB of the 1999 Act, as inserted by section 104 of the *Coroners and Justice Act 2009*, will enable the court to direct that certain vulnerable defendants may be assisted by an intermediary when they give evidence in court if this is necessary to ensure that the accused receives a fair trial. Pending implementation, the court will then be able to use its inherent powers to direct that a defendant be given the assistance of an intermediary.

6.85 In England and Wales, two cases are of particular relevance to the provision of supports to defendants who may require supports. Although they

¹³³ *A Life Like Any Other? Human Rights of Adults with a Learning Disability* (House of Lords/House of Commons Joint Parliamentary Committee on Human Rights 2008) at paragraph 212.

concern child defendants the significance for this discussion of adult defendants lies in the fact that the children's cognitive impairments were recognised as having direct implications for the conduct of the criminal proceedings.¹³⁴

6.86 In *S.C. v United Kingdom*¹³⁵ the European Court of Human Rights held that the right to fair trial under Article 6 of the Convention had been breached. The applicant, an 11 year old boy, with significant learning difficulties meant that he had insufficient understanding of the proceedings and their potential consequences.¹³⁶ The Court held that his right to a fair trial had been breached because he was not facilitated in giving an effective participation in his trial.

6.87 In the 2005 case of *R (TP) v West London Youth Court*,¹³⁷ the administrative court held that neither youth nor limited intellectual capacity on the part of the defendant would necessarily lead to a breach of the right to a fair trial; but that the court hearing the case should adapt its procedures to ensure the defendant can participate in the proceedings. The judge, in directing the minimum requirements for a fair trial, listed the following:

- (i) the defendant must understand what he is said to have done was wrong;
- (ii) the court must be satisfied that the claimant when he had done wrong by act or omission had the means of knowing that was wrong;
- (iii) the defendant must understand what, if any, defences are available to him;
- (iv) the defendant must have a reasonable opportunity to make relevant representations if he wishes;
- (v) the defendant must have an opportunity to consider what representations he wishes to make once he has understood the issues involved.

6.88 Furthermore, the defendant must also be able to give proper instructions and to participate by way of providing answers to questions and

¹³⁴ Jacobson and Talbot *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Prison Reform Trust 2009) at 8.

¹³⁵ *S.C. v United Kingdom* [2004] EWHC 263.

¹³⁶ The boy was said to have a low attention span and cognitive abilities that were consistent with a child of eight years.

¹³⁷ *R (TP) v West London Youth Court* [2005] EWHC 2583 Admin. Expert evidence put the defendant's cognitive ability below a boy of 10 years.

suggesting questions to his lawyers in the circumstances of the trial as they arise.¹³⁸

6.89 The judge outlined the following practical steps that could be taken to assist the defendant in participating in the criminal trial process. These included:

- (vi) keeping the claimant's level of functioning in mind;
- (vii) using concise and simple language;
- (viii) having regular breaks;
- (ix) taking additional time to explain court proceedings;
- (x) being proactive in ensuring the claimant has access to support;
- (xi) explaining and ensuring the claimant understands the ingredients of the charge;
- (xii) explaining the possible outcomes and sentences;
- (xiii) ensuring that cross-examination is carefully controlled so that questions are short and clear and frustration is minimised.¹³⁹

6.90 It has been suggested that in light of the European Court of Human Rights' judgment in *SC v United Kingdom*¹⁴⁰ "it may be appropriate, in certain circumstances, to consider use of an intermediary for defendants with communication needs."¹⁴¹ In the 2009 case *R (on application of C) v Sevenoaks Youth Court*¹⁴² it was established that while the youth court did not have a statutory power to appoint an intermediary, it had a duty to do so under common Law and the Criminal Procedure Rules 2005.¹⁴³

6.91 Furthermore, the Lord Chief Justice in England and Wales issued a practice direction in 2007 which outlined a range of measures that should be adopted in the criminal courts, where appropriate, "to assist a vulnerable defendant to understand and participate in... proceedings". The direction went

¹³⁸ *R (TP) v West London Youth Court* [2005] EWHC 2583 Admin, at paragraph 7.

¹³⁹ *R (TP) v West London Youth Court* [2005] EWHC 2583 Admin, at paragraph 26.

¹⁴⁰ *S.C. v United Kingdom* No. 60958/00.

¹⁴¹ *Intermediary Procedure Guidance Manual* (Criminal Justice System 2005) at paragraph 1.12.

¹⁴² *R (on application of C) v Sevenoaks Youth Court* (2009) EWHC 3088 (Admin).

¹⁴³ Under section 3.10(b) of the Criminal Procedure Rules, the court is required to consider arrangements which facilitate the participation of the defendant.

so far as to recommend that “the ordinary trial process should, so far as necessary, be adapted” for the purpose of helping a vulnerable defendant understand and participate in the proceedings.”¹⁴⁴ The importance of communication is highlighted by the practice direction’s recommendations for assisting vulnerable defendants. It states that:

“[a]t the beginning of the proceedings the court should ensure that what is to take place has been explained to a vulnerable defendant in terms he can understand... Throughout the trial the court should continue to ensure, by any appropriate means, that the defendant understands what is happening and what has been said by those on the bench, the advocates and witnesses.”¹⁴⁵

6.92 Furthermore, the court should ensure, so far as is practicable, that the trial is conducted in easily understood, clear language that the defendant can understand and that cross-examination is conducted by questions that are equally easily understood and short.¹⁴⁶

(3) Northern Ireland

6.93 On the issue of extending the use of intermediaries in civil proceedings, the Northern Ireland Law Commission in its *Report on Vulnerable Witnesses in Civil Proceedings* noted that:

“[i]n order to provide greater clarity regarding the use of intermediaries, the Commission considers that there would be merit in court rules or secondary legislation being produced which would offer assistance in relation to the role and function of intermediaries.”¹⁴⁷

6.94 The intermediary Special Measure completed national roll-out in 2010 and is available to all intimidated and vulnerable witnesses in England and Wales. The matching service for the Witness Intermediary Scheme transferred to the National Policing Improvement Agency on 10 August 2009 which coordinates the use of intermediaries. The recruitment and registration process which ensures that intermediaries are qualified and vetted continues to be

¹⁴⁴ *Further Practice Directions Applying in The Crown Court and Magistrates’ Courts* (Ministry of Justice 2007) at part III.30.1-3 available at www.justice.gov.uk.

¹⁴⁵ *Further Practice Directions Applying in The Crown Court and Magistrates’ Courts* (Ministry of Justice 2007) at part III.30.11 available at www.justice.gov.uk.

¹⁴⁶ *Further Practice Directions Applying in The Crown Court and Magistrates’ Courts* (Ministry of Justice 2007) at part III.30.12 available at www.justice.gov.uk.

¹⁴⁷ Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011) at paragraph 3.51.

managed by the Office of Criminal Justice Reform. This right to support does not extend to support with communication throughout the trial. In Northern Ireland this measure is included in the *Justice Act (Northern Ireland) 2011*.¹⁴⁸

6.95 As highlighted by the Northern Ireland Law Commission in its *Consultation Paper on Vulnerable Witnesses in Civil Proceedings*¹⁴⁹ while the use of intermediaries can be an effective tool in providing assistance to witnesses in helping them understand proceedings and communicating to the court, a note of caution must be raised to ensure that intermediaries are fully trained and that their methods of assisting communication have results. While stressing the need to use caution, the Consultation Paper referred to the method known as “facilitated communication” in light of comments made by Dame Butler-Sloss in *Re D (Evidence: Facilitated Communication)*.¹⁵⁰ In this case a young man of 17 years who suffered from severe autism and epilepsy and who had a cognitive age of 2 years, alleged with the assistance of an intermediary that he had been sexually abused by his father. After an investigation carried out by the social services and police as well as the commencement of wardship proceedings, the allegations were discovered to be unfounded. During the course of the wardship proceedings Dame Butler-Sloss placed a caveat on the use of facilitated communication in noting the following:

“[f]acilitated communication is a process by which a facilitator supports the hand or arm of a communicatively impaired individual while using a keyboard or typing device. It has been claimed that this process enables persons with autism or mental retardation to communicate. Studies have repeatedly demonstrated that facilitated communication is not a scientifically valid technique for individuals with autism or mental retardation. In particular, information obtained via facilitated communication should not be used to confirm or deny allegations of abuse or to make diagnostic or treatment decisions. Therefore, be it resolved that the American Psychological Association adopts the position that facilitated communication is a controversial and unproved communicative procedure with no scientifically demonstrated support for its efficacy.”

¹⁴⁸ Section 104 of the *Coroners and Justice Act 2009* inserts section 33(b)(a) in the *Youth Justice and Criminal Evidence Act 1999* to provide for the use of an intermediary for defendants.

¹⁴⁹ Northern Ireland Law Commission *Consultation Paper on Vulnerable Witnesses in Civil Proceedings* (NILC 4 2010) at paragraph 6.37.

¹⁵⁰ *Re D (Evidence: Facilitated Communication)* [2001] 1 FLR 148.

6.96 The Commission has, in light of this discussion and the development in other jurisdictions, concluded that there is a case to be made for the introduction of pre-trial recording of the cross-examination of a defendant with an intellectual disability, and that this would be taken at the same time as evidence in-chief, and invites submissions on this.

6.97 *The Commission invites submissions as to whether pre-trial recording of the cross-examination of a defendant with an intellectual disability should be introduced, and whether this would be taken at the same time as evidence in-chief.*

CHAPTER 7 SUMMARY OF PROVISIONAL RECOMMENDATIONS

The provisional recommendations made by the Commission in this Consultation Paper are as follows.

7.01 The Commission provisionally recommends that the same functional approach to capacity 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 Commission also provisionally recommends that capacity to marry should generally include capacity to consent to sexual relations. The Commission also provisionally recommends that, consistently with the functional approach, capacity to consent to sexual relations should be regarded as act-specific rather than person-specific. [paragraph 2.44]

7.02 The Commission provisionally recommends, that consistently with the general presumption of capacity in the forthcoming mental capacity legislation, which would include 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*. The Commission also provisionally recommends that, in providing assistance to parents with disabilities, an inter-agency protocol is needed between the child protection services 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 and training that would assist parents with disabilities to care for their children. [paragraph 3.76]

7.03 The Commission provisionally recommends that national standards be developed concerning safeguards from sexual abuse for “at risk” adults, including protocols on cooperation between different agencies, including the Health Service Executive, the Health Information and Quality Authority, the proposed Office of the Public Guardian and the Garda Síochána. The Commission also provisionally recommends that, in developing such standards, a multi-agency approach be adopted similar to that adopted for the implementation of the National Guidelines for the Sexual Assault Treatment Units (SATUs). [paragraph 4.89]

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7.04 The Commission provisionally recommends 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. Consistently with this, therefore, 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, including the consequences;
- (b) to retain that information;
- (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). [paragraph 5.119]

7.05 The Commission provisionally recommends 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. [paragraph 5.120]

7.06 The Commission provisionally recommends that there should be a strict liability offence for sexual acts committed by a person who is in a position of trust or authority with another person who has an intellectual disability. 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 loco parentis to the victim; or any person who is, even temporarily, responsible for the education, supervision or welfare of the victim. [paragraph 5.121]

7.07 The Commission also provisionally recommends that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should cover all forms of sexual acts including sexual offences which are non-penetrative and sexual acts which exploit a person’s vulnerability. [paragraph 5.122]

7.08 The Commission provisionally recommends that a defence of reasonable mistake should apply, which would mirror that applied to sexual offences against children but that the defence should not be available to persons in positions of trust or authority. [paragraph 5.123]

7.09 The Commission provisionally recommends that the fact that the sexual offences in question occurred within a marriage or a civil partnership should not, in itself, be a defence. [paragraph 5.124]

7.10 The Commission invites submissions as to whether any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should provide a specific offence of obtaining sex with a person with intellectual disability by threats or deception. [paragraph 5.125]

7.11 The Commission provisionally recommends that the maximum penalty on conviction on indictment for the sexual offences involving a person with an intellectual disability should be 10 years imprisonment. The Commission also provisionally recommends that the consent of the Director of Public Prosecutions be required for any prosecution of such offences, as is currently the case under section 5 of the *Criminal Law (Sexual Offences) Act 1993*, bearing in mind that where a prosecution is brought the ultimate assessment of capacity will be matter for the jury in a trial on indictment. [paragraph 5.126]

7.12 The Commission invites submissions on whether the *Criminal Evidence Act 1992* should be amended to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act to special measures in the criminal trial process. [paragraph 6.34]

7.13 The Commission provisionally recommends the development of guidelines for those working in the criminal justice process in identifying current obstacles and examining methods by which the participation of eligible adults in court proceedings could be enhanced in consultation with the proposed Office of Public Guardian, to be established under the proposed mental capacity legislation, and the National Disability Authority. [paragraph 6.40]

7.14 The Commission invites submissions on the current use of intermediaries under section 14(1) of the *Criminal Evidence Act 1992* and their efficacy as a special measure in criminal proceedings. [paragraph 6.49]

7.15 The Commission invites submissions as to whether pre-trial recording of the cross-examination of a defendant with an intellectual disability should be introduced, and whether this would be taken at the same time as evidence in-chief. [paragraph 6.97]



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