Law Reform Commission of Ireland

Seminar on 'Sexual Offences and Capacity to Consent'

Opening remarks of the chairman

This issue is of serious importance to many people. The consultation paper published by the Law Reform Commission indicates that there may be around 26,000 or more adults who may have issues over their capacity to consent to sexual relations. Their carers need clarity as to the law that will come to govern this area. That law must be humane and it must be cast, as far as possible, in acceptable language.

In regulating human conduct related to sexuality it has always been permissible for the legislation to take into account that relations on an emotional and physical level between lovers and potential lovers can operate at any level from romance to violence. Some have referred to the interaction of men and women in this sphere as a battleground and while this language is used figuratively it is regrettable to see how the excess strength of the typical male over the typical female has been abused. That slight difference in physical power has been exploited over the ages by men. While the differing physiognomy of men and women is not a cause for different treatment as to capacity to consent to sexual relations, it offers a warning that where people are less empowered, they are more liable to exploitation the less power they have.

Children are among those with a lesser understanding of the battleground of sexual attraction. It takes little for an informed individual in the Ireland of 2011 to realise how that has been and can be exploited. In assessing mental capacity, psychologists often refer to a person as having a mental age that is less than their physical age. While this is rarely accurate as a guide to functioning, it helps in that warns us that adults with capacity issues can be left unempowered and adrift in the event of exploitation.

A judge rarely has any special expertise in framing legislation or in assessing how the law must offer provision for the protection of particular individuals in particular circumstances. The task of adjudication, instead, involves the necessity to listen and to absorb information rapidly. That, it seems to me, is my function today as chairman of this seminar. But a judge is expected to know how the law works and to understand how the law functions it helps to know where the law has come from and what motivation led to its formulation in the first instance. So, let me speak about that for a moment or two.

In the distant past, our system of criminal law, inherited from England, rarely had written rules. It was based instead on judge-made

laws based on the need to intervene where notions of fairness indicated that more than personal misconduct had occurred but that, instead, wrongs which struck at the heart of an ordered society were required to be stopped and punished. The exploitation of those who are less empowered necessitated intervention. In the context of capacity to resist unwanted sexual overtures, children were very much placed in the category of the vulnerable in need of protection. From very early on, we have legislation stating when a child might marry; typically different ages for boys and girls. These rules derived from Canon Law, in the first instance. We also have enactments which declared that sexual intercourse below a certain age was to be punished as against the adult because it was clearly felt that those who were grown up were exploiters in that situation. Before any legislation eventually came to be enacted, capacity was at the heart of the old judge-made common law. Age mattered but only as an indication of what capacity a child might have as a matter of commonsense presumption. People in the past were perhaps more protected than they are now, but perhaps not. In England the law was elevated by some as a form of faith. Where the law ruled, peace reigned was the belief. Thirty years ago, looking for the law courts in London, I walked past Edwin Lutyens amazing creation, the Royal Courts of Justice on the Strand, because I thought it was a church. The fiction of the time illustrates this feeling. In one Victorian novel, Conan Doyle's fictional detective Sherlock Holmes and his friend Dr Watson are in a train going to the scene of a crime. Watson remarks on the peacefulness of the countryside. Holmes stops his reverie by pointing out that in the ignorance of the law, the quiet cottages were likely to be harbouring grave crimes shrouded and protected by being out of the reach of justice.

Holmes was right, as usual. It is when people can get away with nastiness that the dark side of human nature dominates. It remains the case that it is within the home that children remain most at danger from sexual exploitation. Most of the cases I have seen since starting practice in 1979 have been uncles and those in the place of uncles like neighbour friends, but a fair few fathers, grandfathers and brothers too. Children in care, in homes as we used to say, may be thought of a doubly vulnerable: vulnerable in understanding and vulnerable because someone else is in control of them. Those with capacity issues demand to be considered in the context often of this double vulnerability, but one which is heightened as their capacity, their ability to fight back it might be called, may never be enhanced through growth to adulthood.

A short note is now appropriate on how the law developed, where it came from, went to and how the Law Reform Commission propose that it should be recast. In earliest times, capacity governed when it was lawful to have sexual relations with a child. The issue before the court of trial would have been whether the girl, homosexual relations

were separate, knew what was being done was sexual in nature and thus the question was whether she could truly consent. Without understanding, capacity to consent was absent. Coupled to capacity came the difficult question of capacity to give evidence; the principle that only those who could understand the nature of an oath could be sworn to give evidence. Bizarre cases abounded the like of which we would imagine we would never see today, such as the singing teacher who proposed a procedure to improve the voice and whether consent based on this fraud was valid. Eventually, a kind of summation came about through the Supreme Court of Victoria, where in R v Morgan [1970] VR 337 two tests were proposed: firstly, did the girl have sufficient knowledge and understanding to realise that what was proposed to be done was the physical act of penetration or, if that could not be proven, secondly, that the act of penetration was of a sexual character as distinct from an action of a totally different character. In reality, this matters little because although the case represents a summation of the common law, long before it was decided it had become realised by legislators that a clear rule, an age of consent, was what was needed. For those with a deficit in understanding into adulthood, and in the absence of legislation, the rules so summarised remained important.

Looking back, the age of consent was startlingly young, 12 years old in some countries. As late as the Criminal Law Amendment Act 1885, the age of consent was 13; but this was an improvement because it also provided for a lesser offence between that age and the age of 16. In Ireland, we increased those ages to 15 and 17 in the Criminal Law Amendment Act 1935. That legislation when it came to provide for those with capacity issues irrespective of age, the issue before us today, carried problems in abundance. It forbade only “carnal knowledge”, sexual intercourse, another Act forbade buggery but nothing forbade lesser acts; it made rape a defence, thus allowing the accused to seek a severance of a rape/capacity indictment because he was prejudiced in his defence by the two charges being tried together; and it used insulting terms like “idiot”, “imbecile” “feebleminded”. That was bad enough, but what was worse was that no one really knew what these terms meant, despite definition in the Mental Deficiency Act 1913, because from the 1970s at least, psychologists did not use such words. Consequently, the prosecution lawyers were at sea in proposing proof of a core element of the offence – that the girl lacked capacity to consent. One might be better off laying a common law charge. The 1885 legislation gave a defence to the under-age charge that the accused had reasonable cause to believe that the girl was over 16, in the 13 to 16 charge, while no such defence was provided for in the under 13 category. The 1935 Act gave no such defence. Was it to be implied under the general principle that every criminal offence has a mental element? Last Monday, having dealt with the 15 to 17 category years before, the same question came before the Supreme Court for the under 15 category. The capacity charge carried an

implied defence that the accused was married to the woman, because in those circumstances sexual intercourse was not unlawful; based on the words "unlawfully and carnally knows". This is not impressive.

The Criminal Law (Sexual Offences) Act 1993 was an improvement. The law became gender neutral, not just girls; the offence was of buggery or sexual intercourse with a person who is "mentally impaired"; and it carried a defence that a person "did not know and had no reason to suspect that the person…was mentally impaired". The core definition of being "mentally impaired" meant suffering from "a disorder of the mind… of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation". It also included, explicitly, the implied marriage defence. How well has this law worked? That after all is a key question and, regrettably, it cannot be answered. We do not collate statistics in criminal cases in this country. One registrar of the Central Criminal Court, Liam Conmey, now retired, regularly collated and published to the judiciary the results of rape and attempted rape charges. His statistics were very useful; see http://www.ijls.ie/test/Articles/IJLS_Vol_1_Issue_1_Article_1_Charleton.pdf. One feature of the time of James Hamilton as our Director of Public Prosecutions has been the enhancement of the prosecution policy unit of that office. From there we see a snapshot of the difficulties in the prosecution of such cases. In a sample size 17 cases of intellectual disability presented as files for direction as to prosecution, prosecutions were initiated in 24% of cases. In another sample from 2005 involving 11 cases, there were no prosecutions. It is worth quoting the reasons:

> *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, 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.(Information provided to the Law*

> *Reform Commission and included in the consultation paper at paragraphs 6.09-6.11)*

So it is not easy to prosecute any case of this kind and there are clearly problems in all sexual violence/ sexual exploitation cases. But why precisely is a matter that we might discuss here. Of importance in the absence of study on a statistical basis are anecdotes: how do people feel approaching a law worded in this way, as carers, as prosecutors, as police, as victims? What are its advantages and disadvantages?

Central to the perceived need for reform is the issue of the central definition. Where the law moves from a medical based definition to a social policy definition it begins to recognise the entitlement of all adults, including those living with a disability, to sexual expression and self-determination. As the United Nations General Assembly resolution on the rights of persons with disabilities put it:

> *Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever their 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 Norman and as full as possible.*

In the consultation paper, this is reflected in a proposal to define capacity on the basis of ability to understand the information relevant to engaging in a sexual act, including the consequences; to retain that information; to weigh up that information; and to communicate a decision. This is not so different, perhaps, the old common law test of capacity to consent. Is such a law an improvement on what we have? I genuinely ask, not rhetorically, because a debate now is important and there is the expertise gathered in this room to see where this will bring us in practical terms. Making the law attractive or acceptable in language is one issue, making a law that will work is crucial because otherwise the vulnerable have no protection. Have the proposals struck the right balance? One thing which is hard to debate about the proposals is that the law if so reformed will cover all sexual acts.

However the Oireachtas frames the law, there will remain other practical problems. One of these is the issue of how a person with capacity issues is to appear in court. Under the 1935 law, everyone apart from children had to take an oath or else they could not give evidence. The practice used to be to instruct a child or disabled person before they went into court. The instruction involved the difference between a lie in ordinary circumstances, such as in the family or in work, and a lie having promised God to tell the truth. Not easy. If a disabled person could pass that test, then under old definitions they were no longer a person under the law's protection.

This was a disaster. Fortunately, it was changed so that anyone who was disabled or a child who could give an intelligible account of events was entitled to give evidence without an oath. Then there was the introduction of the long-distance witness. A person with capacity issues and those under 17 can since the 1990s, the latest incarnation being the Criminal Evidence Act 2009 s 14, can use an intermediary and can give evidence on a video-link from outside the courtroom; the place where the accused will be. Can this facility be increased? This is one of the core issues for discussion. As a former criminal barrister, I wonder about considering these issues as a matter of facilitation and not thinking about their impact. The further you get from the real, live, appearance of a person in a court telling their story, the more the prosecution case can be weakened. I have seen video link work, and there have been times as prosecutor that I was grateful that it was there, but on other occasions I wondered about it. Putting a distance between the victim and the jury could on occasion be less than helpful. There can be occasions, however, where without facilitators, without video-link, you will have no witness. Just how far are we prepared to go? Is there a balance to be struck and if so what are the competing factors? For instance, I might mention that the upset of apparently not being believed can be very serious. Going to court is not always a cathartic experience: the case must be proved beyond reasonable doubt, in sexual exploitation or violence cases a measure of corroboration really helps, and you are not always going to win. A measure to improve communication may weaken the case or it may enable a case that otherwise would never have been brought. Again, it is an issue to be debated.

The final matter I want to touch on is the issue of what is a fair defence. No defence, the Law Reform Commission propose, where the accused is in a position of trust or authority. This is in reality, I believe, going to cover a large number of potential defendants, maybe even a majority. I may be wrong about this, completely wrong, and that is the reason for inviting views in a seminar such as this. For others, there will be a defence that the accused believed on reasonable grounds that the victim had capacity. The burden of proof would be on the accused. Recently, there was a clarification of the law on defence burdens by the Court of Criminal Appeal in The People (DPP) v Smyth and Smyth. While that was a drug dealing case, one involving handling a closed package containing controlled drugs, the statutory defence was of not knowing or having reason to believe that the package contained a prohibited drug. The burden on the accused was to raise a reasonable doubt. This had practical consequences: it removed from the prosecution the duty of disproving any doubt on that issue; it required the accused to prove a reasonable doubt through an attack on the prosecution proofs or by giving evidence; and it meant that a direction of no case to answer could never be given on this point. I quote:

The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty. Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the Court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted… The Court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence…In consequence, the Court considers that an evidential burden of proof is cast on the accused by s. 29 of the Misuse of Drugs Act 1977, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. This is not a burden merely of adducing evidence. It is legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt. This has consequences for the trial of charges based on possession of a controlled drug. The prosecution must prove possession as against the accused. They must also prove that the substance in question was a controlled drug as defined in the Misuse of Drugs Act 1977, as amended. Regulations may need to be proven by handing in an official copy of them. These elements must be proven by the prosecution beyond all reasonable doubt. A burden is then cast on the accused to make out a reasonable doubt in accordance with s. 29. This may be done by pointing to a weakness in the prosecution case, by reference to a statement made to the gardaí, or by the accused himself giving evidence. Because this is a legal burden of proof, the decisions as to what evidence on that issue will be sufficient so as to raise a reasonable doubt are for the accused. He must decide if he has put sufficient evidence by way of proof to raise a reasonable doubt before the jury. This carries practical consequences.

Perhaps this analysis will become of universal application in criminal cases casting a burden of proof on the accused. Consistency would assist and help to guide the way in this difficult area.

So, there is much to debate. These are only a few issues. I commend the brilliant presentation of the issues in the consultation paper of the Law Reform Commission. Our thanks are due to the experts who are to present views today in the form of papers or structured remarks: Sir James Munby of the Law Reform Commission of England and Wales; Dr Fintan Sheerin; our own Patricia Rickard-Clarke; Freida Finlay of Inclusion Ireland; James Hamilton, the Director of Public Prosecutions; and all of you in attendance. The Commission paper was informed by the huge range of groups who had views to give. Their generosity and public spiritedness is outstanding. Above all, we are here today and it is a unique gathering of interested and expert people and the opportunity of all of us to hear informed views from all participants.

Peter Charleton
Judge of the High Court
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