

# **Sexual Offences and Capacity to Consent**

Law Reform Commission's provisional  
recommendations

Eight Annual Conference

of the

Law Reform Commission

at

Law Society of Ireland Blackhall Place

7 November 2011

# Overview

- Background
- Current law *Criminal Law (Sexual Offences) Act 1993 – Section 5*
- Capacity to consent – common law/statute law
- Capacity to consent – criminal law
- Criminal Procedure issues
- Reproductive and parental rights

# Background

- *Criminal Law Amendment Act 1935*
  - Language, females only, misdemeanour
- *Mental Health Act 1945*
  - If a person had care or charge
- *LRC Report on Sexual Offences against the Mentally Handicapped 1990*
  - Language offensive, not gender neutral
  - Must prove impairment and accused knew

# ***LRC Report on Sexual Offences against the Mentally Handicapped 1990***

- Principles:
  - Law should respect the right to sexual fulfilment of persons with ‘mental handicap’
  - The law while maintaining that respect should protect as far as practicable, such person against sexual exploitation

## ***S5 Criminal Law (Sexual Offences) Act 1993***

- 3 Offences
- Definition of 'mentally impaired'
- Penalties – 10 years, attempt 3/5 years, gross indecency 2 years
- 2 Defences – marriage, did not know/had no reason to believe
- Proceedings require consent of DPP

# ***Criminal Law (Sexual Offences) Act 1993***

- Created a new offence for people who are 'mentally impaired' outside a marriage context
- No provision for consent as a defence in situations where both capable of giving real consent to sexual intercourse
- Predicating the capacity to consent on ability to live independently is not an accurate assumption
- Does not deal with sexual abuse or exploitation generally
- Fear of prosecution may prevent development of relationships where consent and no element of exploitation

# Capacity to consent: Common/ Statute Law– criminal law context

- *R v Camplin* (1845) intercourse had taken place without consent even though no force, fear or fraud
- *R v Fletcher* (1886) incapable of giving consent due to ‘a defect in reasoning’
  - Established a subjective functional test of capacity to consent to sexual relations.
- Sec 4 of the 1935 Act and Sec 5 of the 1993 Act – status based assessment of capacity to consent to sexual relationships and a general retreat from common law functional test in place since 19C

# Capacity to consent: Common/ Statute Law – civil law context

- No one generally applicable definition of capacity at common law or statute
- Presumption of capacity
- *Lunacy Regulations (Ireland) Act 1871*
- Capacity to marry
  - formalities set out in statute
  - Issue of capacity to marry a matter for common law – free consent of both parties

# Capacity to Consent to Sexual Relationships

- Issue of **consent** distinguishes between when a sexual activity becomes a criminal act or a protected right of the individual
- Capacity to enter into a sexual relationship is a matter ruled by the criminal law
  - Touching in a sexual manner without consent
  - Penetrative sexual relations without consent

# Consent

- Consent – no definition
  - common law test
  - *R v Morgan* [1970] VR 337
- No consent –
  - *Criminal Law (Rape) Amendment Act 1990*

# Capacity

- LRC CP on Capacity 2005
  - Recommended Sec 5 be amended ‘in order to ensure that relationships between adults with limited decision-making ability would be lawful where there is real informed **consent**’
- Human Rights Convention
- UN Convention on Rights of Persons with Disabilities 2006
- LRC Report on Capacity 2006
- Mental Capacity legislation

# Capacity – Commission's Recommendations

- Capacity – functional test
- Presumption of Capacity
- Definition of Capacity
  - ‘Capacity’ means the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision has to be made.

# Test for assessing capacity to consent to sexual relations

- Should reflect the functional approach to capacity
- A person lacks capacity to consent to sexual relations, if he or she is unable
  - To understand the information relevant to engaging in the sexual act, including the consequences
  - To retain that information
  - To use or weigh that information as part of the process of deciding to engage in the sexual act or
  - To communicate his or her decision (whether by talking, using sign language or any other means)

# Recommendations

- Since *S5 Criminal Law (Sexual Offences) Act 1993* is not consistent with the functional test of capacity, it should be repealed and replaced
- Replacement of S5 of 1993 Act should cover all forms of sexual acts which are non-penetrative and sexual acts which exploit a person's vulnerability
- The fact that the sexual offences in question occurred within a marriage should not be a defence
  - *Criminal Law (Rape)(Amendment) Act 1990*

# Specific Issues

- Strict liability offence for sexual acts committed by a person in a position of trust or authority with a person with id
  - *Criminal Law (Sexual Offences) Act 2006*
- A defence of reasonable mistake should apply but should not be available to a person in position of trust or authority
- Should there be a specific offence of obtaining sex by threats or deception?

# Criminal Procedure Issues

- *Criminal Law (Rape)(Amendment) Act 1990*
- *Civil Legal Aid Act 1995*
- *Sex Offenders Act 2001*
  
- *Criminal Evidence Act 1992*
  - Intermediaries
  - Pre trial evidence (2008)
  - ?????Pre trial cross examination
  
- Issues for defendants with a disability

# Access and Right to a fair trial

- Developments of guidelines for those working in the criminal justice process in identifying current obstacles and enhancing methods by which the participation of eligible adults in court proceedings could be enhanced

# Reproductive and Parental Rights

- Mental Capacity legislation
  - Non-therapeutic sterilisation
- Right to bodily integrity and right to family life
- Cultural views and attitudes

# Parental rights of people with id

- *Child Care Act 1991*
  - Used as a measure of last resort
  - *‘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 be achieved’*
- Applications for child care orders
- *Legal Aid Board v Brady and Ors (2007)*

# Capacity to Parent

- NDA and CPP in 2011
  - Number of women with id having children increasing
  - Have to constantly prove capacity to parent
  - Accessing sexual health information
  - Accessing sexual health services
  - Negative attitudes
- Parents with id more likely to be subject to a child care order

# Support for parents with disabilities

- *Disability Act 2005* – does not extend to a positive assessment of need for parents with limited capacity in the context of *Child Care Act 1991*
- National Advocacy Service launched in 2011

# Recommendation

- Consistently with the general presumption of capacity this should 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*
- Inter-agency protocol needed to provide that before application for child care order is made, an assessment of parenting skills and necessary support and training necessary to assist parents in caring for their children.

**Submissions**  
by  
**31 December 2011**

**Thank You**