

THE LAW REFORM COMMISSION
AN COIMISIUN UM ATHCHOIRIU AN DLI

(LRC 33-1990)

REPORT
ON
SEXUAL OFFENCES AGAINST THE MENTALLY HANDICAPPED

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon Mr. Justice Ronan Keane, Judge of the High Court, President;
 John F. Buckley, Esq., B.A., LL.B., Solicitor;
 William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Associate Professor of Law, University of Dublin;
 Ms. Maureen Gaffney, B.A., M.A., (Univ. of Chicago), Senior Psychologist, Eastern Health Board; Research Associate, University of Dublin;
 Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-two Reports containing proposals for reform of the law. It has also published eleven Working Papers, two Consultation Papers and Annual Reports. Details will be found on pp31-34.

William Binchy, Esq., B.A., B.C.L., LL.M., Barrister-at-Law, is Research Counsellor to the Commission.

Ms. Una O'Raiheartaigh, B.C.L., Ms. Elizabeth Heffernan, LL.B. and Patrick Dillon-Malone, B.A. (Mod. in Legal Science), Dip in Advanced European Law (College of Europe, Belgium) are Research Assistants.

Further information from:

The Secretary,
 The Law Reform Commission,
 Ardilaun Centre,
 111 St. Stephen's Green, Dublin 2.
 Telephone: 715699.

NOTE

This Report was submitted on 17th August, 1990 to the Attorney General, Mr. John L. Murray, S.C., under Section 4(2)(c) of the Law Reform Commission Act, 1975, and, at the Attorney General's request, is being made available to the public at this stage while the proposals it contains are being considered in the relevant Government Departments.

<i>CONTENTS</i>	<i>PAGES</i>
<i>CHAPTER 1: INTRODUCTION</i>	1- 5
<i>CHAPTER 2: SCOPE OF REPORT: THE PRESENT LAW</i>	6-11
Scope of Report	6
The Present Law	8
Criticisms of the Present Law	10
<i>CHAPTER 3: COMPARATIVE ASPECTS</i>	12-15
Categorisation of Persons to be Protected	12
Is there any role for the Criminal Law in this area?	15
<i>CHAPTER 4:</i>	16-27
Policy Considerations	16
Definition of Persons to be Protected	19
The Burden of Proof and Mens Rea	21
The Oath and Corroboration	22
Other Evidential Aspects	24
Wardship	24
Sentencing	26
Miscellaneous	26
<i>SUMMARY OF RECOMMENDATIONS</i>	28-29
<i>FOOTNOTES</i>	30
<i>LIST OF COMMISSION PUBLICATIONS</i>	31-34

CHAPTER 1 INTRODUCTION

1 On the 6th March, 1987, the then Attorney General, in pursuance of s4(1)(c) of the Law Reform Commission Act 1975, requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was

"Sexual offences generally, including in particular the law relating to Rape and the Sexual Abuse of Children"

In response to this request, the Commission submitted a Report on *Rape and Allied Offences* to the Attorney General on the 3rd May 1988. Under the heading *Sexual Offences Against the Mentally Handicapped*, the following comment was made

"We also referred in our Consultation Paper to the importance of ensuring that legislation in this area is effective. We hope to address the entire topic in the near future in the context of sexual offences against another vulnerable section of the community, i.e. children."

2 In these two areas, i.e. sexual offences against the young and against the mentally handicapped, there are problems in common. These principally relate to the difficulties attendant on the complainant's competence to give evidence and to take the oath. But there are also significant differences in principle, which are discussed in Chapter 4 below. Accordingly, we concluded that the topic of *Sexual Offences Against the Mentally Handicapped* should be the subject of a separate Report to the Attorney General.

3 The Commission, as a first step, prepared a draft Discussion Paper on the topic which was circulated to a number of lawyers, psychiatrists, psychologists and social workers with particular skills in this area. A substantial number

of written comments was received and in addition a meeting was held at the Commission's offices in December 1989 which a number of experts attended. The results of this consultation process have now been carefully assessed by the Commission and this Report embodies our final proposals to the Attorney General.

4 Inevitably, some of the Report is concerned with problems of classification and definition and it is necessary at the outset to say something as to the title.

Traditionally, sexual offences against the mentally handicapped and the mentally ill were dealt with together. We are aware that the two conditions are quite distinct. For example, those suffering from mental illness are not usually mentally handicapped, though they may be mentally impaired in their capacity to make judgments or decisions or to give consent. Moreover, unlike mental handicap, mental illness may be transient or episodic. However, the Commission considers that changes in the law should apply to both categories. Criminal law is concerned with the degree and effect, rather than the cause, of mental impairment or handicap.

In the context of sexual offences, the degree of mental impairment or handicap is relevant to the twin questions of competency to consent to sexual relations and to give reliable evidence. As to the first, one of the primary concerns of the law in this area is the reality or relevance of consent to sexual conduct at a particular time. That issue will arise whether the mental condition in question is temporary or permanent and whatever its cause may be. As to the second, where the degree of mental impairment or handicap does not significantly affect the ability to give reliable evidence, the situation is governed by the ordinary criminal law. Where the degree of mental impairment or handicap is such as to render the person incompetent to give evidence, applying established legal criteria, possible alterations in the law become relevant.

5 Chapter 2 sets out in more detail the scope of this Report and the nature of the existing law together with what appear to be its major defects. Chapter 3 consists of a summary of the law in those jurisdictions in which the Commission's researches suggest the most profitable models can be found. Chapter 4 examines the policy considerations which arise and the various options for change which appear to merit consideration and sets out the Commission's final recommendations for reform of the law.

6. The Commission express their gratitude to the following who assisted them in coming to their conclusions:

Ms Anne Byrne, B.Soc. Sc., Dip. ASS,
Principal Social Worker,
Brothers of Charity Services,
Woodland Centre,
Renmore,
Galway.

Seamus Caffrey, Esq.,
National Association for the Mentally Handicapped of Ireland,
St Michael's House,
Ballymun Road,
Dublin 9.

Peter Charlton, Esq.,
Barrister at Law.

The Hon Mr Justice Declan Costello.

Dr John Dunne,
Chairperson,
Psychological Society of Ireland Mental Handicap Group.

Thomas F. Farrell, Esq., B.C.L., LL.B.,
Solicitor and
Caren Farrell, B.C.L.,
Solicitor,
Messrs Farrell and Partners,
Solicitors,
Tullamore.

Ms Anne Geraghty,
Principal Speech Therapist,
Brothers of Charity Services,
Woodland Centre,
Renmore,
Galway.

P W Flanagan Esq.,*
Secretary,
Department of Health.

Ciaran Foley Esq ,
Chairperson,
Social Workers in Mental Handicap (SWIM)
Sub Committee on Mental Handicap and Law Reform,
Secretary of SWIM National Committee

Dr J V Halpenny, M B , B Ch , MRC Psych ,
Medical Director,
Daughters of Charity of St Vincent de Paul,
Navan Road,
Dublin

Brother A T Hassett,
Provincial Superior,
Brothers of Charity

The Hon Mr Justice Seamus Henchy

T N G Hogan Esq ,
Chief Executive,
Galway County Association for Mentally Handicapped Children

District Justice Mary Kotsonouris

Ms Francesca Lundstrom,
Assistant Professor,
Secondary Transition Intervention Effectiveness Institute,
University of Illinois at
Urbana-Champaign,
Illinois,
USA

Sr Angela Magee, D C , R G N , R N N N H , R N T ,
Daughters of Charity,
Mental Handicap Services,
St Vincent's Centre,
Navan Road,
Dublin

J Martin Esq ,*
Assistant Principal Officer,
Department of Justice

Professor Desmond McGrath, F R C P I , FRC Psych , D P M ,
St John of God Hospital,
County Dublin

Patrick McGinley Esq ,
 Director of Psychology,
 Brothers of Charity Services,
 Woodland Centre,
 Renmore,
 Galway

John P McMahon Esq ,
 Deputy Commissioner,
 Garda Síochána

Dr Anne O'Grady-Walsh,
 St Ita's Hospital,
 Portrane,
 Co Dublin

Dr D J Lane-O'Kelly,
 Belmont Park Hospital,
 Waterford

Dr Sinead O Nuallain,
 Consultant Paediatrician/Director of Medical Services,
 Daughters of Charity Services,
 Woodland Centre,
 Renmore,
 Galway

Dr Charles Smith,
 Medical Director,
 Central Mental Hospital,
 Dundrum

His Honour Judge Patrick Smith

Dr Maxwell Taylor,
 Professor of Applied Psychology,
 University College,
 Cork

We should emphasise that, while we much appreciate the assistance freely given by the foregoing, the Commission itself is solely responsible for the contents of this Report and its recommendations

* In his personal capacity

CHAPTER 2 SCOPE OF REPORT THE PRESENT LAW

Scope of Report

7 The subject matter of this Report has certain features in common with another area of the law which is currently being examined by the Commission, i.e. the law relating to the sexual abuse of children. In both cases, the law is intended, in part at least, to protect vulnerable members of society from sexual exploitation which is either damaging to the victim or socially undesirable for other reasons. In both cases, problems arise as to the competence of the alleged victim to give evidence and to take the oath. But there are also major differences in principle between the two areas.

8 It is, in the view of the Commission, fundamentally wrong to approach and study the mentally handicapped or mentally ill as children. They should be approached as persons, adults and children, who suffer from disabilities in varying degrees of severity. The emphasis should be on approaching them as people who enjoy the same rights as other more fortunate members of the community but who may also require the protection of the law in the area of sexual activity.

9 It follows, in our view, that the law must respect the rights of the mentally handicapped and mentally ill to sexual fulfilment and should not pose unnecessary obstacles to intimate relationships which find sexual expression where one of the partners is mentally disabled. Most of those whom we consulted prior to the presentation of this Report were in wholehearted agreement with this general approach.

10 In this context, it is worth recalling that Article 1 of the United Nations Declaration on the *rights of mentally retarded persons* says

"The mentally retarded person has, to the maximum degree of

feasibility, the same rights as other human beings "

Article 6 provides *inter alia* that

'The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment ' '

Article 7 provides that

'Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities ' '

11 The Constitution of Ireland contains no specific references to the rights of the mentally handicapped. However, Article 40.3.1 under which

the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen"

undoubtedly applies to the mentally handicapped and mentally ill as to all other citizens. Included among the unenumerated rights thus guaranteed are the right to privacy¹ and, it would seem, the right to marry and found a family²

12 Article 8 of the *European Convention on Human Rights* provides

- "(1) everyone has the right to respect for his private and family life, his home and his correspondence
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others "

Article 12 of the Convention recognises a right to marry and found a family

There is no specific reference to a right to sexual relations in the Constitution, the Declaration or the Convention. As judicially interpreted, however, the Constitution guarantees the right of all citizens to be protected against intrusions on their privacy not warranted by the requirements of the

common good

Writing about the relevant law in England in the light of the Convention, M J Gunn has said

If sexual development and reproduction are to be possible, it must be legally acceptable for people with a mental handicap to enter into sexual relationships. Wholly unreasonable restrictions on such relationships would appear to fall foul of article 8, ECHR, where the right to private life, including sexual life, can only be restricted if the conditions in article 8(2) are fulfilled. It, therefore, needs to be considered whether the restrictions which are imposed by English criminal law are 'for the protection of health or morals, or for the protection of the rights and freedom of others'

English criminal law may hinder and perhaps prevent sexual relationships of people with a mental handicap through the offences created by the Sexual Offences Acts 1956-76³

13 Bearing these considerations in mind, we have sought first to establish the present state of the law applicable to sexual offences against the mentally handicapped and mentally ill and to ascertain to what extent it can be said that

- (a) it fails to protect them in their sexual relations, and
- (b) it unduly inhibits them from leading sexually fulfilled lives

We also consider the other respects in which the present law may be thought to be inadequate or out of date

The Present Law

14 Rape is defined by s2(1) of the Criminal Law (Rape) Act 1981 as

"unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it"

A woman may be suffering from mental impairment to such a degree as to render her incapable of giving consent to sexual intercourse within the meaning of this section. Where this is found as a fact by a jury, the accused can undoubtedly be properly convicted of rape. *R v Fletcher*⁴ (It is also an essential ingredient of the crime, it should be noted, that the accused either knew that she was not consenting or was reckless as to whether she was or not⁵). But unless the jury are satisfied beyond reasonable doubt that the alleged victim's mental condition prevented her from consenting at the time of the acts complained of, they cannot convict of rape. *R v Fletcher*⁶ It follows that sexual connection with a woman of impaired intellect does not, of itself and without more, constitute the crime of rape

15 Statute law has, however, rendered criminal sexual intercourse with mentally handicapped women and girls, where the circumstances do not amount to rape. Section 4 of the Criminal Law Amendment Act 1935 provides that

- (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 the 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 12 months after the date on which such offence is alleged to have been committed "

16 Section 254 of the Mental Treatment Act 1945 provides that where

- "(a) a person has been convicted on indictment of a misdemeanour under s4 of the Criminal Law Amendment Act 1935 and
- (b) the judge is satisfied that at the time when the misdemeanour was committed -
 - (i) such person had the care or charge of the woman or girl in relation to whom the misdemeanour was committed, or
 - (ii) such person was carrying on a mental institution and such woman or girl was a patient therein, or
 - (iii) such person was employed as an officer or servant in a mental institution or an institution for the detention of persons of unsound mind and such woman or girl was a patient or prisoner therein,

the said s4 shall have effect as if it provided that such person shall be liable on such conviction to penal servitude for any term not exceeding 5 years nor less than 3 years or to imprisonment for any term not exceeding 2 years "

17 It will be noted that the offences thus created are limited to cases of 'carnal knowledge' of females, i.e. vaginal sexual intercourse. It may

presumably be inferred from the use of the adverb 'unlawfully' that no offence is committed where the persons concerned are married to each other

Criticisms of the Present Law

18 There was unanimous agreement with our initial view that the language of s4 is both offensive and out of date. This alone would justify the repeal of the section and its replacement by appropriately worded legislation. The categorisation of the persons who should be protected by legislation of this nature is, however, a question of considerable difficulty to which we shall return in our final chapter

19 As noted, s4 applies only to unlawful "carnal knowledge" of a woman or girl, i.e. vaginal sexual intercourse, or an attempt to have such unlawful carnal knowledge. It is accordingly not a crime to commit other acts of a sexual nature, such as cunnilingus or fellatio, with a woman or girl, no matter how severely mentally handicapped. We do not know why the present law is confined to vaginal sexual intercourse. It may be that it was considered that the law should only protect mentally handicapped women against the risk of pregnancy. If, however, the law has a broader justification, i.e. the protection of the mentally handicapped and mentally ill against sexual exploitation, then quite clearly such acts should be also unlawful. Moreover, if the law relating to homosexual acts between consenting adults is altered as a result of the judgment of the European Court of Human Rights in *Norris*,⁹ it might be thought that it should continue to be an offence for a man to have anal intercourse or commit what are at present described as acts of "gross indecency" with a man coming within the proposed definition of mental handicap or mental illness

20 Clearly a major difficulty in the practical operation of s4 is that in the typical case the principal (frequently indeed the only) evidence against the accused is that of the complainant herself. This immediately creates a dilemma. If the complainant can satisfy the judge that she is capable of giving sworn evidence in that she understands the nature and consequences of the oath, a doubt may arise as to whether she is "feeble minded", an "imbecile" or an "idiot" within the meaning of s4. If, on the other hand, she is adjudged incompetent to give evidence because of her mental state, the prosecution collapses at the outset.

These difficulties were illustrated in two recent cases. In the first, *DPP v JS*,¹⁰ medical evidence classified the prosecutrix as being moderately mentally handicapped according to a scale graded in terms of mild, moderate and severe. The accused was charged with having unlawful carnal knowledge of a feeble minded woman contrary to s4. When her deposition was taken in the District Court, she manifested an ability to carry on a fairly normal conversation on matters related to her every day household life. At the trial in the Circuit Court, however, she could not answer questions as to the nature of the oath or the nature of a lie. She made no response when asked

by the judge what the moral and legal consequences of telling a lie were. In the result, she could not be sworn and, as there was no independent evidence of sexual intercourse, a *nolle prosequi* was entered. In the second case, *DPP v MW*,¹¹ the prosecutrix was again classified as moderately mentally handicapped but was normal in appearance and could converse on a similarly limited range of topics, albeit with a speech defect. She alleged that non-consensual intercourse took place in a car and accordingly there were two counts on the indictment, the first of rape and the second under s4. The rape trial came on first and the judge ruled that she was competent to take the oath. However, because her evidence as to consent was contradictory, the judge directed an acquittal. Upon the trial of the s4 charge, her preliminary answers were less satisfactory than on the first occasion and a different judge declined to have her sworn. There being no other evidence, the State was compelled to enter a *nolle prosequi*. A member of the Bar with considerable experience in this field has remarked that these two cases

"highlight the fact that the legal regime designed to protect the mentally subnormal against sexual exploitation is totally inadequate and urgently needs reform."¹²

21. There is a further feature of the offence created by s4 which does not appear to have arisen for discussion in any recent Irish cases, but which should be borne in mind if that section is being replaced. The general principle of the criminal law is that, in the case of more serious crime, it is not sufficient to prove the commission of the act prohibited by the law: it must also be established that the accused possessed the mental state required for the particular crime in question. In the case of the offences under consideration, this necessity to prove *mens rea* is spelled out in the section. The prosecution must, accordingly, prove, not merely that the complainant was mentally impaired in the terms of the section, but that the accused was aware that she was so impaired. This is in contrast to the offences created by the same statute of having sexual intercourse with girls beneath a defined age, where in Ireland it is necessary to do no more than prove the commission of the act and it is not even a defence for the accused to prove that he was reasonably mistaken as to the age of the girl.¹³ While the absence of a defence of reasonable mistake to the latter offences would be regarded by many as unduly draconian, there is undoubtedly an argument to be made that, in the case of the offences under consideration, the prosecution should not be required to establish knowledge on the part of the accused as to the complainant's mental condition, which can be extremely difficult: it should be sufficient, on this view, to prove the commission of the prohibited act, leaving the burden on the accused to establish by way of defence that he was not actually aware, or could not reasonably have been aware, of the complainant's mental condition.

CHAPTER 3 COMPARATIVE ASPECTS

Categorisation of Persons to be Protected

22 It is clear from our consultations and the literature available to us that the terms employed in the existing legislation are not only offensive but are wholly out of date. While we have employed the expression "the mentally handicapped" in the title of this Report, it has been pointed out to us that there is support for the view that "people with mental handicap" is a more appropriate description. It has also been suggested that expressions such as 'intellectual disability' or "learning difficulties" are coming more into favour to describe those formerly categorised as the "mentally handicapped".

23 As to the gradation of persons with mental handicap, it would appear that the most generally favoured classification is that of the World Health Organisation which divides those affected into four categories, defined by generally recognised IQ criteria as follows

Mild mental handicap	IQ range 50 to 70
Moderate mental handicap	IQ range 35 to 49
Severe mental handicap	IQ range 20 to 34
Profound mental handicap	IQ range less than 20

It is important to note that this classification is not confined to the mentally handicapped in the strict sense, but extends to those whose mental condition may be affected by psychiatric illness. The classification, in other words, is based on the individual's current level of functioning without regard to its nature or causation.

Some of the experts whom we consulted considered that the more acceptable definition of "mental handicap" was that of the American Association on Mental Retardation i.e.

significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behaviour and manifested during the developmental period"

24 In England, it is an offence of strict liability under s7 of the Sexual Offences Act 1956 (as substituted by s127(a) Mental Health Act, 1959) to have sexual intercourse with a "defective" "Defective" is defined in s45 of the Act (as amended by the Mental Health (Amendment) Act 1982) as

'A person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning '

Section 96 of the Mental Health (Scotland) Act 1960 uses the same expression, i.e. "defective", but it is defined differently, i.e.

"a person suffering from mental deficiency which is of such a nature or degree that the person is incapable of living an independent life or of guarding herself against serious exploitation"

25 In some other jurisdictions, the emphasis has been on protecting individuals whose degree of mental handicap is such that they should be treated as being incapable of giving a real and valid consent to the act. As we have seen, under the existing law, if the jury is satisfied beyond reasonable doubt that the woman at the time of the alleged offence was suffering from mental impairment to such a degree as to render her incapable of giving consent to sexual intercourse and that the accused knew this or was reckless as to whether it was the case, the accused can properly be convicted of rape. In *Morgan*,¹⁴ the Supreme Court of Victoria said that for a woman to lack capacity to consent to intercourse in this context

"it must be proved that she has not 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 connection as distinct from an act of a totally different character "

This apparently very restricted view is justified, as Glanville Williams points out,¹⁵ on two grounds. First, in order to prevent men who have intercourse with willing but sexually innocent girls from being convicted of rape. Secondly, in order not to forbid sexual expression to women of low intelligence

Where the threshold of understanding by the mentally impaired person is higher, and sexual intercourse with her does not amount to rape, it is still necessary, in the view of some law reform agencies, to protect that person. Thus, the Canadian Law Reform Commission in its *Report on Sexual Offences* said

"The protection (of s148 of the Criminal Code) is based on the premise that a mentally handicapped individual is incapable of giving real and valid consent to the act

Consultations with specialists on this question have confirmed the Commission's own opinions. The mentally handicapped, like other persons, have a right to sexuality. The law ought not therefore to protect them except in so far as their handicap prevents them from giving a valid consent and from realising the consequences of their own acts

It is the Commission's opinion, therefore, that beyond the general protection that all persons enjoy under the law the mentally handicapped should not be afforded special protection except in so far as their handicap has been exploited and in so far as they were incapable of giving consent. The determination of this question of fact must be left in each case to the discretion of the trier of fact "¹⁶

This approach, however, may be criticised as begging the question. If one limb of the test is that the persons in question were "incapable of giving consent", how is the offence to be differentiated from rape?

Another approach based on the alleged victim's lack of understanding of the nature of the act is to be found in s213(2)(b) of the Model Penal Code prepared by the US Law Institute. This provides that it is a third degree felony for a male to have sexual intercourse with a female if he

"knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct "¹⁷

The commentary in the code remarks

"By specifying that the woman must lack ability to assess the 'nature' of her conduct, the statute is intended to avoid questions of value judgment and of remote consequences of immediate acts. Furthermore, sub-section (2)(b), unlike the tentative draft version of this offence, does not include any provision for liability based only on conditions affecting the woman's capacity to 'control' her own behaviour. What those conditions might be is a murky question full of potential for debate and confusion, and the Institute thought that it was dangerous to premise felony sanctions on the male's failure to discriminate between simple enthusiasm and diseased eroticism. *Sub-section (2)(b)*

therefore limits liability for intercourse with a mentally incompetent woman to cases of severe defect or impairment precluding ability to understand the nature of the act itself This standard has been adopted by a number of jurisdictions that have recently revised their penal law, including both New York and Michigan " (Emphasis added) ¹⁸

The commentary had earlier rejected two other possible standards

- (i) whether the woman was capable of expressing any judgment on the matter,
- (ii) whether she had the ability to comprehend the moral nature of the act

The Institute considered both tests unacceptable, having this to say about them

The first test was rejected because it gives too little scope to this version of the offence. Only a female suffering from extreme retardation or some catastrophic psychological disability would be incapable of expressing a judgment in the sense of saying 'yes'. Many persons of lesser impairment should be included within this protection against illegitimate sexual intimacy. The second test, on the other hand, seems too expansive. 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 notion 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. ¹⁹

Is there any role for the Criminal Law in this area?

26 The difficulties discussed in the preceding paragraph of defining the category of persons who require protection inevitably raise an issue as to whether the criminal law should play any role in this area. Given the understandable concern not to inhibit the sexual conduct of people on the sole ground that they are unfortunate enough to be mentally handicapped, it has been urged that no attempt should be made to criminalise such behaviour. Perhaps reflecting this approach, the Victorian Law Reform Commission recommended the intrusion of the criminal law in one area only, i.e. by proposing to make it an offence for a person employed in a facility providing services for mentally ill or intellectually disabled people to take part in a sexual act with a person receiving services at that facility ²⁰. In England, however, the Criminal Law Revision Committee rejected the suggestion that any sanctions should be left to the *civil* law, pointing out that "in practice it would tend to be invoked only after the damage has been done" ²¹

CHAPTER 4

Policy Considerations

27 Throughout this Report, we have laid emphasis on two principles which we believe are of fundamental importance. The first is that the law should respect the right to sexual fulfilment of persons with mental handicap. The second is that the law, while maintaining that respect, should protect, so far as practicable, such persons against sexual exploitation.

28 We have encountered virtually no disagreement as to the first principle. As to the second, while there is little or no support for the view that the criminal law should play no role whatever in this area, there is certainly considerable room for debate as to the extent of the role it should play. Thus, it has been suggested to us that, although the wording undoubtedly needs to be altered, the policy which presumably is reflected in s4 of the 1935 Act is correct, i.e. that the intrusion of the criminal law should be confined to cases in which there is at least the possibility of injury to the alleged victim in the form of an unwanted pregnancy. Again, with or without that limitation, we have seen that in other jurisdictions it has been proposed to confine the offence to cases in which the other participant in the sexual act is a person employed in, or connected with, a facility providing services for persons with mental handicap.

29 We take the view, in common with most of those we have consulted, that the criminal law should not be so limited in its scope. As to the first suggested limitation, it is no doubt true that the only case in which clear and identifiable harm can be said to result to the alleged victim is where there is an unwanted pregnancy. We do not think, however, that it is correct to premise criminal sanctions in this area on established and indubitable harm to the other participant in the act. There would seem to be a public interest in discouraging exploitation. It has, however, been forcefully pointed out to

us that it is essential to be clear as to what is meant in this context by "exploitation" if protection from such exploitation (as distinct from disguised moral proscriptions) is to be the basis for the involvement of the criminal law in this area

We have also borne in mind that the trend today is towards persons with mental handicap living in the community and leading lives as full and normal as their handicap permits. The general expectation of those with mental handicap that they should be treated as adults and not as children is a factor which should be constantly borne in mind when legislation designed for their protection is under consideration

It is, of course, extremely difficult to say in any case whether the person whom the law proposes to protect can be regarded in any real sense as a "victim" he or she may simply be enjoying physical pleasure or relief from tension which may result in no detriment. But other considerations also arise. A characteristic case was graphically described for us by a member of the Bar with considerable experience in this area

'In typical circumstances the girl is spotted and induced into sexual intercourse or other acts by a male who has no interest in her personally and who has no intention of offering her any attempt at a long term relationship or marriage. The essence of the wrong done is that, unlike a normal girl, the handicapped one cannot see clearly the intentions of the predatory male, is too weak willed to struggle against physical inclination and is not the personality equal of the male in any struggle for friendship or commitment. If a handicapped girl is exploited in these circumstances, she may have unrealistic expectations which can be fuelled by a predatory male and be subjected to hurt or exploitation greater than a mentally able person "

In many cases, as we have stressed, it may be impossible for the prosecution to prove that any such detriment actually occurred. Nonetheless, there has been an intrusion on the dignity of the human personality in circumstances of gross inequality which, we are satisfied, the law should condemn

There is a further reason of a pragmatic nature which might be advanced as a justification for legislation in this area. There are cases where there may be strong grounds for believing that a person with mental handicap has in fact been raped or sexually assaulted but where, because of the handicap, the prosecution are unable to prove the absence of consent. In these cases, the prosecution may be able to establish the ingredients of the statutory offence. However, while the common sense evident in that approach is obviously attractive, it must be acknowledged that it is wrong in principle to seek to justify the conviction of persons for a lesser offence because there are strong grounds for suspecting that they are guilty of a greater offence. It is a fundamental principle of our law that persons acquitted of a crime are innocent in the eyes of the law. If justification is to be found for an offence

of the nature under consideration, it can only be because of the possibility of injury to the person concerned or the need to give legislative form to society's disapproval of exploitative conduct in relation to persons unable to protect themselves. We are satisfied that there is a widespread acceptance that the exploitation by a mentally competent adult of a person with significantly impaired mental faculties for sexual purposes is wrong. The law should reflect that view.

We would point out, in this context, that it cannot be said that, questions of unwanted pregnancies apart, harm is necessarily caused to girls under a prescribed age by sexual activity. Yet the sanctions of the general criminal law in that area extend beyond cases of vaginal sexual intercourse to other forms of sexual conduct with young girls.

There is, of course, an important distinction between sexual offences against the young and against persons with mental handicap. When one makes criminal certain sexual activity with young persons, one is simply postponing their right to complete sexual fulfilment until adulthood. It may well be that many persons under the relevant age could enjoy complete sexual fulfilment in a mature and responsible fashion, but in this type of legislation one paints in broad strokes in an effort to secure the greatest good of the greatest number. By contrast, when an adult is classified as mentally defective to such an extent that a sexual relationship with him or her constitutes an offence, the particular adult has been so assessed and classified as a result of decisions by one or more experts. He or she has not simply failed to attain an age threshold applicable to everyone. The Commission recognises that there is a grave responsibility on the experts making such classifications and the requirements of natural justice must in such instances be scrupulously observed. (We should observe, in passing, that it is clear from our consultations that the classification will normally be made by, among others, persons such as social workers and others in daily contact with the affected persons and not necessarily solely by medical experts). With those qualifications, it still seems reasonable to make such a classification in respect of persons with the most severe form of mental handicap as a legitimate form of social control. People in this category have, like everyone else, a right to personal happiness. They also have a right, which society must recognise and protect, not to be exploited by others.

Nor do we think that the offence should be confined to cases in which the other participant is a person employed in a facility providing services for persons with mental handicap. Since in such cases there is an additional element of abuse of trust or authority, there is justification in principle for providing for a more severe sentence. For the reasons already given, however, we are satisfied that protection should not be confined to persons with mental handicap who are exploited or abused in such situations.

Definition of Persons to be Protected

30. It will be obvious from the discussion in this Report that it is extremely difficult to arrive at a satisfactory categorisation of the persons who should be protected. We are satisfied that in general terms it should be an offence to engage in sexual intercourse with persons suffering from mental handicap to such a degree as to render them susceptible to exploitation. While it may well be that such persons will normally come within the WHO categories of persons suffering from either severe or profound mental handicap by reference to IQ ranges, we do not think it is prudent or practicable to attempt to incorporate these standards expressly in legislation. While it is no doubt the case that psychologists and others concerned with the scientific classification of persons within given ranges of mental handicap will, in giving expert evidence, make legitimate use of the WHO categorisations -and any other similarly authoritative classifications of mental handicap which may exist - to provide a workable statutory definition based on them would be extremely difficult and would inevitably result in cases which might properly be within the ambit of the section creating the offence being excluded because of an over rigid scheme of statutory classification.

31. Of the statutory definitions which might provide an appropriate model, s96 of the Mental Health (Scotland) Act 1960 has much to recommend it. Those whom we consulted, however, expressed serious reservations about the necessity to establish that the person was "incapable of living an independent life". It was pointed out that many people suffering from relatively severe mental handicap who might well be vulnerable to sexual exploitation could nevertheless be said to be capable of living an independent life in the sense that they do not require institutional care. In many instances today such people, with appropriate support, are able to live in the community and to that extent could indeed be regarded as leading independent lives. At the same time, they could remain seriously at risk. We are impressed by this argument and are not in any event convinced that the requirement that the person be "incapable of living an independent life" adds anything of significant value to the definition.

It is undoubtedly the case that making it an offence to have sexual relations with a person with mental handicap as so defined leaves open the possibility that a criminal offence may be committed although there was no element of exploitation in the particular case. This could be met by requiring proof that the defendant *actually intended* to exploit the complainant. We are conscious of the danger that, without some such limitation, there would be, in theory at least, what some would consider an undue restriction on the sexual freedom of those with mental handicap or suffering from mental illness.

Having given the matter careful consideration, however, we have decided against imposing such a requirement. At a later stage in this Report, we shall be recommending a reversal of the burden of proof so far as knowledge of the complainant's mental condition is concerned. No doubt, if it was a requirement for the commission of the offence that the defendant should have

intended to exploit the complainant, one could provide for a presumption as to the intention in this area also. But this would not eliminate an obstacle to successful prosecutions in a branch of the law where major difficulties already confront the prosecution. Even in a case where the complainant was suffering from a grave degree of mental handicap, was manifestly capable of exploitation and it was clear beyond argument that the accused was aware of her condition, the accused could escape if he was simply prepared to say that he did not intend to exploit her. No doubt there would be cases where the surrounding circumstances were such as to make it unlikely that the tribunal of fact would regard such evidence as credible. The fact remains that, in an area where convictions are notoriously difficult to obtain, yet another obstacle would confront the prosecution.

We recognise that the arguments are finely balanced in this area and that, if our proposals are accepted, we will be relying heavily on prosecutorial discretion to prevent the trial and conviction of a person who is engaged in a loving, rather than exploitative, sexual relationship with a person with mental handicap. We have, however, concluded that such risks as there are in thus relying on prosecutorial discretion are, on the whole, outweighed by the risk inherent in creating further difficulties in the prosecution of such cases.

32. The Commission accordingly *recommends that s4 of the Criminal Law Amendment Act 1935 be repealed and replaced by a section providing that it shall be an indictable offence for any person to have unlawful 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. The offence should be prosecutable summarily or on indictment at the election of the Director of Dublin Prosecutions.*

33. It is clear, as we have already indicated, that confining the offence to cases of vaginal sexual intercourse is not, in our view, justified. In our Report to the Attorney General on Child Sexual Abuse,²² we propose the abolition of offences based on the "legal fiction" of indecent assault with consent and their replacement by an offence of "sexual exploitation" or "child sexual abuse" consisting of sexual activity engaged in with children or young persons *for the purposes of sexual gratification, or as an expression of aggression, threat or intimidation.* Thus, sexual contact which took place, for example, in the context of bona fide medical treatment would not constitute an offence. There should be a similar offence to capture such activity with persons with mental handicap. In a prosecution for this offence, the onus should lie on the defendant, once sexual contact has been proved, to establish that the activity in question was not exploitative. The Commission, accordingly, *recommends that it should also be an offence to commit acts of anal penetration or engage in other acts of sexual exploitation with persons with mental handicap or suffering from mental illness as defined. This offence should be prosecutable summarily or on indictment at the election of the Director of Public Prosecutions.*

We do not address in this Report the question as to how these acts should be described.

The Burden of Proof and Mens Rea

34. We have pointed out that under the present law the prosecution must prove that the accused knew at the time of the alleged offence that the woman was then suffering from the relevant mental condition. Our consultations have fully confirmed the provisional view we had formed, i.e. that this is an unnecessary obstacle to the prosecution of such offences and is not reasonably required in the interests of justice to the accused. The fact that the offence created by s7 of the English Sexual Offences Act 1956 is one of strict liability does not appear to have given rise to any unease among commentators in that jurisdiction. Instead, criticism has tended to focus on the issue as to whether the criminal law has any role in this area. We accordingly recommend that in prosecutions for the offences referred to in the preceding paragraphs, it should be presumed until the contrary is shown that, where the complainant was suffering from the relevant degree of mental handicap or mental illness at the time of the alleged offence, the accused was aware of that fact. It should also be provided that a person is not guilty of the offence if at the time the offence is alleged to have been committed, he did not know, and had no reason to suspect, that the complainant was suffering from mental handicap or mental illness as defined.

35. It 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, since it might not be possible for one of the participants to establish that he or she was unaware of the relevant degree of handicap or illness of the other. *A fortiori*, the general defence of insanity under the criminal law would not be available to that participant. This would be clearly contrary to the underlying principles which, in our view, should inform the proposed legislation.

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.

36. We are also satisfied, and recommend, that there should continue to be higher penalties where the relevant offences are committed by persons in charge of, or employed in, mental institutions or where the accused person had the care or charge of the other participant. The definition of "mental institution", in the Mental Treatment Act 1945 should be expanded so as to include residential centres and community based residences.

The Oath and Corroboration

37. There was general agreement among those we consulted that crucial difficulties arose in prosecutions where the complainant was adjudged incompetent to take the oath. In our Consultation Paper on Child Sexual Abuse, we had provisionally suggested that the oath might be replaced with a universal test of competence. However, the severely mentally handicapped will in all likelihood be unable to pass any test of competence fixed for the mentally normal, young or old. We had provisionally suggested that, in the case of persons with mental handicap, the law should be altered by allowing the person alleged to be the victim of the offence to give unsworn evidence if, in the opinion of the trial judge, he or she understands that it is his or her duty to tell the truth in court and is aware that it is morally wrong to lie. It must be said, however, that the psychologists and social workers whom we consulted had grave reservations as to whether even with this substituted test there would be many complainants adjudged competent to give evidence. We appreciate fully that this may well be so, but take the view that our provisional suggestion represented at least some improvement which might enable prosecutions to see the light of day which otherwise would have to be abandoned at the outset.

The question as to what form a new test of competence replacing the oath should take has been considered in detail in the Consultation Paper on Child Sexual Abuse. In that Paper, we indicated a provisional preference for a form of affirmation made after an adjudication on competence on lines similar to those suggested by the Australian Law Reform Commission, i.e. an approach which ascertains the potential witness's cognitive ability. Their proposed criteria are summed up in the following passage:

"A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence, is not competent to give evidence.

A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact."²³

In our Paper, we went on to say:

"It must be remembered that we are examining this question in the relatively limited context of child sexual abuse. While our provisional conclusion is in favour of [the Australian proposal], it would clearly be anomalous and unjustifiable to confine the proposed alterations in the law to prosecutions for child abuse. At the same time, to propose such a change in the criminal law generally is probably outside the terms of the matters referred to us by the Attorney General, even more so if we were to extend the enquiry, as we logically should, to the desirability of retaining the oath in all other forms of litigation.

However, as it happens, the Commission's first programme of law reform expressly commits the Commission to examining the question of the desirability of retaining the oath for witnesses and for jurors. Accordingly, while, as we have said, our provisional preference is for option 3, we propose, having received submissions from interested bodies, to accompany our final Report with a separate Report which will contain our proposals as to the retention of the oath for witnesses and for jurors in all proceedings, criminal and civil."²⁴

We have now concluded our examination of the submissions we have received following the publication of that Consultation Paper and the holding of a Seminar attended by many experts in the field.

We will also be presenting a Report on the question of the desirability of retaining the oath for witnesses and jurors generally to the Taoiseach in the near future. While we would not wish to anticipate our final proposals on the topic, it is clear that there are two broad options: either to abolish the oath for witnesses and jurors in all proceedings, civil and criminal, or to permit all witnesses and jurors to affirm, while allowing those who wish to take the oath to do so. In our Report on Child Sexual Abuse, we recommend that, whichever regime is adopted, neither an oath nor an affirmation should be required of children under the age of 14, but that in such cases the court should satisfy itself as to the competence of the child to give evidence. There should be no presumption that children of any age are incompetent to give evidence, but where it is appropriate, the court should satisfy itself that the child is capable of giving an intelligible account of events which he or she has observed. We are also satisfied that there should be no requirement of corroboration in such cases.

It is unnecessary to set out the reasons which have led to these conclusions as they are set out in detail in our Report. In the present context, it is sufficient to say that, so far as children are concerned, they rest on the fundamental premise that no person, by reason of his or her age, should be deemed to be incapable of giving evidence upon which a tribunal might reasonably rely. Broadly similar considerations arise in the case of persons with mental handicap, although we again emphasise that it is wrong to treat such persons, where they are in fact adults, as though they were children. Since, however, they, by definition, suffer from a mental disability which may make it difficult, or even impossible, for them to give evidence upon which a tribunal could rely, the court should also in their case, where it is appropriate, ascertain their competence to give evidence, applying the same test as we have proposed in the case of children. If they meet that test and are above the age of 14, they should be subject to the same regime as to taking the oath or affirming as all other witnesses. As in the case of children, there should be no requirement of corroboration.

We accordingly recommend 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 giving an intelligible account of events which he or she has observed. There should be no requirement of corroboration

Other Evidential Aspects

38 In our Consultation Paper on the law relating to Child Sexual Abuse, we provisionally recommended that children should be permitted to give evidence by means of closed circuit television, that provision should be made for the video recording and presentation in evidence of District Court depositions and other statements in certain circumstances and that the child should be questioned in legal proceedings at all times by appropriately skilled and disinterested examiners²⁵ The Commission's final proposals on this topic are contained in their Report on Child Sexual Abuse We had, already provisionally concluded that, in the event of the Commission presenting proposals of this nature to the Attorney General, and of the necessary legislation being introduced, there should be similar provision in the case of persons with mental handicap and mental illness There was no dissent from those we consulted on the desirability of making such provision in the sort of case now under consideration We accordingly *recommend 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*

Wardship

39 The Supreme Court have recently decided that an entitlement to property requiring management or protection is not a condition precedent to the assumption of the wardship jurisdiction of the High Court²⁶ In the case in question, the person in respect of whom a wardship application was made was a 20 year old girl who had been mentally retarded since birth The application to have her taken into wardship was made by the Midland Health Board who had come to the conclusion that her welfare was at risk of serious harm should she continue to reside at home The President of the High Court, in whom the wardship jurisdiction is exclusively vested, concluded that the ownership of property requiring management or protection was a condition precedent to the exercise of his jurisdiction An appeal to the Supreme Court was allowed and, delivering the judgment of that court, Finlay CJ stated

"If upon an inquiry had by the learned President of the High Court he concludes that this respondent is of unsound mind and concludes in the circumstances of the case that protection of her person requires her admission into wardship of the court, then it seems to me that her protection should be afforded by that procedure"²⁷

The welcome clarification of the law provided by this judgment will be of assistance in a number of areas of wardship, in the case both of persons of unsound mind and minors. We are satisfied, however, that, so far as protecting persons with mental handicap against sexual exploitation is concerned, wardship has a limited role only to play. Those whom we consulted agreed that the sanctions of the criminal law, rather than wardship, must remain the primary means of protection.

40. In this context, for the sake of completeness, reference should be made to two recent English decisions. In *re B (a minor) (Wardship: Sterilisation)*,²⁸ Heilbron J declined to sanction the carrying out of a sterilisation operation on a 17 year old girl who had a mental age of five or six and whom it was proposed to take into wardship. This case was distinguished in *Re B (a minor) (Wardship: Sterilisation)*²⁹ where a local authority had the care of a mentally handicapped and epileptic 17 year old girl who also had a mental age of five or six. The girl was exhibiting the normal sexual drive and inclinations for some one of her physical age. There was expert evidence, however, that it was vital that she should not be permitted to become pregnant and that certain contraceptive drugs would react with drugs administered to control her mental instability and epilepsy. There was further evidence that it would be difficult, if not impossible, to place her on a course of oral contraceptive pills. An application at first instance for leave to be given for her to undergo a sterilisation operation was granted and the decision unanimously upheld by the Court of Appeal and the House of Lords.

A different view was taken by La Forest J delivering the decision of the Canadian Supreme Court in *Re Eve*³⁰ where he said:

"The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilisation without 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 authorized for non-therapeutic purposes under the *parens patriae* jurisdiction."

41. It seems unlikely that this controversy will fall to be resolved by an Irish court, but it seems probable that, if it did, the Canadian view would be preferred, possibly buttressed by constitutional considerations. It is in any event right to say that the House of Lords in particular stressed the special features of the facts in *Re B*, and laid emphasis on the fact that the case was not about sterilisation for social purposes or eugenics and involved no general principle of public policy. It may also be noted that the girl in that case was still a minor and that the Law Lords left open the question as to whether there was any jurisdiction to permit the operation in the case of a person of unsound mind who is not a minor.

Sentencing

42. The maximum sentence for the offence created by s4 is two years. Where it is committed by a person providing mental services to the alleged victim or somebody in whose care or charge she was at the relevant time, the maximum sentence is penal servitude for five years or imprisonment for two years. The adequacy of these possible sentences is questionable. There is certainly a marked disparity between them and the sentences provided by the same Act for the offences of carnal knowledge with girls under the prescribed age. In the case of a girl between the age of 15 and 17, the maximum sentence is five years. In the case of a girl under 15, it is penal servitude for life. Many people would take the view that sexual intercourse with an adult so seriously mentally handicapped as to be unable to give any real consent to the intercourse is significantly more blameworthy than the same act committed with a 16 year old girl whose mental faculties are unimpaired. That disparity was of some significance even when the legislation was enacted in 1935: in modern circumstances, it is even more striking.

We have addressed the question of sentencing in the case of sexual offences with young persons in our Report on Child Sexual Abuse.³¹ We do not wish to repeat what is said there: for the moment, it is sufficient to say that we think there is a strong case for increasing the maximum sentence for the offences now under consideration to seven years' imprisonment. Undoubtedly, there will be cases in which judicial discretion will suggest a far more lenient sentence than seven years. Providing such a ceiling will, however, enable the courts to deal with peculiarly gross and offensive cases which, our consultations have satisfied us, do occur from time to time. It would also logically follow that, in the case of persons who have abused their positions of authority and trust, longer sentences should be available.

We, accordingly, recommend that in the case of the offences proposed to be created in paras. 6 and 7 above, the maximum sentence should be imprisonment for any term not exceeding 7 years. In cases where s254 of the Mental Treatment Act 1945 applies, the maximum sentence should be imprisonment for any term not exceeding 10 years.

43. It has been represented to us, and we fully accept, that persons found guilty of these offences may themselves be similarly inappropriate subjects for custodial treatment. We appreciate the validity of that point and have no doubt that it is a factor which must be borne in mind by the courts when imposing sentences. However, it also raises questions which are beyond the remit of this Report and, accordingly, the Commission confines itself to stressing the desirability of a flexible approach to sentencing and drawing attention to the views expressed in the Whitaker Report on the *Penal System*.

Miscellaneous

44. The area of the criminal law considered in this Report is peculiarly one in which the exercise of prosecutorial discretion is of great importance. We

accordingly recommend that the consent of the Director of Public Prosecutions should be required before prosecutions are initiated in respect of any of the offences referred to in paragraphs 32 and 33 above.

45. As we have seen, under the present law prosecutions must be brought within 12 months of the date on which the offence is alleged to have been committed. In view of the fact that disclosure is often delayed through fear or ignorance, we see no reason for such a provision. The Director of Public Prosecutions will presumably exercise normal prosecutorial criteria in respect of delay. We accordingly *recommend that s4(2) of the 1935 Act be repealed.*

SUMMARY OF RECOMMENDATIONS

- 1 Section 4 of the Criminal Law Amendment Act 1935 should be repealed and replaced by a section providing that it shall be an indictable offence for any person to have unlawful sexual intercourse with another person who is at the time of the offence a person with mental handicap or suffering from mental illness which in either case is of such a nature or degree that the person is incapable of guarding himself or herself against exploitation
- 2 It should also be an offence punishable on indictment to commit acts of anal penetration or engage in other exploitative sexual activity with persons suffering such mental handicap or mental illness
- 3 In prosecutions for the offences referred to in the preceding paragraphs, once it is proved that the complainant was suffering from the relevant degree of mental handicap or mental illness at the time of the alleged offence, it should be presumed until the contrary is shown that the accused was aware of that fact. It should also be provided that a person is not guilty of the offence if at the time the offence is alleged to have been committed, he did not know, and had no reason to suspect, that the complainant was suffering from mental handicap or mental illness as defined
- 4 None of the acts of vaginal sexual intercourse, anal penetration or other proscribed sexual activity referred to 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

- 5 There should continue to be higher penalties where the relevant offences are committed by persons in charge of, or employed in, mental institutions or where the accused person had the care or charge of the other participant. The definition of "mental institution" in the Mental Treatment Act 1945 should be expanded so as to include residential centres and community based residences
- 6 In the case of persons with mental handicap, the requirement as to giving evidence on oath or affirmation should be the same as for all other witnesses. Where appropriate, however, the court should satisfy itself that the person with mental handicap is capable of giving an intelligible account of events which he or she has observed. There should be no requirement of corroboration
- 7 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
- 8 The offences referred to in paras 1 and 2 above should be prosecutable summarily or on indictment at the election of the Director of Public Prosecutions
- 9 In the case of the offences referred to in paras 1 and 2 above, the maximum sentence should be imprisonment for any term not exceeding 7 years. Where s254 of the Mental Treatment Act 1945 applies, the maximum sentence should be imprisonment for any term not exceeding 10 years
- 10 The consent of the Director of Public Prosecutions should be required before prosecutions are initiated in respect of any of the offences referred to in paras 1 and 2 above
- 11 Section 4(2) of the Criminal Law Amendment Act 1935, which requires prosecutions in respect of the offences referred to in paras 1 and 2 above to be brought within 12 months of the date on which the offence is alleged to have been committed, should be repealed

FOOTNOTES

- 1 *McGee v Attorney General*, [1974] IR 284 (Sup Ct)
- 2 *Ryan v Attorney General*, [1965] IR 294, at 313 (High Ct. Kennv J)
- 3 *McGee v Attorney General*, at 301 (Sup Ct, *per* Fitzgerald CJ, dissenting),
Murray v Attorney General [1985] IR 532, at p 536 *per* Costello J
- 4 Medical Law (1986) 255, at 257 (1986)
- 5 (1859) Bell 63
- 6 Criminal Law (Rape) Act 1981, s2(1)
- 7 (1866) LR 1 CCR 39
- 8 This section is repealed by s7 of the Health (Mental Services) Act 1981 and there is no corresponding provision in that Act. Section 2 of the 1981 Act, however, provides that the relevant section is to come into operation on a day to be fixed by order of the Minister for Health, at the time of writing no such Order has been made
- 9 For the meaning of "carnal knowledge", see our Consultation Paper on *Child Sexual Abuse* para 4 06 (1989)
- 10 Eur Court HR, *Norris* judgment of 26th October 1988, series A No 142
- 11 Circuit Court (Judge David Sheehy), unreported, 1983
- 12 Circuit Court (Judge Frank Martin), unreported, 1983
- 13 Peter Charlton, *Criminal Law Protecting the Mentally Subnormal against Sexual Exploitation*, [1984] DULJ 165
- 14 See Report on *Child Sexual Abuse* para 4 13
- 15 [1970] VR 337
- 16 *Textbook of Criminal Law*, 571 (2nd ed, 1983)
- 17 Report on *Sexual Offences* (Law Reform Commission of Canada), Report No 10 (1978) 23
- 18 American Law Institute *Model Penal Code and Commentaries*, vol 2, 321-2
- 19 *Id.*, 322
- 20 *Id.*, 321-2
- 21 Law Reform Commission of Victoria *Report on Sexual Offences against People with Impaired Mental Functioning* (Report No 150 para 4 1988)
- 22 15th Report on *Sexual Offences* (1984), para 93
- 23 Report on *Child Sexual Abuse*, para 4 19
- 24 Australian Law Reform Commission Report on *Evidence*, 150 (Report No 38)
- 25 Consultation Paper on *Child Sexual Abuse*, para 5 44
- 26 *Id.*, chapter 7
- 27 *In re D*, [1987] IR 449 (Sup Ct)
- 28 *Id.*, at 456
- 29 [1976] 1 All ER 326
- 30 [1987] 2 All ER 206
- 31 (1986) 31 DLR (4th) 1, at 32
- 32 Report on *Child Sexual Abuse*, paras 4 08 to 4 10