

Office of the
Oifig an



Director of Public Prosecutions
Stiúrthóra Ionchúiseamh Poiblí

**Sexual Offences & Capacity to Consent:
A Prosecution Perspective**

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According to the reports published following the 2006 Census, from a population at the time of over 4.2million.

- 70,535 have a “learning or intellectual disability”.
- The Health Research Board undertook a National Psychological Wellbeing and Distress Survey in 2006.
- 12% of the Irish adult population was experiencing psychological distress
- 25% of us will experience some form of mental health problem at some time^[1].

[1] A Vision for Change, 2006, Report of the Expert Group on Mental Health Policy
http://www.dohc.ie/publications/pdf/vision_for_change.pdf?direct=1

Criminal Law (Sexual Offences) Act, 1993

Protection of mentally impaired persons.5.—

- (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.**
- (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**
- (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**

Approaches to Assessment of Capacity

- **‘Status Approach’** A broad assessment without reference to the particular capacities of the person or the particular circumstances of the individual. This is the approach which forms the basis of the Ward of Court system in the Lunacy Regulation (Ireland) Act 1871 as well as s.5 of the 1993 Act.
- **‘Functional Approach’** looks at whether the person understands the specific decision to be made at the time it is to be made. This test of capacity would not require that the person be “able to live independently” or that the person would themselves be able to “guard against serious exploitation.” It is the model adopted in the proposed *Mental Capacity Bill* and is consistent with the 2006 UN Convention on the Rights of Persons With Disability.

Dr. Mary Keys notes^[1]:

“Importantly, both partial and fluctuating capacity can be recognised. For example, You may not be able to look after your investments but be well able to decide you do not want to share a bedroom with anyone or have a particular course of treatment”.

^[1] “Capacity –whose decision is it anyway?” Law and Mental Health Conference, Law Faculty, NUI Galway.

The Difficulties to be faced in the tension between providing protection and maximising personal autonomy.

Prof. Gerard Quinn of NUI Galway speaks of ‘blowing away the cobwebs of paternalism’

Criticisms of s.5

- the inappropriateness of the language used
- an illogical divide in relation to the prohibited acts,
- a contradiction between the available defence of marriage, with the abolition, under the 1990 Act, of the defence of marriage to a charge of rape.
- the whole approach to the test of capacity (including predicating the capacity to consent on the ability to live independently) being out of step with the now almost universally accepted test of 'functionality'

Rape & Justice in Ireland (Hanly et al) surveyed 597 'Rape' prosecution files received by the Office 2000-2004:

- 13.1% of the sample related to a complainant with a history of mental illness (n=78)
- 5% of the sample related to a complainant with an intellectual disability.

Prosecution Policy Unit Research

Mental Health or learning Disability of Complainants in Files with an initial categorisation as 'Rape' (adults & children).

Year	Total Sample	Intellectual Disability	Mental Health
2005	296	6%	4%
2006	289	3%	4%
2007	218	2%	5%

Chapter 6 of the Consultation Paper (at P.184) provides the detailed outcomes in relation to 2005's files concerning complainants with an intellectual disability /mental health issue.

Psychiatric Illness

- **11 (3.7%) of cases involved complainants with a history of psychiatric illness, none of which were prosecuted.**

Learning Disabilities

- **17 cases (5.8%) involved complainants with learning disabilities ranging from mild to moderate. Of these cases 4 were prosecuted (24%) and 1 was withdrawn by the complainant. Of the 4 prosecutions there was 1 acquittal and 3 pleas.**

S.5 – Compatibility with Article 16 of the UN Convention on the Rights of Persons with Disabilities ?

Are we failing to provide the context within which people with intellectual disabilities/mental health issues may have consensual non-exploitative sexual relationships?

Mary Donnelly^[1], Senior Lecturer in the Faculty of Law in UCC states that “the development of an appropriate legal framework will require engagement with complex questions of policy and principle and that this urgently needs to be addressed at a legislative level”.

^[1] Assessing Legal Capacity: Process and the Operation of the Functional Test; p141 Judicial Studies Institute Journal [2007:2]

Criminalising Carers

The ODPP would advocate precluding only persons who are acting in a caring (professional) capacity from engaging in any sexual contact with a person under their care and would recommend a degree of freedom of sexual expression (kissing/sexual touching) falling short of penetrative acts (including fellatio), with all others.

In conclusion:

- Protect and ensure full and equal enjoyment of all human rights & fundamental freedoms by all persons with disabilities and promote respect for their dignity.
- And by all means ‘blow away the cobwebs of paternalism’
- Find a way to deliver a national programme of appropriate sex education to people with intellectual disabilities/ mental health issues

BUT

Ensure that we provide an effective bulwark of **protection** for those of us with significant intellectual disability or mental illness.

James Hamilton

Director of Public Prosecutions