



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

REPORT

# SEXUAL OFFENCES AND CAPACITY TO CONSENT

(LRC 109-2013)

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Law Reform Commission

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## LAW REFORM COMMISSION'S ROLE

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 180 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at [www.lawreform.ie](http://www.lawreform.ie). Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its *Fourth Programme of Law Reform (2013-2015)* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in October 2013. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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Full responsibility for this publication lies, however, with the Commission.

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## INTRODUCTION

### A Background

1. This Report forms part of the Commission's *Third Programme of Law Reform*<sup>1</sup> and follows the publication of the Commission's *Consultation Paper on Sexual Offences and Capacity to Consent*.<sup>2</sup> The Report, like the Consultation Paper, examines whether the current law on sexual offences and capacity to consent in section 5 of the *Criminal Law (Sexual Offences) Act 1993* is in need of reform. In particular, the Commission examines whether section 5 of the 1993 Act complies with a rights-based analysis derived from the Constitution and relevant international law, including the need to prevent abuse or exploitation. The Report complements the general review of the law on sexual offences on which the Department of Justice and Equality is currently engaged.<sup>3</sup>

### B Evolving language and the subject-matter of the Report: decision-making capacity

2. In preparing this Report and in describing its subject-matter, the Commission is conscious of the need to use suitable terminology that indicates respect and does not insult or demean. Equally, the Commission is aware that the terminology used in this area is prone to the "euphemism treadmill"<sup>4</sup> by which terminology that appears at a given time to be respectful, or at least acceptable, runs the risk that it eventually comes to have a derogatory or insulting meaning.<sup>5</sup> In this respect, the *Lunacy Regulation (Ireland) Act 1871*, which regulates the adult wardship system and remains in force at the time of writing, provides that a person may be made a ward of court if he or she is a "lunatic," "idiot" or "person of unsound mind." It is clear that these terms are entirely unacceptable and derogatory (and, as discussed below, also conflate a person's decision-making capacity and his or her state of health). For this and other reasons, the Commission's 2006 *Report on Vulnerable Adults and the Law*<sup>6</sup> recommended the repeal of the 1871 Act and the enactment of modern capacity legislation that would be consistent with relevant human rights standards. The Government's *Assisted Decision-Making (Capacity) Bill 2013*, which is discussed extensively in this Report, proposes to implement the key elements of the Commission's 2006 Report and is also intended to comprise a significant element in fulfilling the State's

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<sup>1</sup> Law Reform Commission *Report on Third Programme of Law Reform* (LRC 86 – 2007), Project 12 (Chapters 1-4 of the Report) and Project 14 (Chapter 5 of the Report).

<sup>2</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011).

<sup>3</sup> The Commission is conscious that a consolidated *Criminal Justice (Sexual Offences) Bill* may arise from this general review, which would have the considerable benefit of bringing together all the offences in this area which are currently found in a disparate number of Acts, some of which predate the foundation of the State in 1922. At a wider level, this Report also complements the codification of the criminal law undertaken by the Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*. In 2011, the Department of Justice and Equality published the Advisory Committee's inaugural *Draft Criminal Code Bill and Commentary*, available at [www.justice.ie](http://www.justice.ie) and at [www.criminalcode.ie](http://www.criminalcode.ie).

<sup>4</sup> The term was developed in Pinker, *The Blank Slate: The Modern Denial of Human Nature* (Viking, 2002). Professor Steven Pinker is a renowned psychologist, cognitive scientist and linguist, and is currently Johnstone Family Professor, Harvard University.

<sup>5</sup> The Commission notes that significant efforts have been made both in the literature and in policy formation to restrict the use of derogatory terms and to encourage the use of positive language such as "ability" (not disability), "developmental delay" (to indicate the individual's potential) and "capacity" (not incapacity). Nonetheless, in everyday speech terms such as "cretin", "handicapped", "mongol", "moron", "retard", "retarded" and "spastic" – many of which also have, or had at one time, specific legal or medical meanings – are also often used pejoratively, whether consciously or unconsciously. The problem of the "euphemism treadmill" is also reflected in the comparable literature on the identification of persons based on ethnicity, race, religion, sex and sexual orientation.

<sup>6</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006).

commitment to ratify the 2006 UN Convention on the Rights of Persons With Disabilities (the UNCRPD). The 2013 Bill was published in July 2013 and at the time of writing is awaiting Second Stage debate in Dáil Éireann.

3. The title of the Commission's 2006 Report used the term "vulnerable adults" and the Report itself referred to "mental capacity" which was intended to denote a positive and respectful approach by contrast with a phrase such as "mental incapacity." The term "mental incapacity" had been used by the Law Commission for England and Wales in its comparable examination of this area in 1995.<sup>7</sup> In 2011, it approved the term "adult at risk" as being more suitable in some contexts, in particular where there is a real potential that a person with "intellectual disability" is open to exploitation or abuse.<sup>8</sup> The Commission is conscious that, in 2013, terms such as "vulnerable adult," "mental capacity" or even "adult at risk" may not be regarded as acceptable because they can be viewed as emphasising disability rather than ability or empowerment (even if they are not as objectionable as the language used in the 1871 Act). It is also notable that the legislation intended to implement the Commission's 2006 Report was, in 2008, published with the title *Scheme of Mental Capacity Bill 2008*<sup>9</sup> and that this was retained as its proposed title between then and 2012.<sup>10</sup> As already noted, in 2013 this proposed legislation was published as the *Assisted Decision-Making (Capacity) Bill 2013*. These changes in the terminology used to describe the same subject-matter illustrate the fast-evolving state of the language in this area.<sup>11</sup> Against this background, the Commission is conscious that, just as terms such as "vulnerable adult" and "mental capacity" were regarded as suitable less than a decade ago but may not be in 2013, any replacement terms regarded as suitable in 2013 may come to be regarded as inappropriate at some time in the future. Bearing in mind this risk, the Commission nonetheless accepts that it must settle on a consistent and recognised term to describe those affected by the subject-matter of this Report.

4. Even relatively recent legislation such as section 5 of the *Criminal Law (Sexual Offences) Act 1993*, which is the specific focus of this Report, provides for an offence involving a person who is "mentally impaired". "Mentally impaired" is defined as "suffering from a disorder of the mind, whether through mental handicap or mental illness." Clearly, these terms are no longer appropriate and the words "suffering from" also contain a sense of paternalism from an era that preceded a rights-based approach. The Commission's 1990 *Report on Sexual Offences Against the Mentally Handicapped*,<sup>12</sup> from which section 5 of the 1993 Act derived, used the term "mentally handicapped" in its title and had recommended the repeal and replacement of section 4 of the *Criminal Law Amendment Act 1935*. The 1935 Act had

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<sup>7</sup> Law Commission for England and Wales *Report on Mental Incapacity* (Law Com No. 231 1995).

<sup>8</sup> Law Commission for England and Wales *Report on Adult Social Care* (Law Com No. 326 2011) at paragraph 9.21 and *Consultation Paper on Adult Social Care* (No. 193 2010) at paragraph 12.28, fn 26, citing Association of Directors of Adult Social Services *Safeguarding Adults: A National Framework of Standards* (2005) at 5.

<sup>9</sup> *Scheme of Mental Capacity Bill 2008*, available at [www.justice.ie](http://www.justice.ie).

<sup>10</sup> The *Programme for Government 2011-2016* (2011), available at [www.taoiseach.ie](http://www.taoiseach.ie), contains a commitment to "introduce a Mental Capacity Bill that is in line with the UN Convention on the Rights of Persons with Disabilities". The Government Legislation Programmes published in 2011 and 2012 also referred to the Government's proposed "Mental Capacity Bill." In 2012, the Oireachtas Joint Committee on Justice, Defence and Equality published its *Report on Hearings in Relation to the Proposed Mental Capacity Bill*, available at [www.oireachtas.ie](http://www.oireachtas.ie). This was a pre-legislative scrutiny report which set out a series of observations on the Government's *Scheme of Mental Capacity Bill 2008*, among them that the title "Legal Capacity Bill" would be preferable to "Mental Capacity Bill."

<sup>11</sup> The changes since 2006 can be attributed, in part, to the rights-based analysis that has begun to emerge in the wake of the coming into force of the 2006 UN Convention on the Rights of Persons with Disabilities. The 2006 Convention refers to "disability" rather than "ability" in its title, which underlines the difficulties associated with the choice of terminology that is acceptable to the range of Contracting States who were party to the negotiation of the 2006 Convention. At the time of writing, Ireland is a signatory to the 2006 Convention and has indicated an intention to ratify it. The enactment of the *Assisted Decision-Making (Capacity) Bill 2013* would constitute a significant step towards ratification.

<sup>12</sup> Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990).



provided for an offence involving “any woman or girl who is an idiot, or an imbecile, or is feeble-minded.” These words echo some of the terms used in the *Lunacy Regulation (Ireland) Act 1871* (and it may also be noted that the 1935 Act was limited to the criminalisation of sexual offences involving women only).

5. While the terms used in the 1935 Act are objectionable, they can also be seen not simply as a collection of words that appear, from a contemporary perspective, to be gratuitously insulting but rather as specific terms related to the extent of a person’s ability. Indeed each of these terms, albeit using updated language, continues to have a recognised meaning in contemporary medical literature. Using the relevant World Health Organisation (WHO) classification system,<sup>13</sup> the term “profound intellectual disability” is the equivalent of the term “idiot” and is used to describe an IQ of under 20, in adults a mental age below 3 years. This would also mean that a person would have severe limits to his or her capacity for self-care or to protect against common physical dangers. Two WHO categories, “severe intellectual disability” and “moderate intellectual disability” correspond to the term “imbecile.” The term “severe intellectual disability” is used to indicate an approximate IQ range of 20 to 34, in adults a mental age from 3 to under 6 years, and likely to mean the person would be in continuous need of support. The term “moderate intellectual disability” is used to indicate an approximate IQ range of 35 to 49, in adults a mental age from 6 to under 9 years. The WHO classification system indicates that this “is likely to result in marked developmental delays in childhood but most can learn to develop some degree of independence in self-care and acquire adequate communication and academic skills. Adults will need varying degrees of support to live and work in the community, and likely to mean the person would be in continuous need of support.”

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

7. The terminology used in this area is subject to ongoing development and change. The Commission accepts that any proposals to replace existing legislation, whether the *Lunacy Regulation (Ireland) Act 1871* or section 5 of the *Criminal Law (Sexual Offences) Act 1993*, must take account of this reality while ensuring that any chosen terminology indicates appropriate respect for those addressed or affected by any resulting legislation. The Commission notes that the leading international human rights instrument in this area, the 2006 UN Convention on the Rights of Persons with Disabilities, uses the term “disability” while clearly promoting a rights-based approach. Similarly, “Rosa’s Law”<sup>14</sup> which was enacted in 2010 by the US Federal Congress, replaces the term “mental retardation” with the term “intellectual disability” in all US federal legislation. The term “intellectual disability” (or ID) is also commonly used in Ireland in this respect.<sup>15</sup> In the Consultation Paper, the Commission had provisionally concluded that it should use “intellectual disability” as a general term to include persons whose decision-making or cognitive capacity may be limited.<sup>16</sup>

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<sup>13</sup> The discussion here is based on the World Health Organisation’s (current) 10<sup>th</sup> Revised Version of the *International Statistical Classification of Diseases and Related Health Problems* (ICD-10), available at [www.who.org](http://www.who.org). The WHO classification system retains the general term “mental retardation”, which is no longer in general use in many countries, including Ireland. The Health Research Board’s National Intellectual Disability Database (NIDD), available at [www.hrb.ie](http://www.hrb.ie) and discussed in Chapter 1 of this Report, uses the WHO classification system but employs the term “intellectual disability” rather than “mental retardation.”

<sup>14</sup> Public Law 111-256. Section 1 of the 2010 Act provides that it is to be cited as “Rosa’s Law”, which refers to Rosa Marcellino, a Special Olympics athlete: see [www.specialolympics.org/rosas-law.aspx](http://www.specialolympics.org/rosas-law.aspx).

<sup>15</sup> See the discussion in Chapter 1 of this Report of the Health Research Board’s National Intellectual Disability Database (NIDD), available at [www.hrb.ie](http://www.hrb.ie).

<sup>16</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011), Introduction at paragraph 15. The same conclusion was reached in *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis*

8. Submissions received by the Commission in response to the Consultation Paper suggested that while the term “intellectual disability” is commonly used in Ireland, this should not necessarily lead to the conclusion that it is an appropriate term to use in the context of reforms arising from this Report. The Commission has reflected further on this matter and notes the change in the title of the comparable proposed legislation in the civil law setting, which has evolved from being described in 2008 as a *Scheme of Mental Capacity Bill* to being published in 2013 as the *Assisted Decision-Making (Capacity) Bill 2013*. The Commission is conscious that, where feasible and practicable, legislation in comparable areas should use consistent terminology. Indeed, as noted above, consistent language, albeit now outdated and objectionable, was to be found in the civil law and criminal law legislation applicable to the subject-matter of this area in, respectively, the *Lunacy Regulation (Ireland) Act 1871* and the *Criminal Law Amendment Act 1935*. It is only in more recent legislation that different terminology is to be found.

9. In its 2013 *Report on Jury Service*<sup>17</sup> the Commission used the term “assisted decision-making capacity” in the context of a comparable discussion of the capacity and competence of jurors. This was intended to reflect the principle of equality set out in Article 12 of the UNCRPD. Since then, the *Assisted Decision-Making (Capacity) Bill 2013* has been published and, bearing in mind the risks associated with the “euphemism treadmill”, the Commission considers that it should seek to mirror as closely as possible the terminology used in the 2013 Bill, which uses the term “relevant person.” The 2013 Bill defines “relevant person” as “(a) a person whose capacity is being called into question or may shortly be called into question in respect of one or more than one matter... (b) a person who lacks capacity in respect of one or more than one matter in accordance with the provisions of this [Bill], or (c) a person who falls within paragraphs (a) and (b) at the same time but in respect of different matters.” The 2013 Bill deals with a wide range of decision-making matters and, by contrast, this Report deals with one matter only, whether a person has capacity to consent to a sexual act. Because of this the Commission has concluded that the definition in the 2013 Bill should be adapted for the specific purpose of this Report. Accordingly, the Commission has concluded that the term “relevant person” should be defined as: “(a) a person whose capacity to consent to a sexual act is called into question or (b) a person who lacks capacity to consent to a sexual act” and that this term should be used in any legislation to refer to those affected by any reform or replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993*, which is the subject-matter of this Report. In order to make this Report accessible to the reader, the Commission has decided to use the terms “a person who has capacity to consent” and “a person who lacks capacity to consent” throughout the Report. The phrase “limited capacity” is used to describe persons who may have some capacity to consent but who may be open to exploitation or abuse.

10. The Commission acknowledges that much of the legislation and literature discussed in this Report uses a wide range of terms such as those identified above, including “mental disorder”, “mental retardation” and “intellectual disability”. Having regard to the fast changing nature of the language used in this area, it is not possible to avoid using such terms in the analysis contained in this Report. The Commission’s final recommendations and draft Bill will, however, avoid these terms and use the term “relevant person” as already suggested.

11. *The Commission recommends that the term “relevant person,” which should be defined as: “(a) a person whose capacity to consent to a sexual act is called into question or (b) a person who lacks capacity to consent to a sexual act” should be used in any legislation resulting from this Report to refer to those affected by any reform or replacement of section 5 of the Criminal Law (Sexual Offences) Act 1993, which is the subject-matter of this Report.*

## **C The need to separate capacity to consent and health**

12. In the historical development of law and policy in this area, decision-making capacity and mental ill-health were often considered and dealt with together. A clear indication of this is that the institutional “lunatic asylums” of previous centuries often housed persons with limited decision-making

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*Pregnancy* (National Disability Authority and Crisis Pregnancy Programme 2011) at 29-30, available at [www.nda.ie](http://www.nda.ie).

<sup>17</sup> Law Reform Commission *Report on Jury Service* (LRC 107-2013), Chapter 4.

capacity as well as persons with mental illnesses. This conflation of capacity and health is also evident in the various terms used in the *Lunacy Regulation (Ireland) Act 1871*, the *Criminal Law Amendment Act 1935* and the *Criminal Law (Sexual Offences) Act 1993*, discussed above. In its 2006 *Report on Vulnerable Adults and the Law*,<sup>18</sup> the Commission emphasised that, in the context of the proposed capacity legislation which it recommended should be enacted to replace the 1871 Act, a person's state of health or ill-health is not and should not be seen as being directly connected with a person's decision-making capacity. This is because illness, whether physical or mental, often has no effect on a person's decision-making capacity, though it sometimes does. The key point is to recognise that decision-making capacity and health should not be conflated.

13. This approach was reflected in the Consultation Paper in which the Commission emphasised that when considering capacity to consent in the law on sexual offences, it is necessary to consider separately a person's decision-making capacity and the person's state of health or ill-health.<sup>19</sup> Section 5 of the *Criminal Law (Sexual Offences) Act 1993*, which uses the term "mentally impaired," defines this as "suffering from a disorder of the mind, whether through mental handicap or mental illness." Section 5 of the 1993 Act thus appears, like the 1871 and 1935 Acts, to conflate decision-making capacity ("mental handicap") and a person's state of health or ill-health ("mental illness").

14. In its 2000 *Report on the Review of the Mental Health (Scotland) Act 1984*,<sup>20</sup> the Scottish Millan Committee noted that where decision-making capacity is related to a learning disability this may be a lifelong condition which, by contrast with a person's state of health or ill-health, cannot be cured or alleviated by medication, although an improvement in functioning can often be achieved by other measures. Some jurisdictions have introduced a clear distinction between capacity and health in this context. In New Zealand, the *Mental Health (Compulsory Assessment and Treatment) Act 1992* recognises that there is a fundamental difference between what it refers to as "intellectual disability" (that is, decision-making capacity) and mental health by excluding "intellectual disability" from mental health law.<sup>21</sup> In Tasmania, while legislation uses the term "mental impairment" to mean "senility, intellectual disability, mental illness or brain damage", it also provides that a diagnosis of mental ill-health may not be based solely on "intellectual disability" (that is, decision-making capacity).<sup>22</sup>

15. The Commission therefore reiterates the approach taken in the Consultation Paper<sup>23</sup> that a person's state of health or ill-health should not be seen as directly connected with a person's decision-making capacity to consent to sexual activity. The Commission has therefore concluded that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should provide that while a relevant person's lack of capacity to consent may arise because of (a) a disability or (b) ill health the fact of disability or of ill health does not, in itself, mean that the relevant person lacks capacity to consent and that each should be treated quite separately. The Commission also considers that it is important to ensure that, in determining whether a person has capacity to consent or lacks capacity to consent, all the circumstances surrounding the decision of the person to engage in a sexual act should be taken into account. For this reason, the Commission has concluded that the legislation should also provide that the issue of capacity may be considered by reference to "any other reason." The Commission notes that this phrase has been used in comparable legislation such as the English *Sexual Offences Act 2003* and the Northern Ireland *Sexual Offences (Northern Ireland) Order 2008*, which are discussed in the succeeding

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<sup>18</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 1.15.

<sup>19</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 1.12.

<sup>20</sup> Scottish Executive *New Directions Report on the Review of the Mental Health (Scotland) Act 1984* (2001), recommendation 4.5 at 31.

<sup>21</sup> Section 4 of the New Zealand *Mental Health (Compulsory Assessment and Treatment) Act 1992* as substituted by section 4 of the *Mental Health (Compulsory Assessment and Treatment) Act 1999*.

<sup>22</sup> Section 126(4) of the *Criminal Code Act 1924* (Tas) and section 4 of the *Mental Health Act 1996* (Tas).

<sup>23</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 1.12.

chapters of this Report. It allows the court to have regard to any matter that might affect capacity to consent, whether this arises from a developmental issue (including autism), a neurological disorder, dementia or an acquired brain injury. Its use also allowed the UK House of Lords in *R v Cooper*<sup>24</sup> to have regard to the specific and unusual circumstances which arose in that case in determining whether there was capacity to consent to the sexual acts involved.

16. In its 2006 *Report on Vulnerable Adults and the Law*<sup>25</sup> the Commission recommended that the proposed capacity legislation should include provision for an Office of Public Guardian which would be empowered to publish a statutory Code of Practice to provide practical guidance on the legislation. The Government's *Assisted Decision-Making (Capacity) Bill 2013*, intended to implement the key elements of the 2006 Report, includes provision for an Office of Public Guardian and the publication by it of a Code of Practice.<sup>26</sup> The Commission recommends that the Code of Practice to be published by the Office of Public Guardian which is to be established under the *Assisted Decision-Making (Capacity) Bill 2013* should provide that a person's state of health or ill-health should not be seen as directly connected with a person's decision-making capacity and should include detailed guidance on the effect, where relevant, of ill-health on decision-making capacity.

17. *The Commission recommends that any replacement of section 5 of the Criminal Law (Sexual Offences) Act 1993 should provide that while a relevant person's lack of capacity to consent may arise because of (a) a disability, (b) ill health or (c) any other reason, the fact of disability or of ill health or the presence of any other reason does not, in itself, mean that the relevant person lacks capacity to consent and that each should be treated quite separately. The Commission also recommends that the Code of Practice to be published by the Office of Public Guardian, which is to be established under the Assisted Decision-Making (Capacity) Bill 2013, should provide that a person's state of health or ill-health should not be seen as directly connected with a person's decision-making capacity and should include detailed guidance on the effect, where relevant, of ill-health on decision-making capacity.*

18. The Commission now turns to provide an outline of the Report.

## **D Outline of this Report**

19. Chapter 1 begins by setting out the contextual background to reform of the law relating to sexual offences and capacity to consent. This includes a discussion of the evolution of policy and the constitutional and international legal framework concerning relevant persons and the current law on capacity to consent to sexual activity. The Commission then proceeds to examine the wider policy issue of reproductive rights. The vulnerability to sexual abuse and exploitation of relevant persons is also discussed. The Commission concludes by recommending that section 5 of the *Criminal Law (Sexual Offences) Act 1993* should be repealed and replaced because it is not consistent with a functional test of capacity to consent to sexual activity. The Commission also concludes that section 5 of the 1993 Act should be replaced by provisions that recognise that persons whose capacity to consent is open to question or who lack capacity to consent are at a greater risk of sexual abuse or exploitation than the general population and that this risk is not limited to sexual intercourse, to which section 5 of the 1993 is confined, but more commonly involves other forms of sexual assaults and sexual abuse. The Commission also recommends that any replacement of section 5 of the 1993 Act should provide that no offence occurs where two relevant persons engage in or attempt to engage in a sexual act and there is no exploitation or abuse involved.

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<sup>24</sup> [2009] UKHL 42, [2009] 4 All ER 1033: see the discussion at paragraphs 3.47-3.48, below.

<sup>25</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 1.15.

<sup>26</sup> The Oireachtas Joint Committee on Justice, Defence and Equality had also recommended the establishment of an Office of Public Guardian in its 2012 *Report on Hearings in Relation to the Proposed Mental Capacity Bill*, available at [www.oireachtas.ie](http://www.oireachtas.ie). This was a pre-legislative scrutiny report which set out a series of observations on the Government's *Scheme of Mental Capacity Bill 2008* and which influenced the content of the 2013 Bill as initiated.

20. In Chapter 2, the Commission discusses the general approach that should be taken to reform so that it reflects the development of a rights-based approach to persons whose capacity to consent is open to question or who lack capacity to consent, while at the same time adequately protecting such persons from sexual abuse and exploitation. The Commission sets out the contextual background by analysing the general law relating to consent to sexual activity and the circumstances in which consent is considered to be absent. The Commission then considers the various options for reforming the law relating to sexual offences and capacity to consent, having particular regard to the UNCRPD. The Commission concludes that specific provisions on capacity to consent to sexual activity should be incorporated into the criminal law that are consistent with the equality principles in the UNCRPD but which also provides substantive and procedural protections against exploitation and abuse. The Commission recommends that these provisions should state that it is an offence to engage in sexual activity with a person who lacks capacity to consent to that sexual activity or whose capacity is in question. The Commission also recommends that a person's capacity to consent to sexual activity should be determined by reference to a functional test of capacity.

21. In Chapter 3, the Commission considers the detailed elements of the functional test of capacity to consent. The Commission concludes that the functional test should require that the relevant person can choose to agree to the sexual act involved (including where he or she can so choose arising from the provision to him or her of suitable decision-making assistance) because he or she has sufficient understanding of the nature and reasonably foreseeable consequences of the sexual act involved; that it should not include a specific requirement that the person is able to retain the information related to the understanding of the nature and reasonably foreseeable consequences of the specific sexual act involved; that it should include a requirement that the person is able to weigh up relevant information in deciding whether to engage in the specific sexual act involved; and that it should include a requirement that the person is able to communicate his or her decision (whether by talking, using sign language or any other means).

22. In Chapter 4 the Commission discusses the specific sexual offences that should be included in legislation intended to replace the limited range of offences in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. The Commission examines the vulnerability of relevant persons to exploitation or abuse, including by those in a position of trust or authority over them and then discusses the specific offences it recommends should be enacted to replace section 5 of the 1993 Act. These involve offences that broadly correspond to existing generally applicable sexual offences, as set out in the *Criminal Law (Rape) Acts 1981 and 1990*, and they also deal with circumstances where a person is in a position of trust or authority. The Commission then addresses a number of specific elements of the offences, including whether they should involve strict liability, defences to the proposed offences and the penalties that should apply to them.

23. Chapter 5 discusses reforms of the pre-trial criminal procedure system and the trial process as they apply to the offences under consideration in this Report. This includes reforms for witnesses and defendants who may require assistance and support to facilitate giving evidence in the early stages of the criminal justice process and during the trial itself. The Commission discusses the forms of assistance already provided for under the *Criminal Evidence Act 1992* as well as comparable arrangements in other jurisdictions. The Commission's recommendations for reform, which involve some extensions to the existing provisions in the 1992 Act, take account of relevant constitutional requirements and international human rights standards.

24. Chapter 6 contains a summary of the Commission's recommendations.

25. The Appendix contains a draft *Criminal Law (Sexual Offences and Capacity) Bill* to implement the recommendations for reform contained in the Report.



## CHAPTER 1 THE CONTEXT FOR REFORM

### A Introduction

1.01 In this Chapter, the Commission sets out the context in which its proposals for reform in this Report should be viewed. Part B summarises the evolution of policy and the constitutional and international legal framework concerning relevant persons whose capacity is at issue.<sup>1</sup> In Part C, the current law on capacity to consent to sexual activity is explained and deficiencies in that law are highlighted. Part D contains an analysis of the wider policy issue of reproductive rights. Finally, Part E addresses the vulnerability to sexual abuse and exploitation of relevant persons and the supports and safeguards which are considered necessary to protect them.

### B Evolution of policy and international legal framework

#### (1) *From eugenics to a rights-based analysis*

1.02 The Commission's general approach in this Report is that the law should recognise the right of persons who have capacity to consent to sexual activity to express their sexuality. The law should also recognise that there is a small group of persons who lack capacity to consent to sexual activity even with provision of appropriate support and accommodation. In addition, the law must reflect the fact that people who fall within either of these categories may be at risk or are otherwise vulnerable to sexual exploitation or abuse. The Commission notes in this respect that a rights-based approach to the sexuality of such persons has only become a real concern in relatively recent times.

1.03 Policy concerning persons with intellectual disability went through enormous changes in a relatively short period in the second half of the 20<sup>th</sup> century and the beginning of the 21<sup>st</sup> century. The eugenics movement of the late 19<sup>th</sup> century and early 20<sup>th</sup> century, now discredited, was an extreme instance of how poor understanding of intellectual disability led to gross violation of rights, including forced sterilisation. Even when, largely from the middle of the 20<sup>th</sup> century, these aspects of eugenics were ended, a continuing major feature of policy that continued until the late 20<sup>th</sup> century was overwhelmingly based on taking persons with intellectual disability out of their family and community setting, detaining them in large institutions with relatively limited developmental support structures where, often, persons with mental illness were also detained. While some improvements were evident in the second half of the 20<sup>th</sup> century, in terms of providing some level of vocational training in the institutional setting, the predominant policy approach continued to be based on separation from the general community.

1.04 Towards the end of the 20<sup>th</sup> century, developed countries such as Ireland recognised the need to close these large institutions and move towards a community-based approach or social model of policy development.<sup>2</sup> As a result, persons with intellectual disability were integrated more fully into the mainstream educational and employment setting. This reflected a better understanding of the capacity of persons with intellectual disability, as well as the need to recognise their rights. Internationally, from the 1970s onwards the member states of global bodies such as the United Nations laid the foundation for the recognition of the rights of persons with intellectual disability, culminating in the 2006 UN Convention on the Rights of Persons with Disabilities, the UNCRPD (which applies to persons with physical disability as well as persons with intellectual disability). This rights-based analysis is also evident in the case law of

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<sup>1</sup> See discussion of terminology in the Introduction above.

<sup>2</sup> For a discussion of the evolution of policy and law in this area, see Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63- 2011) at paragraphs 1.61-1.90.

the Irish courts concerning the rights under the Constitution of Ireland of persons with intellectual disability, beginning with the 1993 High Court decision in *O'Donoghue v Minister for Health*.<sup>3</sup>

## **(2) From institutional care to empowerment in the community**

1.05 The 2006 National Disability Survey (NDS) carried out by the Central Statistics Office indicates that 50,400 people in Ireland have a diagnosed intellectual disability. This includes 14,000 whose main disability was classified as dyslexia or a specific learning difficulty and 2,500 whose disability was classified as attention deficit disorder. Many of these 16,500 individuals are unlikely to require specific supports outside their specific educational needs. The Health Research Board, which has adapted the WHO classification system in the development of its National Intellectual Disability Database (NIDD), has noted that, in 2011, there were 27,324 people registered on the NIDD.<sup>4</sup>

1.06 Between 1996 and 2011, there was an increase of 72% in the number of people with intellectual disability living full time in community group homes and a 78% reduction in the number of people with intellectual disability accommodated in psychiatric hospitals.<sup>5</sup> In a 2011 Report, the Health Service Executive (HSE) recommended the closure, within 7 years, of institutions in which people with disabilities live in such congregated settings.<sup>6</sup>

1.07 The growth of the rights movement has resulted in the expression of one's sexuality being seen as a human rights issue and attention has now turned to empowering people with capacity to consent with the benefit of practicable assisted decision-making support and accommodation in relation to their sexuality, while at the same time providing protection to those who may not have the requisite capacity to consent to sexual relations.

## **(3) Development of a functional approach to capacity**

1.08 Two differing approaches to determining capacity to consent for the purposes of the criminal law on sexual offences currently exist in Irish law.<sup>7</sup> The subjective, functional approach has long been a feature of the common law, having its roots in 19<sup>th</sup> century decisions such as *R v Camplin*<sup>8</sup> and *R v Fletcher*.<sup>9</sup> Section 5 of the *Criminal Law (Sexual Offences) Act 1993* and its predecessor, section 4 of the *Criminal Law Amendment Act 1935*, constituted a departure from the established common law rule in *R v Fletcher* by incorporating a "status based" assessment of capacity to consent to sexual relations in respect of persons with intellectual disability.<sup>10</sup> Rather than determining capacity to consent by reference to whether a specific individual understands the nature and consequences of the sexual act, section 5 of the 1993 Act automatically deems a "mentally impaired" person incapable of consenting to sexual activity.

1.09 By contrast, the functional approach recognises that a person whose capacity is limited may be capable of making decisions in one area but may not have the requisite capacity to understand the nature

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<sup>3</sup> *O'Donoghue v Minister for Health* [1993] IEHC 2; [1996] 2 IR 20.

<sup>4</sup> Health Research Board *Annual Report of the National Intellectual Disability Database Committee 2011* (2012) at 15, available at [www.hrb.ie](http://www.hrb.ie).

<sup>5</sup> Health Research Board *Annual Report of the National Intellectual Disability Database Committee 2011* (2012) at 16, available at [www.hrb.ie](http://www.hrb.ie).

<sup>6</sup> Health Service Executive *Time to move on from congregated settings: A strategy for community inclusion. Report of the Working Group on Congregated Settings* (2011) at 136, available at [www.hse.ie](http://www.hse.ie).

<sup>7</sup> This was recognised by the Criminal Law Codification Advisory Committee in its *Draft Criminal Code and Commentary*. See Commentary on Head 1105 (Consent) at paragraph 34, available at [www.criminalcode.ie](http://www.criminalcode.ie) and [www.justice.ie](http://www.justice.ie)

<sup>8</sup> *R v Camplin* (1845) 1 Den 89.

<sup>9</sup> *R v Fletcher* (1886) LR 1 CCR 39.

<sup>10</sup> The status approach is also associated with the current Wards of Court system, regulated under the *Lunacy Regulation (Ireland) Act 1871*. This is to be replaced under the *Assisted Decision-Making (Capacity) Bill 2013* with an approach based on the functional test of capacity.



and consequences of making a decision in another area or be able to communicate their decision on the matter. Thus, it rejects the idea that once capacity has been established in one area it is seen as conclusive proof of capacity in other areas regardless of the circumstances. The functional approach defines capacity as the ability, with suitable assistance if needed, to understand the nature and consequences of a decision within the context of the available range of choices; and to communicate that decision. It also recognises that capacity or lack of capacity is not a permanent state but may fluctuate.<sup>11</sup> In *MX v Health Service Executive*,<sup>12</sup> MacMenamin J endorsed a functional approach to capacity. Relying on case law from the European Court of Human Rights (ECtHR), he recognised that legislative frameworks on capacity should as far as possible recognise that different degrees of capacity may exist and that capacity, and lack of capacity, may vary from time to time. Accordingly, measures of protection should not result automatically in a complete removal of legal capacity.<sup>13</sup>

1.10 There may also be cases where a person can understand the nature and effects of a decision, but the effects of their intellectual disability prevent them from using that information in the decision-making process. In addition, a functional test recognises that there may be differences in capacity depending on the nature of the relationship, particularly where the accused is in a relationship of trust with or in a position of authority over the complainant in a sexual offence. This task-specific or functional approach has become the most commonly used basis for assessing capacity internationally.<sup>14</sup> Article 12(3) of the UNCRPD clearly espouses a functional approach by enjoining the State to take appropriate measures to provide access to supports in order to exercise legal capacity.

1.11 In its 2006 *Report on Vulnerable Adults and the Law*, the Commission recommended the enactment of capacity legislation based on the functional approach.<sup>15</sup> The 2006 Report also recommended that the proposed capacity legislation should set out a rebuttable presumption of capacity.<sup>16</sup> In May 2012, the Joint Committee on Justice, Defence and Equality published its *Report on Hearings in Relation to the Scheme of Mental Capacity Bill 2008*<sup>17</sup> which also endorsed the functional approach, and it has also been adopted in the Government's *Assisted Decision Making (Capacity) Bill 2013*.

## **C Current law on capacity to consent to sexual relations**

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

1.12 The current legislation on sexual offences in the specific context of persons who lack capacity to consent is contained in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. Section 5 of the 1993 Act implemented some of the recommendations made by the Commission in its 1990 *Report on*

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<sup>11</sup> Rook and Ward *Sexual Offences: Law and Practice* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 334.

<sup>12</sup> *MX v Health Service Executive* [2012] IEHC 491.

<sup>13</sup> [2012] IEHC 491 at paragraphs 62 and 79.

<sup>14</sup> For example, the degrees of capacity are defined by the World Health Organisation (which, as already discussed uses the term "mental retardation") by reference to "social adaptation in a given environment", as well as that any diagnosis of ability or disability "should be based on current levels of functioning" and a recognition that intellectual abilities and social adaptation "may change over time" and "improve as a result of training and rehabilitation" (Chapter 5 of the *International Statistical Classification of Diseases and Related Health Problems*, 10<sup>th</sup> Revised Version (ICD-10) available at [www.who.org](http://www.who.org)). As already noted in the Introduction to this Report, the WHO classification system is used by the Health Research Board in Ireland in carrying out individual assessments of persons in compiling the National Intellectual Disability Database: see Health Research Board *Annual Report of the National Intellectual Disability Database Committee 2011 (2012)* at 25, available at [www.hrb.ie](http://www.hrb.ie).

<sup>15</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.30.

<sup>16</sup> *Ibid*, at paragraph 2.39.

<sup>17</sup> Joint Oireachtas Committee on Justice, Defence and Equality *Report on Hearings in Relation to the Scheme of Mental Capacity Bill* (Houses of the Oireachtas, 31/JDAE/005, 2012), available at [www.oireachtas.ie](http://www.oireachtas.ie).

*Sexual Offences Against the Mentally Handicapped*<sup>18</sup> but it retains a paternalistic or protective approach to the specific aspect of the law under discussion in this Report. Section 5 of the 1993 Act reflects the legitimate aim of protecting from sexual exploitation or abuse persons who are at risk or are otherwise vulnerable to such exploitation or abuse because of (a) their lack of capacity even with the benefit of practicable assisted decision-making support and accommodation or (b) their need for such support and accommodation to exercise capacity, but it fails to sufficiently clarify that it recognises the rights of such persons to have a fully-expressed consensual sexual life. Section 5 of the 1993 Act provides:

“(1) A person who—

- (a) has or attempts to have sexual intercourse, or
- (b) commits or attempts to commit an act of buggery,

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

- (i) in the case of having sexual intercourse or committing an act of buggery, imprisonment for a term not exceeding 10 years, and
- (ii) in the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery, imprisonment for a term not exceeding 3 years in the case of a first conviction, and in the case of a second or any subsequent conviction imprisonment for a term not exceeding 5 years.

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

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

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

(5) In this section ‘mentally impaired’ means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation.”

## **(2) Deficiencies in the current law on sexual offences and capacity to consent**

### **(a) Empowerment**

1.13 There is no provision under section 5 of the *Criminal Law (Sexual Offences) Act 1993* for consent as a defence in situations where both parties to a sexual act are capable of giving real consent to sexual intercourse. The operation of section 5 of the 1993 Act therefore, in effect, bars a mutually consensual sexual relationship with another person with intellectual disability, irrespective of whether or not they have capacity to consent to the relationship. This runs contrary to the Commission’s recommendation in its 1990 *Report on Sexual Offences Against the Mentally Handicapped* that a relationship between participants who both have either a mental handicap or mental illness should not in itself be prohibited.<sup>19</sup> The Commission noted in its 2005 *Consultation Paper on Capacity* that “a

<sup>18</sup> Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990). The 1990 Report followed on from related recommendations made by the Commission concerning the law on sexual offences generally in its 1987 *Consultation Paper on Rape* (LRC CP 1-1987) and 1988 *Report on Rape and Allied Offences* (LRC 24-1988).

<sup>19</sup> Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990) at paragraph 35.

regrettable effect of section 5 of the 1993 Act is that outside a marital context a sexual relationship between two ‘mentally impaired’ persons may constitute a criminal offence because there is no provision for consent as a defence in respect of a relationship between adults who were both capable of giving a real consent to sexual intercourse.”<sup>20</sup> As mentioned in the Commission’s 2005 *Consultation Paper on Capacity*, a fear of prosecution on the part of parents and carers may prevent the development of relationships between two adults with intellectual disability even though they have the capacity to consent and where there is no element of exploitation.<sup>21</sup>

1.14 Rather than determining capacity to consent by reference to whether a specific individual understands the nature and consequences of the sexual act, section 5 of the 1993 Act automatically deems a “mentally impaired” person incapable of consenting to sexual activity. By not clearly providing for situations of consensual sex between two persons who have capacity to consent, section 5 has the effect of precluding a mutually consensual sexual relationship between persons with limited decision-making capacity.<sup>22</sup>

1.15 The definition of “mentally impaired” in section 5(5) of the 1993 Act predicates capacity to consent on ability to live independently. In the Commission’s view, this is not an accurate assumption and an element of dependency should not necessarily preclude an ability to consent.<sup>23</sup> The Commission premises its position on the argument, as discussed in the Consultation Paper,<sup>24</sup> that equating a person’s ability to live independently with his or her capacity to consent to sexual relations involves using a medical model of mental disability which also fails to recognise that it imposes socially constructed barriers to the enjoyment by persons of their sexual lives. The Commission considers that this paternalistic approach is at variance with the changes in general national policy towards a rights-based and functional analysis of capacity and fails to take into account the constitutional and human rights of persons with intellectual disability.<sup>25</sup> One submission received by the Commission in response to the Consultation Paper noted that many people who are capable of living independently currently live at home or in residential accommodation due to insufficient resources to facilitate independent living.

1.16 In the Consultation Paper, the Commission provisionally recommended that a functional approach should be used in determining whether a person has capacity to consent to sexual relations in the criminal law.<sup>26</sup> In addition, in its 2005 *Consultation Paper on Capacity*, the Commission provisionally recommended that section 5 of the 1993 Act be amended “in order to ensure that relationships between

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<sup>20</sup> Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 6.20.

<sup>21</sup> *Ibid* at paragraph 6.20.

<sup>22</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 1.21.

<sup>23</sup> See Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 1.23-1.24. The same view was expressed by the Commission in its 1990 *Report on Sexual Offences and the Mentally Handicapped* (LRC 33-1990) at paragraph 32 and in its 2005 *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 6.19.

<sup>24</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 1.23. See also Doyle “The notion of consent to sexual activity for persons with mental disabilities” (2010) 31(2) *Liverpool Law Review* 111 at 123.

<sup>25</sup> The Commission has previously observed that if the matter arose for consideration section 5 of the *Criminal Law (Sexual Offences) Act 1993* may be considered to be in breach of Article 8 of the European Convention on Human Rights: see *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 1.89 and Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 6.22.

<sup>26</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 2.44.

adults with limited decision-making ability would be lawful where there is real informed consent.”<sup>27</sup> This reflected the Commission’s recommendation in its 1990 *Report on Sexual Offences Against the Mentally Handicapped* that a relationship between participants who both have either a mental handicap or mental illness should not in itself be prohibited.<sup>28</sup> It is worth noting that the English Law Commission took a similar view in its 2000 Report which formed part of the Home Office’s 2000 Sex Offences Review.<sup>29</sup> The English Commission proposed that the autonomy of those with limited decision-making capacity to engage in sexual activity could be recognised by providing that, in certain circumstances, an offence would not be committed despite a lack of capacity to consent. Such an exemption might apply where (a) apparently consensual activity takes place between two people whose capacity is such that they may lack a sufficient understanding of the consequences in order to have capacity to give consent in non-exploitative circumstances and (b) where only one party lacks capacity and this occurs in non-exploitative circumstances.<sup>30</sup>

1.17 As outlined above, the Commission considers that a functional test of capacity enables an individual to realise their self-determination in the context of their personal social setting.<sup>31</sup> Accordingly, the Commission has concluded, and recommends, that section 5 of the 1993 Act should be repealed because it does not reflect the changes in policy regarding persons whose capacity is in question and is not consistent with a functional test of capacity to consent. The Commission also reiterates the recommendation in its 1990 *Report on Sexual Offences Against the Mentally Handicapped* that a relationship between two relevant persons, as already defined in the Introduction to this Report, should not in itself be prohibited, and that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should provide that, to avoid any doubt on the matter, no offence occurs where (a) two relevant persons engage in or attempt to engage in a sexual act and (b) there is no exploitation or abuse of either relevant person. The Commission considers it important that such a provision should refer to the potentially wide scope of exploitation or abuse that may arise, which can include physical, sexual or emotional elements. The Commission notes in this respect that, in comparable contexts, both the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* and the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*<sup>32</sup> expressly refer to these three elements of exploitation or abuse. The Commission also considers that, in relation to this proposed statutory provision, it should be the case that the two relevant persons not have the same decision-making capacity as each other.

**(b) Protection**

1.18 The offence in section 5 of the *Criminal Law (Sexual Offences) Act 1993* is limited to sexual intercourse only and it thus fails to provide adequate protection to relevant persons from unwanted sexual contact generally. A strong theme emerged in submissions regarding the need to provide sufficient protection from sexual exploitation and abuse. In addition, the limited scope of section 5 of the 1993 Act and its resulting failure to provide appropriate protection from sexual exploitation or abuse was highlighted by White J in 2010 in *The People (DPP) v XY*.<sup>33</sup> In that case, the accused was alleged to have forced a woman with an intellectual disability into performing oral sex with him. As this act does not come

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<sup>27</sup> Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 6.26.

<sup>28</sup> Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990) at paragraph 35.

<sup>29</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000).

<sup>30</sup> *Ibid* at paragraphs 4.71-4.77. See also the discussion at paragraph 3.12, below.

<sup>31</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011), Introduction at paragraph 17.

<sup>32</sup> These 2012 Acts are further discussed at paragraphs 1.43 and 1.44, below.

<sup>33</sup> Central Criminal Court, 15 November 2010, *The Irish Times*, 16 November 2010. The case is also discussed at paragraphs 2.55, 4.07 and 5.36, below.

within the scope of section 5 of the 1993 Act, the accused was charged under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. White J noted that “[i]t seems to me that the Oireachtas when they introduced the 1993 Act did not fully appreciate the range of offences needed to give protection to the vulnerable.” In directing the jury to acquit the defendant, he stated that the judiciary could not fill “a lacuna in the law.”

1.19 In legislating in this area, the evidence base must be taken into account, namely that people with a disability are at a greater risk of sexual abuse or exploitation than the general population.<sup>34</sup> In addition, an Irish study of sexual abuse in intellectual disability services over a 15 year period found that sexual touching, rather than penetration, was the most common type of abuse.<sup>35</sup> While respecting the right to sexual fulfilment of persons whose capacity to consent is at issue, the Commission considers that the law should also recognise that such persons are at a higher risk of sexual exploitation and abuse. The development of community-based care also brings with it the potential for vulnerability to sexual exploitation or abuse. The Commission discusses in further detail in Chapter 4, below,<sup>36</sup> the precise scope of sexual acts to which the replacement of section 5 of the 1993 Act should apply.

1.20 *The Commission recommends that section 5 of the Criminal Law (Sexual Offences) Act 1993 should be repealed because it does not reflect the changes in national policy towards a rights-based and functional analysis of capacity to consent. The Commission also recommends that section 5 of the 1993 Act should be replaced by legislative provisions that recognise that persons who lack capacity to consent are at a greater risk of sexual abuse or exploitation than the general population and that this risk is not limited to sexual intercourse, to which section 5 of the 1993 is confined, but more commonly involves other forms of sexual assaults and sexual abuse. The Commission also recommends that any replacement of section 5 of the Criminal Law (Sexual Offences) Act 1993 should provide that, to avoid any doubt on the matter, no offence occurs where (a) two relevant persons engage in or attempt to engage in a sexual act and (b) there is no exploitation or abuse (whether physical, sexual or emotional) of either relevant person; and that in such a case they need not have the same decision-making capacity as each other.*

## **D Reproductive and parental rights**

### **(1) Introduction**

1.21 The Commission made a number of provisional recommendations dealing with parental rights in the Consultation Paper.<sup>37</sup> Having reflected on this matter in preparing this Report, the Commission has concluded that it should not make any final recommendations in this regard as it would be outside the scope of this Report, namely that of sexual offences and capacity to consent to sexual activity. The Commission is of the view, nonetheless, that any discussion of the freedom to engage in sexual relations requires a consideration of the wider policy issues of reproductive freedom and parental rights of relevant persons having regard to constitutional and international standards. At the time of publication of this

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<sup>34</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 4.02-4.14. See also National Disability Authority *A review of the literature and qualitative studies on sexual abuse and people with disabilities: findings and methodologies* (2011) at 1, available at [www.nda.ie](http://www.nda.ie); National Disability Authority and Crisis Pregnancy Programme *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (2010), available at [www.nda.ie](http://www.nda.ie); and Voice UK, Respond and Mencap UK *Behind closed doors: preventing sexual abuse against adults with a learning disability* (2001) at 5.

<sup>35</sup> This figure amounted to 59%. Sexual touching and masturbation together accounted for two-thirds (65%) of all episodes of abuse. Penetrative and attempted penetrative abuse together accounted for almost a third (31%) of episodes: see McCormack, Kavanagh, Caffrey, Power “Investigating Sexual Abuse: Findings of a 15-Year Longitudinal Study” (2005) 18 *Journal of Applied Research in Intellectual Disabilities* 217 at 222-223.

<sup>36</sup> See paragraph 4.18, below.

<sup>37</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 3.76.

Report, comprehensive data on the total number of parents with learning disabilities in Ireland was not available but it is widely recognised that the number of parents with intellectual disabilities is increasing.<sup>38</sup>

1.22 This Part begins by discussing the challenges and barriers facing parents whose capacity may be in question. The Commission then considers the rights of such parents under the Constitution and international human rights law. The need for appropriate support and accommodation for parents who require it is then assessed.

## **(2) Challenges facing parents who require decision-making assistance**

1.23 Although research<sup>39</sup> has dispelled the myth of the eugenics era that parents with intellectual disability are more likely to have children with an intellectual disability,<sup>40</sup> such parents continue to face many challenges.<sup>41</sup> These include access to sexual health information, equal access to sexual health services, inadequate information and negative attitudes to pregnancy and parenthood among service providers and the wider community.<sup>42</sup> Even when parents with intellectual disability do receive information, they may have difficulty understanding it or putting it into practice.<sup>43</sup> In addition, the Commission noted in the Consultation Paper that section 18 of the *Child Care Act 1991*, under which a care order can be made bringing a child into the care of the Health Service Executive, has been used as a response to persons with intellectual disability having children.<sup>44</sup> This practice is in conflict with the functional approach which has at its core a rebuttable presumption of capacity and which is now included in the *Assisted Decision-Making (Capacity) Bill 2013*. As noted in the Consultation Paper, the Commission welcomes the development of a policy by the Legal Aid Board under which a person is

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<sup>38</sup> See Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 3.26–3.28.

<sup>39</sup> See, for example, a study from Australia, McConnell and Ors “Developmental Profiles of Children Born to Mothers with Intellectual Disability” (2003) 28 *Journal of Intellectual and Developmental Disability* 122 cited in National Disability Authority and Crisis Pregnancy Programme *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (2010) available at [www.nda.ie](http://www.nda.ie). The Australian study concluded that there was no statistically significant correlation between the developmental status of children and the characteristics of the mother or their home environment, but that the developmental status of the children varied markedly in physical, self-help, academic, social and communication domains.

<sup>40</sup> The eugenics era views were reflected in the long-since discredited comments of Holmes J in *Buck v Bell* (1927) 274 US 200 at 207. In that case, the US Supreme Court upheld the constitutionality of a Virginia statute that permitted eugenical sterilisation of persons with disabilities. Holmes J stated: “[i]t would be strange if [the public welfare] could not call upon those who already sap the strength of the State... in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes. Three generations of imbeciles are enough.”

<sup>41</sup> See Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 3.27-3.32.

<sup>42</sup> See National Disability Authority and Crisis Pregnancy Programme *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (2010) at 161-163, available at [www.nda.ie](http://www.nda.ie). See also House of Lords/House of Commons Joint Parliamentary Committee on Human Rights *A Life Like Any Other? Human Rights of Adults with a Learning Disability* (2008) at paragraph 165.

<sup>43</sup> National Disability Authority and Crisis Pregnancy Programme *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (2010) available at [www.nda.ie](http://www.nda.ie) at 154.

<sup>44</sup> For further discussion of the *Child Care Act 1991* and the criteria for the making of a care order, see Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 3.15-3.21.

appointed to assist a parent with intellectual disability in care order proceedings under section 18 of the *Child Care Act 1991* to communicate their views to the solicitor who has been retained in the proceedings.<sup>45</sup>

1.24 A 2011 survey of public attitudes to disability published by the National Disability Authority (NDA) brought the issues of sexual freedom, parental rights and protection into sharp focus. The NDA's 2011 study revealed that only 51 per cent of respondents felt that people with intellectual disability or autism should have the same right to fulfilment through sexual relationships as everyone else.<sup>46</sup> The main reason offered by the 49 per cent of respondents who did not support this right was that people with intellectual disability or autism would not be able to make informed decisions or be in a position to consent (62 per cent of this group of respondents). Vulnerability of adults with intellectual disability to abuse was offered as another reason (38 per cent). Only 37 per cent of respondents agreed that adults with intellectual disability or autism should have children if they wish. This figure represents a significant fall from the 64 per cent figure recorded in the NDA's 2006 survey.<sup>47</sup> Concern about the child's emotional well-being (36 per cent) was the main reason given by respondents.<sup>48</sup> This analysis demonstrates that while the worst features of the eugenics movement may be in the past, some echoes of it continue to linger. The references in the responses to whether informed choices could be made by people with an intellectual disability reinforces the importance of providing suitable decision-making assistance to persons whose capacity may be in question in order to enhance their ability to make informed choices and to limit the risk of exploitation or abuse.

**(3) *Rights of parents who require decision-making assistance: the Constitution and international standards***

1.25 Article 41.1.1<sup>o</sup> of the Constitution recognises that the family is the "fundamental unit group of society." This is also reflected in international instruments such as the 1948 UN Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1989 UN Convention on the Rights of the Child and the 2006 UN Convention on the Rights of Persons With Disabilities, the UNCRPD.<sup>49</sup>

1.26 The following principles can be extracted from these national and international documents: (a) parents and others with parental responsibility have primary responsibility for the upbringing and development of their children; (b) the State may intervene to supply the place of parents only in exceptional circumstances where this is necessary; and (c) the rights of the child and their best interests must always be taken into account in this context.<sup>50</sup>

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<sup>45</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 3.24 where the Commission refers to the Legal Aid Board's Circular 2/2007, which provides for the arrangements to appoint persons to assist clients with impaired capacity in child care proceedings. These arrangements were made in the wake of *Legal Aid Board v Brady*, High Court, March 2007 (settlement of case) High Court Record Nos. 474/2005/JR and 2006/652/JR. See also the submissions on behalf of the Irish Human Rights Commission in *Legal Aid Board v Brady*, available at [www.ihrc.ie](http://www.ihrc.ie).

<sup>46</sup> National Disability Authority *A National Survey of Public Attitudes to Disability in Ireland* (2011) at 10, available at [www.nda.ie](http://www.nda.ie).

<sup>47</sup> National Disability Authority *Public Attitudes to Disability in Ireland* (2006) at 33, available at [www.nda.ie](http://www.nda.ie). A possible explanation for this fall is the inclusion of autism in the question response category in the 2011 survey, which was not included in the 2006 survey.

<sup>48</sup> National Disability Authority *A National Survey of Public Attitudes to Disability in Ireland* (2011) at 10, available at [www.nda.ie](http://www.nda.ie).

<sup>49</sup> This approach is also reflected in Article 6 of the 1949 German Grundgesetz (the German Basic Law, in effect its Constitution) and section 43(1)(b) of the Australian (Federal) *Family Law Act 1975*.

<sup>50</sup> For further discussion of this, see Law Reform Commission *Report on Children and the Law: Medical Treatment* (LRC 103-2011), at paragraphs 1.22-1.35.

1.27 Article 23 of the UNCRPD provides that states who ratify it must take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others. These provisions may be considered to have particular application to women, and in this regard Article 23 ensures that all persons, including pregnant women, irrespective of their disability status, are entitled to have access to age-appropriate information and reproductive and family planning education. With a view to ensuring that children with disabilities have equal rights with respect to family life, Article 23 also requires states that ratify the Convention to undertake to provide early and comprehensive information, services and support to children with disabilities and their families. Under Article 23(4), children have a right not to be separated from their parents against their will except where necessary in their best interests. In addition, Article 12(3) of the UNCRPD obliges states who ratify the Convention to take appropriate measures to provide access to persons with disabilities to the support they may require in exercising their legal capacity.<sup>51</sup>

**(4) Supports for parents with disabilities**

1.28 In its 2010 literature review, the National Disability Authority observed that there is a substantial body of work which demonstrates that parents with intellectual disability can adequately care for their children given appropriate support.<sup>52</sup> The Commission now turns to consider the supports that are currently available in Ireland to parents with intellectual disability.

**(a) Family support services**

1.29 Action 27 of the Government's 2001 Health Strategy<sup>53</sup> details an expansion programme for family support services including the expansion of positive supports and programmes for families. There already exists a range of services which fall under national family support programmes, as provided by Community Mothers, Family Support Workers, Teen Parents, and Spring Board Projects and encompass specific interventions such as Parents Plus programme, the Family First Parenting Initiative as well as a range of general parenting programmes and supports.

**(b) Personal Advocacy Service**

1.30 The Personal Advocacy Service, established under the *Citizens Information Act 2007*, provides assistance to people with intellectual disabilities in care order proceedings under section 18 of the *Child Care Act 1991*.<sup>54</sup>

**(c) Disability Act 2005**

1.31 The *Disability Act 2005* introduced independent assessments of need<sup>55</sup> which determine the services that a person needs based on their specific disability and circumstances. Arising from the assessment, the person concerned is entitled to an assessment report which indicates whether a person has a disability, the nature and extent of the disability, the health and education needs arising from the disability, the services considered appropriate to meet those needs and the timescale ideally required for their delivery, and when a review of the assessment should be undertaken. The assessment of need under the *Disability Act 2005* does not currently extend to a positive assessment of need for parents with intellectual disability. The Commission notes the inclusion of a general presumption of capacity in the Government's *Assisted Decision-Making (Capacity) Bill 2013* and that this includes a presumption of capacity to parent. A presumption of capacity to parent would ensure that mothers would have to be

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<sup>51</sup> This was also noted in the submissions on behalf of the Irish Human Rights Commission in *Legal Aid Board v Brady* High Court March 2007 (settlement of case), High Court Record Nos. 474/2005/JR and 2006/652/JR, available at [www.ihrc.ie](http://www.ihrc.ie).

<sup>52</sup> National Disability Authority and Crisis Pregnancy Programme *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (2010) at 176, available at [www.nda.ie](http://www.nda.ie).

<sup>53</sup> Department of Health and Children *Quality and Fairness: A Health System for You* (2001) at 71.

<sup>54</sup> This arose from the decision in *Legal Aid Board v Brady and ors*: see the discussion paragraph 1.23, above.

<sup>55</sup> Sections 8 and 9 of the *Disability Act 2005*.



proved to be incapable of parenting before social services could apply for a care order to take her child into care. In the Consultation Paper, the Commission provisionally recommended that, consistently with this presumption of capacity, there should be a positive obligation to make an assessment of the needs of parents with disabilities under the *Disability Act 2005*<sup>56</sup> and this provisional recommendation was supported in submissions received in response to the Consultation Paper. In preparing this Report, however, the Commission considered that it would not be feasible to make any final recommendation on this issue because full consideration of the nature of any reform of the scope of duties in the *Disability Act 2005* involved wide-ranging issues that deserved detailed and separate consideration and that these fall outside the scope of this Report. Accordingly, the Commission does not make a final recommendation on this matter.

1.32 A number of submissions received by the Commission in response to the Consultation Paper expressed concerns regarding the definition of “disability” contained in the 2005 Act. “Disability” in relation to a person is defined in section 2 of the 2005 Act as “a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.” It was considered that the definition is too restrictive and could miss parents with milder needs. For example, it was argued that a situation could arise whereby a parent with a mild intellectual disability who does not come within the definition of “disability”, but who may still require some support, would be precluded from obtaining that support.

1.33 Some submissions also expressed concerns about the efficacy of the 2005 Act. For example, it was stated that although the Department of Justice and Equality described the *Disability Act 2005* as “rights-based”,<sup>57</sup> it is not entirely clear whether it satisfies the requirements of the UNCRPD. The 2005 Act established a complaints process for persons who are unhappy with the result of their assessment and requires assessment officers, liaison officers and complaints officers to make decisions within specified periods of time, generally within three months.<sup>58</sup> The 2005 Act stipulates that 6 Sectoral Plans must be drawn up by the relevant government departments which should state how they intend to progressively implement their obligations under the new legislation. Thus, although it has been questioned whether the 2005 Act is truly “rights-based”, the Commission accepts that the Sectoral Plans and funding arrangements surrounding the 2005 Act represent, at least to some extent, evidence of movement towards the objectives of the UNCRPD, namely, autonomy and equal participation in society. For the reasons already mentioned the Commission has concluded that, while these are important matters that warrant further exploration and review, they fall outside the scope of this Report and the Commission accordingly does not make any final recommendations on them.

**(d) Inter-agency protocol**

1.34 In the Consultation Paper, the Commission also provisionally recommended the adoption of an inter-agency protocol between child protection and family support services in providing assistance to parents with disabilities, which would provide that, before any application for a care order is made under the *Child Care Act 1991*, an assessment is made of parenting skills and the necessary supports and training that would assist parents with disabilities to care for their children.<sup>59</sup> This would ensure that parents who require assisted decision-making support and accommodation are not pressurised into giving up their children. The Commission considers that, while such a protocol could support the effective delivery of support and accommodation to parents whose decision-making capacity is in question, for the reasons already mentioned the Commission does not make final recommendations on this issue. The

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<sup>56</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 3.76.

<sup>57</sup> Department of Justice, Equality and Law Reform *Mental Capacity Bill 2008 Screening Regulatory Impact Assessment* (2008), available at [www.justice.ie](http://www.justice.ie).

<sup>58</sup> Sections 14 and 15 of the *Disability Act 2005*.

<sup>59</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 3.76.

Commission has referred to them in this Report because they raise important issues that may be considered by other bodies with relevant expertise and experience in these matters.

## **E Protection from exploitation and abuse**

### **(1) Introduction**

1.35 The literature in this area clearly suggests that people with disabilities are at a greater risk of sexual abuse than the general population.<sup>60</sup> It is also accepted that such abuse is under-reported.<sup>61</sup> A study of abuse and harassment amongst people living with learning disabilities in the UK conducted by Mencap found that only 17% of participants who had experienced some form of abuse reported it to the police.<sup>62</sup> In Ireland, it has been noted that institutional obstacles and bureaucratic structures contribute to the low reported response rate to abuse.<sup>63</sup> The existence of a sub-culture within organisational hierarchies of passive acknowledgement or condonement has also been identified as perpetuating the position of people with intellectual disability as potential victims of sexual violence.<sup>64</sup> Environmental factors, such as dependency of persons on families, caregivers or the State, for everyday needs and the unwillingness of some agencies to intervene, have been identified internationally as barriers to reporting abuse.<sup>65</sup> In addition to facing the same impediments to reporting sexual assault that other victims face, such as embarrassment, shame and powerlessness, persons with intellectual disability are confronted with problems such as misconceptions about their credibility, memory and presentation as witnesses, difficulties communicating with police, lawyers and judges<sup>66</sup> and lack of appropriate information about the criminal justice process.<sup>67</sup> The difficulties experienced by adults with intellectual disability in the criminal justice system are addressed in greater detail in Chapter 5 of this Report.

1.36 Having regard to the vulnerability of relevant persons to sexual exploitation and abuse and the barriers to reporting such abuse, the Commission is concerned to ensure that if a functional test of capacity to consent to sexual activity is implemented, adequate safeguards are put in place in order to protect such persons. The Commission is conscious that a functional test could potentially put such persons in a more vulnerable position unless there are strong supports and safeguards in place. Thus, in this Part, the Commission considers the supports and safeguards which should be in place prior to the introduction of a functional test of capacity to consent to sexual activity.

### **(2) International obligations**

1.37 Article 12(3) of the UNCRPD underlines the need for measures to support the exercise of legal capacity, recognised in Article 12(2). Article 12(4) calls for the establishment of safeguards to ensure there is no abuse of that support. Article 16 of the UNCRPD imposes a duty on states that ratify the Convention to take all appropriate measures to protect persons with disabilities both within and outside the home from all forms of exploitation, violence and abuse.<sup>68</sup> Importantly, Article 16 requires effective

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<sup>60</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 4.02-4.14.

<sup>61</sup> *Ibid* at paragraphs 4.15-4.17.

<sup>62</sup> Mencap *Living in Fear: the need to combat bullying of people with a learning disability* (1999).

<sup>63</sup> McGee, Garavan, deBarra, Conroy *The SAVI Report. Sexual Abuse and Violence in Ireland. A national study of Irish experiences, beliefs and attitudes concerning sexual violence* (Liffey Press 2002) at 247.

<sup>64</sup> *Ibid* at 249.

<sup>65</sup> See, for example, Victorian Law Reform Commission *Sexual Offences: Interim Report* (2003) at paragraph 3.29.

<sup>66</sup> Victorian Law Reform Commission *Sexual Offences: Interim Report* (2003) at paragraph 3.29.

<sup>67</sup> *Ibid* at paragraph 3.32.

<sup>68</sup> Quinn has stated that the “explicit inclusion of ‘home’ means that States Parties will have to craft appropriate tools to investigate abuse within the family setting”, Quinn “Disability and Human Rights: A New Field in the

legislation and policies to be put in place to ensure identification, investigation and prosecution of abuse. States that ratify the UNCRPD are also obliged to introduce preventative measures to ensure that people with disabilities and their families are given information to help them avoid, recognise and report instances of abuse which is age, gender and disability-specific.<sup>69</sup> In addition, the Council of Europe's *Disability Action Plan 2006-2015*, which was agreed in 2006,<sup>70</sup> calls on member states to develop a national action plan to protect people with disabilities from abuse with the aim of ensuring access to services and supports for victims.

### **(3) Current protections**

#### **(a) Current protection framework and the proposed Office of Public Guardian**

1.38 There are currently gaps in the protection framework for people with disabilities. In addition, the movement from institutional care to community living will necessitate the strengthening of this framework in the mainstream setting for people with disabilities.<sup>71</sup> In Ireland,<sup>72</sup> the main protective mechanisms for disability service users are in the form of formal policies, standards, regulations and inspection, together with advocacy services.<sup>73</sup> The HSE's *Trust In Care* policy document provides the framework for the treatment of allegations of abuse within health and social care services.<sup>74</sup> In addition, the Health Information and Quality Authority (HIQA), established under the *Health Act 2007*, is responsible for registration and inspection of residential care centres for people with disabilities. In 2013, HIQA published statutory standards in relation to residential care for people with disabilities, with specific provisions on abuse. The HIQA standards do not apply to people with disabilities availing of community-based or day services. In this regard, there is a need for HIQA to develop a set of standards that would apply to community services as well as extending the mandate of the Social Services Inspectorate to oversee community settings.<sup>75</sup>

1.39 In its 2006 *Report on Vulnerable Adults*, the Commission recommended a mechanism whereby anyone may complain to the proposed Office of Public Guardian in relation to abuse, to ensure that the necessary investigation can take place and relevant action be instigated. The Commission also noted that once the proposed Office of Public Guardian is established, co-ordination will be required between that

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United Nations" in Krause & Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) at 262.

<sup>69</sup> Flynn "Ireland's compliance with the Convention on the Rights of Persons with Disabilities: Towards a Rights-Based Approach for Legal Reform" (2009) 31 DULJ 357 at 373.

<sup>70</sup> *Recommendation of the Committee of Ministers to member states on the Council of Europe Disability Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015* (Council of Europe Rec (2006) 5, 2006). The National Disability Authority, the state agency on disability issues, has established an Expert Advisory Committee to advise on the design and implementation of a national study to identify the prevalence of abuse of people with disabilities and areas for improvements within systems for protection and redress.

<sup>71</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 4.54.

<sup>72</sup> For a summary of protective legislative framework and the common law in England and Wales, see the Consultation Paper (LRC CP 63-2011) at paragraphs 4.35 – 4.48.

<sup>73</sup> National Disability Authority *Abuse of People with Disabilities: Briefing Paper by the NDA* available at [www.nda.ie](http://www.nda.ie).

<sup>74</sup> Health Service Executive *Trust In Care Policy for Health Service Employers on Upholding the Dignity and Welfare of Patients/Clients and the Procedure for Managing Allegations of Abuse against Staff Members* (2005). See also Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 4.29 – 4.30.

<sup>75</sup> In its 2011 *Report on Legal Aspects of Professional Home Care* (LRC 105-2011), at paragraph 1.55, the Commission recommended that section 8(1)(b) of the *Health Act 2007* be amended to extend the functions of HIQA to include the setting of standards in relation to services provided by professional home care providers

office and other bodies such as the NDA, the HSE and HIQA.<sup>76</sup> As already noted in this Report, the Government's *Assisted Decision-Making (Capacity) Bill 2013* proposes to establish an Office of Public Guardian.

1.40 The Commission considers that prevention of sexual abuse and exploitation of persons with intellectual disability requires co-ordination between An Garda Síochána and the HSE on responding to allegations of abuse. In 2010, An Garda Síochána published a policy document on the investigation of sexual crimes in which members responding to allegations of sexual crimes involving people with a disability are advised that such incidents may require inter-agency collaboration with the disability sector.<sup>77</sup> The document also advises members to be aware that disability can present itself in many forms such as physical, sensory, intellectual or a mental health difficulty.

**(b) Protection measures in mainstream settings and lessons learned**

1.41 In the Consultation Paper, the Commission observed that the current shift from institutional care to living in the community will demand the strengthening of the protection framework in the mainstream setting for adults with disabilities. The Commission now turns to discuss recent developments in this regard since the publication of the Consultation Paper.

**(i) Whistle-blowing and protected disclosure: Recent developments**

1.42 Protection is currently afforded to employees of relevant bodies who make disclosures of information by the *Health Act 2004* (which established the HSE) as amended by the *Health Act 2007*.<sup>78</sup> In July 2013, the Government published the *Protected Disclosures Bill 2013* which is, broadly, modelled on the English *Public Interest Disclosure Act 1998*.<sup>79</sup> The main objective of the 2013 Bill is to ensure the protection of workers in all sectors of the economy (public and private) against civil and criminal liability in circumstances where they make a disclosure of information relating to wrongdoing (“whistle-blowing”) which comes to their attention in the workplace. The 2013 Bill highlights the responsibility of employers to put effective internal mechanisms in place to investigate complaints of wrongdoing and to develop an organisational culture that supports the making of such complaints as a key element of corporate risk management overall, in order to identify potential wrongdoing and take appropriate corrective action at the earliest possible stage.<sup>80</sup>

**(ii) Mandatory reporting: Recent developments**

1.43 In addition to reporting duties stemming from, for example, service agreements with the HSE, discussed in the Consultation Paper,<sup>81</sup> the *Criminal Justice (Withholding of Information on Offences*

<sup>76</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 1.97.

<sup>77</sup> *Garda Síochána Policy on the Investigation of Sexual Crime, Crimes Against Children and Child Welfare* (2010) at 31, available at [www.garda.ie](http://www.garda.ie).

<sup>78</sup> Section 103(1) of the *Health Act 2007* amended the *Health Act 2004* by inserting Part 9A into the 2004 Act. Section 55B of the 2004 Act now provides for the protected disclosure of information by an employee of a relevant body. Sections 55E and 55G make further provisions regarding protected disclosures of information in relation to regulated professions by persons other than employees. The Irish Human Rights Commission has queried whether the mechanisms for the making of protected disclosures is commonly known to healthcare workers and whether the type of whistle-blowing provided for in the legislation actually works in practice (“Whistleblower law a test of State maturity” *The Irish Times* 11 April 2011). See also Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 4.83.

<sup>79</sup> For a critique of the Heads of the Bill published in 2012, see Irish Human Rights Commission *IHRC Observations on the Scheme of the Protected Disclosures in the Public Interest Bill 2012*, available at [www.ihrc.ie](http://www.ihrc.ie).

<sup>80</sup> Information Note on the General Scheme of the Protected Disclosure in the Public Interest Bill 2012 available at <http://per.gov.ie/wp-content/uploads/Info-note-24-02.pdf>.

<sup>81</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 4.64.

*Against Children and Vulnerable Persons*) Act 2012 creates a criminal offence of withholding information in relation to specified offences, including sexual offences, committed against a child or “vulnerable person”.<sup>82</sup> The offence arises where a person knows or believes that a specified offence has been committed against a child or vulnerable person and he or she has information which would be of material assistance in securing the apprehension, prosecution or conviction of another person for that offence and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of An Garda Síochána.

**(iii) Vetting and Disclosure: Recent developments**

1.44 The *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*<sup>83</sup> provides a statutory basis for the mandatory vetting of persons who seek positions of employment relating to children or vulnerable persons.<sup>84</sup> Section 8 of the 2012 Act provides that relevant organisations must apply to the National Vetting Bureau to be registered. Section 12 of the 2012 Act provides that it is an offence for a relevant organisation to employ or enter into a contract for services with any person without receiving a vetting disclosure from the Bureau in respect of that person. Where a relevant organisation applies to the Bureau for a vetting disclosure in respect of a person, the Bureau must establish by enquiring from An Garda Síochána whether there is any criminal record or specified information relating to the person. The Bureau must also examine the criminal records database system established under the 2012 Act to determine whether it contains any record of, or specified information relating to, the person concerned. In addition, certain organisations such as the HSE, the Teaching Council, the Mental Health Commission and HIQA, must notify the Bureau where they have (as a result of an investigation, inquiry or regulatory process in respect of a person) a *bona fide* concern that the person may harm, attempt to harm or cause harm to a child or a vulnerable person.

**(iv) Protections afforded to other vulnerable groups**

1.45 In the Consultation Paper, the Commission drew parallels from systems that were introduced to address abuse against other categories of vulnerable people, such as children and the elderly.<sup>85</sup> In relation to the protection of the elderly, the HSE published draft *National Quality Guidelines for Home Care Support Services* in 2008.<sup>86</sup> In its 2011 *Report on Legal Aspects of Professional Home Care*, the Commission recommended that these Draft Guidelines should form the basis for National Standards for Professional Home Care to be prepared by HIQA under the *Health Act 2007*.<sup>87</sup>

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<sup>82</sup> The 2012 Act defines “vulnerable person” as a person: “(a) who (i) is suffering from a disorder of the mind, whether as a result of mental illness or dementia, or (ii) has an intellectual disability, which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person, or (b) who is suffering from an enduring physical impairment or injury which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person or to report such exploitation or abuse to the Garda Síochána or both.”

<sup>83</sup> The 2012 Act is modelled on the English *Safeguarding Vulnerable Groups Act 2006* which sets out the legislative basis in England and Wales for the vetting of people working with children and vulnerable adults. At the time of writing, the 2012 Act has not yet been commenced.

<sup>84</sup> The *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* implemented the 2004 *Report of the Working Group on Garda Vetting*, which recommended that there should be a clear statutory framework in place to regulate vetting. The 2012 Act is also modelled on the English *Safeguarding Vulnerable Groups Act 2006*.

<sup>85</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 4.58-4.62.

<sup>86</sup> Services for Older People Expert Advisory Group and Governance Group *Draft National Quality Guidelines for Home Care Support Services* (2008).

<sup>87</sup> Law Reform Commission *Report on Legal Aspects of Professional Home Care* (LRC 105- 2011) at paragraph 2.05.

1.46 The Commission appreciates the need to avoid applying all aspects of the general approach to the protection of children to the protection of relevant persons. This is especially because relevant human rights standards, both national and international, take important different approaches in this area. This is most clearly seen in the relevant international human rights instruments. Thus, the 1989 UN Convention on the Rights of the Child permits a “best interests” approach to be included in an analysis of the rights of the child.<sup>88</sup> By contrast, the UNCRPD does not include any reference to “best interests” as this would be in conflict with the principle of equality in Article 12 of the Convention. Bearing in mind this important distinction, the Commission nonetheless considers that in approaching how to address the abuse and exploitation of adults, it is helpful to examine the inter-agency framework that has been developed in relation to children with a view to preventing, recognising and reporting incidences of abuse.

1.47 Since the publication of the Consultation Paper, the Government published *Draft Heads of a Children First Bill 2012*, which is intended to place on a statutory footing the *Children First: National Guidelines for the Protection and Welfare of Children*.<sup>89</sup> By placing the *Children First Guidelines* on a statutory footing, all organisations and individuals working with children will have a legal obligation to report concerns or allegations relating to child welfare to the HSE or An Garda Síochána and to follow protocols for the assessment of suspected abuse or neglect. The proposed legislation is to provide that a person who is found guilty of the offence of not reporting neglect or child abuse to the HSE which should have been reported in accordance with reporting criteria will be liable to criminal sanctions including fines and imprisonment. The HSE will be required under the proposed legislation to take all necessary steps to ensure all reports of concerns and allegations of abuse made to it are assessed in accordance with the *Child Care Act 1991*. Where the HSE is of the opinion that an activity is occurring or is likely to occur within an organisation which involves or is likely to involve a risk to a child, it may require the organisation to provide an Improvement Plan, specifying the remedial action proposed to be taken by the organisation. In addition, the HSE has the power under the proposed legislation to serve a Prohibition Notice on the organisation, prohibiting the carrying on of the activity concerned.

1.48 In 2012, HIQA published *National Standards for the Protection and Welfare of Children*<sup>90</sup> under section 8(1)(b) of the *Health Act 2007*. The standards are to be followed by services with the responsibility to protect children who have been identified as suffering or who are likely to suffer from harm because of abuse or neglect. The standards were developed with a view to supporting continuous improvements in the care and protection of children in receipt of HSE child protection and welfare services. They provide a framework for the development of safe and effective child-centred services in Ireland that protect children and promote their welfare. In particular, the standards provide for an inter-agency and inter-professional co-operation, procedures for the notification and review of serious incidents and the identification of specific needs of children subjected to institutional abuse who are deemed to be especially vulnerable. All reports of child protection concerns are to be assessed in line with the *Children First Guidelines*. The standards also allude to a child protection and welfare service with effective leadership, governance and management arrangements with clear lines of accountability. In addition, they set standards for safe recruitment practices and the provision of child protection and welfare training of staff. The standards were developed by a working group comprising representatives from the HSE, Department of Children and Youth Affairs, Department of Education and Skills, Irish Youth Justice Service, An Garda Síochána, professionals such as doctors and nurses, people who work with and advocate for children, regulatory bodies and HIQA. The standards apply to the HSE Children and Family Service and to any future agency that will have a legal duty to promote the safety and welfare of children

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<sup>88</sup> In its *Report on Children and the Law: Medical Treatment* (LRC 103 – 2011), at paragraphs 1.33-1.35, the Commission discussed the evolving case law in this area, which points out that the “best interests” of a child must be considered in the context of a rights-based approach, as opposed to a more traditional paternalistic approach.

<sup>89</sup> *Children First: National Guidelines for the Protection and Welfare of Children* (Department of Health and Children 1999) available at [www.dohc.ie](http://www.dohc.ie). At the time of writing it is expected that a *Children First Bill* will be published by the end of 2013: see Government Legislation Programme, Autumn Session 2013 (September 2013), available at [www.taoiseach.ie](http://www.taoiseach.ie).

<sup>90</sup> Health Information and Quality Authority *National Standards for the Protection and Welfare of Children* (2012).

in Ireland. They are to be used in conjunction with the *Children First: National Guidelines for the Protection and Welfare of Children* and the legislation underpinning those guidelines.<sup>91</sup>

#### **(4) Development of National Standards**

1.49 In the Consultation Paper, the Commission provisionally recommended the development of national standards concerning safeguards from sexual abuse for relevant persons and the development of protocols on co-operation between various agencies, including An Garda Síochána, HIQA, the proposed Office of Public Guardian and the HSE.<sup>92</sup> The Commission notes that since the publication of the Consultation Paper, HIQA has developed national standards for the protection and welfare of children. The Commission also provisionally recommended that, in developing such standards, a multi-agency approach should be adopted, similar to that adopted for the implementation of the National Guidelines for the Sexual Assault Treatment Unit (SATUs).<sup>93</sup>

1.50 As already mentioned above, the Government has adopted a national strategic approach in relation to child protection in the form of *Children First: National Guidelines for the Protection and Welfare of Children*. The Commission notes that an inter-agency approach was also adopted in the development of national standards applicable to children and includes members of An Garda Síochána, government departments, professionals such as doctors and nurses, people who work with and advocate for children, regulatory bodies and HIQA. Significant developments have also begun in recognising the need to address elder abuse.<sup>94</sup> There have been calls for a similar national strategic approach on the issue of abuse of adults with disabilities.<sup>95</sup>

**1.51** Accordingly, the Commission recommends the development of national standards concerning safeguards from sexual abuse for relevant persons. Such national standards should be developed in consultation with HIQA, the HSE, the proposed Office of Public Guardian (to be established under the Government's *Assisted Decision-Making (Capacity) Bill 2013*), the Department of Education and Skills, An Garda Síochána, professionals such as doctors, nurses and carers, and groups who work with and advocate for people with intellectual disabilities such as the National Disability Authority. The Commission also recommends that people to whom the standards would apply should be consulted in the drawing up of national standards. The national standards should include protocols on co-operation between different agencies, including the Health Service Executive, HIQA, the proposed Office of Public Guardian and An Garda Síochána, to provide protection to the adults concerned. In addition to protective measures, emphasis should be placed on supporting the positive exercise of a person's legal right to sexual expression. The national standards should also include the development of an inter-agency procedure to respond to reports of exploitation or abuse of relevant persons.<sup>96</sup> They should also provide clarity as to who will be responsible for leadership and implementation of the standards and as to accountability.

1.52 *The Commission recommends that national standards concerning safeguards from sexual exploitation or abuse for relevant persons be put in place. Such national standards should be developed*

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<sup>91</sup> Health Information and Quality Authority *National Standards for the Protection and Welfare of Children* (2012) at 3.

<sup>92</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 4.89.

<sup>93</sup> *Ibid* at paragraph 4.89.

<sup>94</sup> The HSE has taken significant measures in recent years to combat elder abuse in particular by raising awareness such as the National Centre for the Protection of Older People's *Report on the National Study of Elder Abuse and Neglect* (2010) which considered the prevalence of elder abuse in Ireland. See also Law Reform Commission *Report on Legal Aspects of Professional Home Care* (LRC 105-2011).

<sup>95</sup> The National Disability Authority has called for the establishment of a steering group to develop a National Action Plan for safeguarding children and adults with disabilities from abuse to be led by the Department of Justice and Equality.

<sup>96</sup> See UK Department of Health *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* (2000).

in consultation with HIQA, the HSE, the proposed Office of Public Guardian, the Department of Education and Skills, An Garda Síochána, professionals such as doctors, nurses and carers, and groups who work with and advocate for the adults concerned, such as the National Disability Authority. The Commission also recommends that the adults to whom the national standards would apply should be consulted in the drawing up of such national standards. The national standards should include protocols on co-operation between different agencies, including the Health Service Executive, HIQA, the proposed Office of Public Guardian and An Garda Síochána, to provide protection to the adults concerned. In addition to protective measures, emphasis should be placed on supporting the positive exercise of a person's legal right to sexual expression. The national standards should also provide clarity as to who will be responsible for leadership and implementation of the standards and as to accountability.

## **(5) Education**

1.53 In the Consultation Paper, the Commission discussed the connection between the promotion of capacity to consent to sexual relationships and the provision of education on personal and sexual relationships for young adults whose capacity may be limited.<sup>97</sup> It is well-documented that people with intellectual disability often have limited sexual knowledge by comparison with the “non-disabled” population.<sup>98</sup> In addition, there is a clear connection between the level of a person's sexual knowledge and the ability to identify exploitative situations and guard oneself from sexual abuse. Vulnerability to abuse attributable to lack of sexual knowledge was demonstrated in a 2004 study of 120 adults, comprised of sixty individuals with intellectual disabilities and sixty without. The study found that the adults with intellectual disabilities were “significantly less knowledgeable about almost all aspects of sex and appeared significantly more vulnerable to abuse, having difficulty at times distinguishing abusive from consenting relationships.”<sup>99</sup> However, some adults with intellectual disabilities, especially those who had comparatively higher IQs and those who had received sexuality education, scored highly in all areas.<sup>100</sup> The study concluded that there needs to be better provision of sex education, particularly ongoing sex education, in order to allow people with intellectual disabilities to exercise their sexual rights, while at the same time protecting themselves from abuse.<sup>101</sup>

1.54 In addition, the 2002 Report on Sexual Abuse and Violence in Ireland (the SAVI Report)<sup>102</sup> found that while sex education did not appear to prevent sexual abuse it increased the likelihood of it being reported. As noted by the Victorian Law Reform Commission, it is unlikely that legislative change alone will improve the rate of prosecutions in relation to sexual exploitation and abuse of people who lack the capacity to consent to sexual relations. It is necessary for victims to first have a greater understanding of their rights and of what constitutes a criminal offence in order for reporting of these offences to increase.<sup>103</sup> Recent research from Northern Ireland also suggests that there is a strong consensus amongst family carers, direct care staff and professional staff in health and social services on the need for relationships and sexuality education.<sup>104</sup>

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<sup>97</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 4.20-4.26.

<sup>98</sup> *Ibid* at paragraphs 4.20-4.21.

<sup>99</sup> Murphy and O'Callaghan “Capacity of adults with intellectual disabilities to consent to sexual relationships” (2004) 34 *Psychological Medicine* 1347 at 1347.

<sup>100</sup> *Ibid* at 1355.

<sup>101</sup> *Ibid* at 1356.

<sup>102</sup> McGee, Garavan, deBarra, Conroy *The SAVI Report. Sexual Abuse and Violence in Ireland. A national study of Irish experiences, beliefs and attitudes concerning sexual violence* (Liffey Press 2002) at 254.

<sup>103</sup> Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (2004) at paragraph 6.61.

<sup>104</sup> Lafferty, McConkey and Simpson “Reducing the barriers to relationships and sexuality education for persons with intellectual disabilities” (2012) 16 (1) *Journal of Intellectual Disabilities* 29 at 40.



1.55 The importance of sex education has also been recognised by the Court of Protection in England and Wales. In *D Borough Council v AB*,<sup>105</sup> Mostyn J held that AB lacked capacity to consent to sexual relations but directed that attempts be made through the provision of sex education to bring him to the requisite level of capacity. In *A Local Authority v H*,<sup>106</sup> Hedley J emphasised the importance of supports, education and awareness of sexual protection and sexual health issues in striking the right balance between the competing demands of freedom and protection.

1.56 In Australia, the Disability Discrimination Legal Service in its 2003 *Final Report of Stage One of its Sexual Offences Project* noted that education about sexuality, relationships and sexual rights and safety was not systematically delivered or accessible to people with disabilities, resulting in a lack of knowledge about appropriate sexual and self-protective behaviours.<sup>107</sup> Where these programmes were provided, they were considered inadequate to ensure people with intellectual disability would develop protective behaviours from a young age. There also appeared to be inadequate support services to reinforce these behaviours sustained over the person's life, where necessary. In a similar vein, the Victorian Law Reform Commission, in its 2003 *Interim Report on Sexual Offences*, noted that "a recurring theme... was the lack of education available to people with cognitive impairments which would enable them to safely disclose and report sexual assault."<sup>108</sup> The Victorian Law Reform Commission emphasised the importance of knowledge about sexuality, relationships and sexual rights and safety in assisting people with cognitive impairment to develop appropriate sexual and self-protective behaviours and that this in turn, may reduce their risk of assault by people known to them.<sup>109</sup>

1.57 It is widely accepted that sexuality and relationships education needs to be provided on a long term, ongoing basis.<sup>110</sup> Education services should also be tailored to meet the needs of persons who require such support. Methods of pitching education at a level appropriate to a person's capacity include the use of repetition, pictures and role play and the availability of clearly illustrated educational resources written in plain language.<sup>111</sup>

1.58 Having regard to the vulnerability to abuse of relevant persons, the Commission is of the view that the provision of appropriate educational support to such persons should be a pre-requisite to the introduction of a functional test of capacity to consent to sexual activity. Education programmes should deal with privacy, intimacy, assertiveness, empowerment, relationships and the ability to identify abusive or exploitative situations and to distinguish between appropriate and inappropriate requests from others.<sup>112</sup> In addition, they must be tailored to the individual needs of persons who require support and

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<sup>105</sup> *D Borough Council v AB* [2011] EWHC 101 (COP) at paragraph 49.

<sup>106</sup> *A Local Authority v H* [2012] EWHC 49 (COP) at paragraph 35.

<sup>107</sup> Disability Discrimination Legal Service *Beyond Belief, Beyond Justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice* Final Report of Stage One of the Sexual Offences Project (2003) at 43.

<sup>108</sup> Victorian Law Reform Commission *Sexual Offences: Interim Report* (2003) at paragraph 3.30.

<sup>109</sup> Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (2004) at paragraph 6.61. See also Disability Discrimination Legal Service *Beyond Belief, Beyond Justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice* Final report of Stage One of the Sexual Offences Project (2003) at 43-45.

<sup>110</sup> See Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 6.26 and O'Callaghan and Murphy "Capacity of Adults with Intellectual Disabilities to Consent to Sexual Relationships" (2004) 34 *Psychological Medicine* 1347 at 1356.

<sup>111</sup> *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme 2010) available at [www.nda.ie](http://www.nda.ie) at 163. See also Disability Discrimination Legal Service *Beyond Belief, Beyond Justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice* Final Report of Stage One of the Sexual Offences Project (2003) at 44.

<sup>112</sup> Westcott "The abuse of disabled children: A review of the literature" (1991) 17(4) *Child Care, Health and Development* 243.

accommodation to exercise capacity. The use of repetition, pictures and role play, the practice of audio-taping consultations, and the availability of clearly illustrated educational resources written in plain language have been recommended as a way of contributing to effective healthcare consultations.<sup>113</sup>

1.59 Submissions received by the Commission in response to the Consultation Paper, indicated a general desire by service providers to have in place policies and procedures aimed at empowering people to realise their sexual rights.<sup>114</sup> However, during the consultative process, the Commission became aware that currently the provision of sex education is a voluntary step taken by service providers and is, for the most part, focused on protection rather than on educating and empowering clients to have meaningful relationships.<sup>115</sup> Accordingly, the Commission considers that the provision of sex and relationship education should have a dual purpose, namely, to enable persons to exercise capacity to protect themselves against unwanted sexual contact and to enable them to maximise their sexual autonomy and reinforce their right to consensual sexual expression.

1.60 The Commission therefore proposes the adoption of a multi-agency approach with a view to establishing national standards regarding the delivery of high quality sex and relationships education for all relevant persons. This should include: (1) the development of a comprehensive nationwide policy and action plan regarding the delivery of sex and relationships education to such persons; and (2) clarity as to responsibility for the provision of educative support. The provision of education should focus not only on the risks of sexual abuse, but should also place emphasis on supporting the positive exercise of a person's legal right to sexual expression.

1.61 In order to ensure consistency in the delivery of information, there is also a need for training of parents, carers and staff. In this regard, a curriculum along the lines of the FETAC level training courses which are currently provided on a range of topics could be developed. In the past, the Irish Sex Education Network funded research on sex education programmes and this could be reviewed in line with national guidelines. The Government's *Assisted Decision-Making (Capacity) Bill 2013* envisages that the proposed Office of Public Guardian will have a general educational role by preparing codes of practice for the guidance of persons, including health care professionals. The Commission also notes that section 8(3) of the *Assisted Decision Making (Capacity) Bill 2013* provides that a person "shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so." Finally, education of the wider community is necessary in order to create a supportive culture in which adults who require support to exercise their capacity to consent can exercise their right to sexual expression. Thus, the establishment of a communications and information campaign to raise awareness throughout the wider community of the sexual rights of persons with intellectual disability should constitute a further aspect of this multi-agency approach.

1.62 *The Commission recommends that the national standards recommended at paragraph 1.52 of this Report should also cover the delivery of high quality sex and relationships education for relevant persons. This should include: (1) the development of a comprehensive nationwide policy and action plan regarding the delivery of sex and relationships education and (2) clarity as to responsibility for the provision of educative support. The Commission also recommends that national standards should address the need for education and training for carers, staff and parents, in addition to the establishment of a communications and information campaign to raise awareness throughout the wider community of the sexual rights of persons with intellectual disability.*

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<sup>113</sup> *Literature Review on Provision of Appropriate and Accessible Support to People with an Intellectual Disability who are Experiencing Crisis Pregnancy* (National Disability Authority and Crisis Pregnancy Programme 2010) available at [www.nda.ie](http://www.nda.ie) at 163.

<sup>114</sup> See also O'Callaghan and Murphy "Sexual relationships in adults with intellectual disabilities: understanding the law" (2007) 51(3) *Journal of Intellectual Disability Research* 197 at 203.

<sup>115</sup> See Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 4.23.

**A            Introduction**

2.01        In Chapter 1, the Commission has recommended that section 5 of the *Criminal Law (Sexual Offences) Act 1993* should be repealed and replaced because it is not consistent with a functional test of capacity to consent to sexual activity. In this Chapter, the Commission discusses the general approach that should be taken to reform so that it reflects the development of a rights-based approach to relevant persons, while at the same time adequately protecting such persons from sexual abuse and exploitation. Having regard to views expressed in submissions received in response to the Consultation Paper, the Commission discusses various options for reform. In Part B of this Chapter, the Commission sets out the contextual background by analysing the general law relating to consent to sexual activity and the circumstances in which consent is considered to be absent. In Part C, the Commission considers the options for reforming the law relating to sexual offences and capacity to consent, having particular regard to the 2006 UN Convention on the Rights of Persons with Disabilities, the UNCRPD, and then sets out its conclusions.

**B            Absence of consent, including absence of capacity**

**(1)        Introduction**

2.02        A key element of the criminal law on sexual offences is that the absence of consent renders unlawful an otherwise lawful activity. The issue of consent in the law of sexual offences often involves the question of whether the accused knew or ought to have known that the victim had not consented. This in turn raises the question of whether the test is the subjective belief in consent of the accused or the belief of the accused judged against an objective or community standard, or a mixture of both. In this Report, the Commission's analysis of consent involves a related but different starting point, namely, the capacity of a person to consent to sexual activity.<sup>1</sup> Under section 5 of the *Criminal Law (Sexual Offences) Act 1993*, this primarily involves cases where the victim's capacity to consent is in issue. In the context of any replacement of section 5 of the 1993 Act, cases involving the capacity to consent of an accused may also arise.

2.03        As discussed in Chapter 1 of this Report, the functional approach has become the most commonly used basis internationally for assessing capacity. The functional approach to capacity determines a person's capacity to consent on the basis of their ability to understand information relevant to the matter at hand. The Commission considers that a functional test of capacity must also have regard to the principles of equality and non-discrimination in Articles 12 and 23 of the UNCRPD. The Commission now turns to consider how a functional test of capacity to consent to sexual relations could be incorporated into the criminal law on sexual offences. This should be done against the background of the related, albeit different, question of how the law deals with consent to sexual activity generally.

**(2)        Current general law on consent in Ireland**

2.04        Section 2(1) of the *Criminal Law (Rape) Act 1981*<sup>2</sup> provides that a man commits rape if: (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does

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<sup>1</sup> See McAuley and McCutcheon *Criminal Liability* (Sweet & Maxwell 2000) at 513.

<sup>2</sup> Section 2(1) of the *Criminal Law (Rape) Act 1981* was amended by the Schedule to the *Criminal Law (Rape) (Amendment) Act 1990*. Section 2(1)(a) of the 1990 Act, as enacted, had referred to "unlawful sexual intercourse" and the 1990 Act deleted the word "unlawful."

or does not consent to it. Section 2(2) of the 1981 Act provides that, if the question as to whether a man believed that a woman was consenting to sexual intercourse arises, “the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.” The absence of consent is, therefore, a key element in the offence of rape.

2.05 Section 2 of the 1981 Act is directly based on section 1 of the English *Sexual Offences (Amendment) Act 1976*.<sup>3</sup> The 1976 Act was enacted to implement the recommendations of the 1975 *Report of the Advisory Group on the Law of Rape*, the Heilbron Committee.<sup>4</sup> The Heilbron Committee recommended that the approach of the UK House of Lords in 1975 in *DPP v Morgan*<sup>5</sup> should be placed on a statutory footing. In *Morgan*, the House of Lords held that the question of whether the accused “knows” that the woman consents or is “reckless” as to whether she consents is primarily a subjective matter of the accused’s belief. Although the decision has been denounced as a “rapist’s charter”, this argument overlooks the fact that a defendant who says he honestly believed that his victim was consenting will not succeed unless the jury thinks that there is a reasonable chance that his story might be true.<sup>6</sup> Thus, while *Morgan* propounds a primarily subjective test based on the honest belief of the accused, it does not disturb the traditional requirement that mistakes must be reasonable.<sup>7</sup> The *Morgan* decision is reflected in section 1 of the English 1976 Act and in section 2(2) of the 1981 Act, both of which require the jury to have regard to the presence or absence of reasonable grounds for an honest belief in consent. It is important in this respect to differentiate between a defence of “honest” mistake (a primarily subjective test) and a defence of “reasonable” mistake (a primarily objective test). An entirely subjective test would state that the accused would be acquitted if he had acted on an “honest” mistake. The *Morgan* test, although primarily subjective, incorporates an objective element by requiring the jury to objectively assess whether the accused could honestly have believed that the victim had consented.

2.06 Other countries have since moved away from the principle enunciated by the UK House of Lords in *Morgan* towards a primarily objective test of “reasonable belief.” The *Morgan* principle was abandoned in English law in the English *Sexual Offences Act 2003*, on foot of recommendations made in 2000 by the UK Home Office Sex Offences Review in its Report, *Setting the Boundaries: Reforming the law on sex offences*.<sup>8</sup> The Report recommended that a defence of honest belief in free agreement should not be available if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at the time. Under sections 1 to 4 of the English 2003 Act, the prosecution is required to prove that the accused did not “reasonably believe” that the victim had consented. In determining whether a belief is reasonable, regard is had to “all the circumstances”, including any steps the accused took to ascertain whether the victim consented. It has been observed that this new approach minimises the difficulties of proof in rape trials by prohibiting defendants from relying on their own subjective interpretation of a sexual encounter in order to exculpate themselves.<sup>9</sup> The Scottish Law Commission also recommended the adoption of a primarily objective test for assessing the mental element regarding consent. However, the Scottish Commission did not favour the use of the phrase “having regard to all circumstances” as used in the English 2003 Act as it would allow for the inclusion of all the attributes of the accused to be used in assessing the reasonableness of the belief in consent.<sup>10</sup> Instead, it proposed

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<sup>3</sup> See Law Reform Commission *Consultation Paper on Rape* (LRC CP 1-1987) at paragraph 23ff.

<sup>4</sup> *Report of the Advisory Group on the Law of Rape* (Cm 6352 1975). The Advisory Group was chaired by Heilbron J and its Report is often referred to, simply, as the Heilbron Committee.

<sup>5</sup> *DPP v Morgan* [1976] AC 182.

<sup>6</sup> McAuley and McCutcheon *Criminal Liability* (Sweet & Maxwell 2000) at 562.

<sup>7</sup> *Ibid* at 563.

<sup>8</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at recommendation 9.

<sup>9</sup> Leahy “When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law” (2013) 23(1) ICLJ 2 at 7.

<sup>10</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (No 209 2007) at paragraph 3.77.

that in assessing reasonableness of a belief as to consent, regard should be had to the steps, if any, taken by the accused in finding out whether the other party consented.<sup>11</sup> In sections 1 to 11 of the *Sexual Offences (Scotland) Act 2009*, which deal with general sexual offences, the prosecution must prove that the accused acted “without any reasonable belief” that the complainant consented. Section 16 provides that in determining whether a person’s belief as to consent or knowledge was reasonable, regard must be had as to whether the person took any steps to ascertain whether there was consent or knowledge, and if so, to what those steps were. The *Morgan* doctrine is no longer applied in Australian criminal code jurisdictions,<sup>12</sup> New Zealand<sup>13</sup> or in Canada.<sup>14</sup>

2.07 As well as dealing with whether the accused knew or was reckless as to whether the woman consented, the definition of rape in section 2 of the 1981 Act also removed any misunderstanding that an essential ingredient of the offence was the actual presence of fear or fraud,<sup>15</sup> although it is clear from case law that circumstances such as fear<sup>16</sup> or fraud<sup>17</sup> would be relevant. Section 9 of the *Criminal Law (Rape) (Amendment) Act 1990* implemented one of the recommendations in the Commission’s 1988 *Report on Rape and Allied Offences* by adding a third legislative provision related to consent, namely, that any failure or omission to offer resistance does not of itself constitute consent.<sup>18</sup>

2.08 In addition to these important legislative provisions concerning consent, case law provides that consent is absent where the victim is incapable of giving consent, for example, where the complainant was asleep<sup>19</sup> or where the complainant was intoxicated to such a degree as to render her incapable of consenting to the sexual activity.<sup>20</sup> The Criminal Law Codification Advisory Committee’s *Draft Criminal Code and Commentary*, published in 2011, notes that consent may also be vitiated due to lack of capacity.<sup>21</sup> The Commission notes that a common minimum requirement of consent is that the person whose consent is required understands to a sufficient extent the nature of the act involved, has the ability to refuse to participate in it and is not the subject of improper pressure or deception. If these features are

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<sup>11</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (No 209 2007) at paragraph 3.78.

<sup>12</sup> Australian Law Reform Commission *Family Violence – Improving Legal Frameworks* (ALRC CP 1 2010) at paragraph 16.72. See also section 61HA(3) of the *Crimes Act 1900* (NSW) (as inserted by section 3 and Schedule 1 of the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW)) which provides that an accused knows that the other person does not consent to sexual intercourse if the accused has “no reasonable grounds for believing that the other person consents to the sexual intercourse.” The trier of fact is required to have regard to “any steps taken by the [accused] to ascertain whether the other person consents to the sexual intercourse.”

<sup>13</sup> Section 128(2) of the *Crimes Act 1961* (NZ) (as substituted by section 7 of the *Crimes Amendment Act 2005* (NZ)) requires the prosecution to prove that the accused had sexual connection with the complainant without her consent and “without believing on reasonable grounds that [the complainant] consents to the connection.”

<sup>14</sup> Section 273.2 of the *Criminal Code RSC 1985 C-46* provides that the defendant can have a defence of honest but mistaken belief, but not where he failed to take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting. Canadian case law has established that before the defence can be put to the jury, the accused must raise some plausible evidence to give an “air of reality” to the defence of mistaken belief in consent. See *Pappajohn v R* (1980) 14 CR (3d) 243 SCC; *R v Bulmer* (1987) 4 WWR 577; *R v Osolin* (1993) 4 SCR 595; and *R v Park* [1995] 2 SCR 836.

<sup>15</sup> O’Malley *Sexual Offences: Law, Policy and Punishment* (Sweet & Maxwell 1996) at 36.

<sup>16</sup> See *R v Olugboja* [1982] QB 320.

<sup>17</sup> See *R v Flattery* (1877) 2 QBD 410 and *R v Williams* [1923] 1 KB 340.

<sup>18</sup> Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988) at paragraph 17.

<sup>19</sup> See *R v Mayers* (1872) 12 Cox CC 311 and *The People (DPP) v X*, *The Irish Times*, 20 May 1995.

<sup>20</sup> See *R v Lang* (1975) 62 Cr App R 50.

<sup>21</sup> Criminal Law Codification Advisory Committee *Draft Criminal Code and Commentary* (2010), commentary on Head 1105 (Consent) at paragraph 34, available at [www.criminalcode.ie](http://www.criminalcode.ie) and [www.justice.ie](http://www.justice.ie).

present, it may be concluded that the individual was in a position to exercise free choice and, therefore, to consent.<sup>22</sup>

2.09 In its 1988 *Report on Rape and Allied Offences*,<sup>23</sup> the Commission was of the view that it would be advantageous for the Oireachtas to clarify the law so as to put it beyond doubt that consent obtained by force or fraud was not consent. In its 1987 *Consultation Paper on Rape*, the Commission pointed out that the law had been put beyond doubt in definitions of consent in Western Australia, New South Wales, New Zealand and Canada.<sup>24</sup> Thus, in its 1988 Report, the Commission recommended that a definition of consent should also require that consent be “freely and voluntarily given” and that consent is not freely given if it is obtained by force, threat, intimidation, deception or fraudulent means.<sup>25</sup> The Commission adopted the phrase “freely and voluntarily given” from section 324G of Western Australia’s *Criminal Code*<sup>26</sup> which also provides that a failure to offer physical resistance does not of itself constitute consent and that a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means.<sup>27</sup> These aspects of a definition of consent recommended by the Commission were not included in section 9 of the *Criminal Law (Rape) (Amendment) Act 1990*, although as already noted section 2 of the 1981 Act implicitly removed any misunderstanding that an essential ingredient of the offence was the actual presence of fear or fraud. As the discussion below indicates, the concepts of “freedom” and “choice” recommended by the Commission in its 1988 Report now form part of the statutory regimes in many other jurisdictions.

### **(3) Overview of consent in other countries**

#### **(a) England, Wales and Northern Ireland**

2.10 The Commission now turns to provide a general overview of the reform of consent in the law of sexual offences in England, Wales and Northern Ireland since 2003, where the general law on consent and the equivalent of section 5 of the 1993 Act, is contained in the English *Sexual Offences Act 2003* and the *Sexual Offences (Northern Ireland) Order 2008*. A discussion of these legislative reforms is especially useful in the context of this Report as they also involved a consolidation of the generally applicable legislative provisions on sexual offences.

2.11 Whereas in Ireland the various elements of consent in the law of sexual offences are set out in part in legislative form and in part in case law, the English *Sexual Offences Act 2003* contains a consolidated legislative statement of consent. The 2003 Act implemented the main recommendations in the UK Home Office’s 2000 review of the law on sex offences, *Setting the Boundaries: Reforming the Law on Sex Offences*,<sup>28</sup> which also incorporated the English Law Commission’s recommendations on consent.<sup>29</sup> The English *Sexual Offences Act 2003* formed the background to a comparable review of the

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<sup>22</sup> McAuley and McCutcheon *Criminal Liability* (Sweet & Maxwell 2000) at 506.

<sup>23</sup> Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988).

<sup>24</sup> See also Law Reform Commission *Consultation Paper on Rape* (LRC CP 1-1987) at paragraph 63.

<sup>25</sup> Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988) at paragraph 17.

<sup>26</sup> Section 324G of the *Criminal Code 1913* (WA) was inserted by the *Acts Amendment (Sexual Assaults) Acts 1985* (WA). Section 6 of the *Acts Amendment (Sexual Offences) Act 1992* (WA) substituted section 324G of the *Criminal Code 1913* (WA) and the definition of consent is now contained in section 319 of the *Criminal Code 1913* (WA).

<sup>27</sup> Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988) at paragraph 17. See also Law Reform Commission *Consultation Paper on Rape* (LRC CP 1-1987) at paragraph 63.

<sup>28</sup> Home Office *Setting the Boundaries: Reforming the Law on Sex Offences* (2000).

<sup>29</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000).

law in Northern Ireland<sup>30</sup> which led to the *Sexual Offences (Northern Ireland) Order 2008*. In general, the 2008 Order follows the approach in the English 2003 Act.

2.12 As to consent, section 74 of the English *Sexual Offences Act 2003* and Article 3 of the *Sexual Offences (Northern Ireland) Order 2008* are worded identically and provide that a person consents “if he agrees by choice, and has the freedom and capacity to make that choice.” In addition to this general definition of consent, the 2003 Act effectively codified a number of circumstances where, under the common law, it is well-established that consent would not be present.<sup>31</sup> Section 75 of the English 2003 Act and Article 9 of the Northern Ireland 2008 Order are also expressed in identical terms and list 6 circumstances which, if established to have taken place with the defendant’s knowledge, create a rebuttable evidential presumption that the complainant did not consent and that the defendant did not reasonably believe the complainant consented. These circumstances are where: (a) violence or the threat of violence was used against the complainant; (b) violence or the threat of violence was used against a third person; (c) the complainant was unlawfully detained; (d) the complainant was, asleep or otherwise unconscious; (e) the complainant was unable to communicate a consent due to a physical disability; or (f) the complainant had been given a substance which was capable of causing them to be stupefied or overpowered at the time of the attack. The Home Office Sex Offences Review included, in its proposed list of examples of where consent is not present, circumstances “where a person did not understand the nature of the act, whether because they lacked the capacity to understand, or were deceived as to the purpose of the act” but this example was not included in the 2003 Act or 2008 Order.<sup>32</sup>

2.13 The provisions of section 76 of the English 2003 Act and Article 10 of the Northern Ireland 2008 Order are also set out in identical terms and create conclusive presumptions regarding consent in two circumstances: (a) where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act or (b) where the defendant intentionally induced the complainant to consent by impersonating a person known personally to the complainant.

2.14 It has been observed that evidential presumptions have only a limited value in proving lack of consent in the prosecution of sexual offences and that, in the context of the English *Sexual Offences Act 2003*, they are relatively under-used.<sup>33</sup> In rejecting a suggestion to add a further presumption relating to the capacity of a person to give consent whilst intoxicated, the UK Home Office noted in a 2006 Consultation Paper that:

“there is little evidence that the existing evidential presumptions have enjoyed great usage. The presumptions apply unless the defendant raises ‘sufficient evidence’ to raise an issue as to whether the victim consented. Where the defendant does raise such evidence, the judge will direct the jury that the presumption does not apply and the jury should consider the issue of consent in the normal way. In practice, it is not particularly onerous for defendants to enter the witness box and give ‘sufficient evidence’ to disengage the presumption. Therefore, we believe that the arguments for creating an additional evidential presumption are not strong and the better course would be to proceed by legislating to provide for a clearer definition of capacity.”<sup>34</sup>

2.15 In *R v Jheeta*,<sup>35</sup> the English Court of Appeal noted that, in most cases, the absence of consent and the appropriate state of the defendant’s mind will be proved without reference to the evidential or

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<sup>30</sup> Northern Ireland Office *Reforming the law on sexual offences in Northern Ireland – Volume 1 Summary of proposals* (2006); Northern Ireland Office *Reforming the law on sexual offences in Northern Ireland – Volume 2 Detailed discussion and consideration* (2006); and Northern Ireland Office *Reforming the law on sexual offences in Northern Ireland – Summary of responses* (2007). Both available at [www.nio.gov.uk](http://www.nio.gov.uk).

<sup>31</sup> Home Office *Setting the Boundaries: Reforming the Law on Sex Offences* (2000) at paragraph 2.10.7.

<sup>32</sup> *Ibid* at paragraph 2.10.9.

<sup>33</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007) at paragraph 2.47.

<sup>34</sup> Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape. A Consultation Paper* (2006) at 15.

<sup>35</sup> *R v Jheeta* [2007] EWCA Crim 1699 at paragraph 23.

conclusive presumptions. The Court stated that “[w]hen they do apply, sections 75 and 76 are directed to the process of proving the absence of consent to whichever sexual act is alleged. They are concerned with presumptions about rather than the definition of consent.”<sup>36</sup>

**(b) Scotland**

2.16 In Scotland, section 12 of the *Sexual Offences (Scotland) Act 2009* implemented the recommendation of the Scottish Law Commission in its 2007 *Report on Rape and Other Sexual Offences* and provides that “consent” means “free agreement.”<sup>37</sup> In addition, as recommended by the Scottish Commission,<sup>38</sup> section 13 of the 2009 Act contains a non-exhaustive list of 6 circumstances where “free agreement” is absent. These 6 circumstances are similar, though not identical, to the circumstances listed in section 75 of the English 2003 Act and Article 9 of the Northern Ireland 2008 Order, discussed above. They are: (a) where the victim is incapable because of the effect of alcohol or any other substance of consenting; (b) where the victim agrees or submits to the conduct because of violence used against them or any other person, or because of threats of violence made against them or any other person; (c) where the victim agrees or submits to the conduct because they are unlawfully detained; (d) where the victim agrees or submits to the conduct because they are mistaken, as a result of a deception by the accused, as to the nature or purpose of the conduct; (e) where the victim agrees or submits to the conduct because the accused induces them by impersonating a person known personally to the victim; and (f) where the only expression or indication of agreement to the conduct is from a person other than the victim. Where the prosecution is able to prove that the accused did the relevant act, and that one of the 6 circumstances outlined in section 13 existed, it is established as a matter of fact that the complainant did not consent to the conduct.

2.17 Thus, the effect of section 13 is akin to that of section 75 of the English *Sexual Offences Act 2003* and Article 9 of the Northern Ireland 2008 Order. The factual situations set out in the list are not presumptions regarding consent; rather they are situations which constitute lack of consent.<sup>39</sup> Section 14 of the 2009 Act provides that a person is incapable of consenting to any conduct while they are asleep or unconscious. Finally, section 17 of the 2009 Act provides that a “mentally disordered person” is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to (a) understand what the conduct is; (b) form a decision as to whether to engage in the conduct; or (c) communicate any such decision.

2.18 In its 2007 Report, the Scottish Law Commission distinguished between indicators of lack of consent and presumptions about lack of consent.<sup>40</sup> It did not favour stating the indicators as evidential presumptions for the reason that doing so would not correctly characterise what the indicators are seeking to do. It considered that the factual situations are not so much part of the law of evidence as illustrations of the key element of the offence itself, namely lack of consent. It emphasised that the factual situations are not to be understood as pointing to or presuming lack of consent; rather, they are situations which constitute lack of consent. The Scottish Commission was not inclined to include in the list issues concerning general incapacity (because of age or mental disorder) or consent in situations where relationships of trust and authority exist between the parties.<sup>41</sup> Its position was that in many instances where sexual activity occurs involving these situations, the lack of consent will be based on one or more

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<sup>36</sup> *R v Jheeta* [2007] EWCA Crim 1699 at paragraph 23.

<sup>37</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007) at paragraph 2.42.

<sup>38</sup> See recommendation of the Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007) at paragraph 2.59. The 2007 Report was also influenced by the recommendations in the 2001 Report of the Millan Committee, *New Directions Report on the Review of the Mental Health (Scotland) Act 1984*, the Scottish Executive’s review of Scotland’s mental health law.

<sup>39</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007) at paragraph 2.59.

<sup>40</sup> *Ibid* at paragraph 2.45.

<sup>41</sup> *Ibid* at paragraph 2.57.



of the other factors on the list. In addition, it considered that there is a general question of whether the law should disregard any apparent consent given by a person with a general incapacity based on age or mental disorder or by a person over whom someone holds a position of trust or authority.

**(c) Western Australia**

2.19 As noted above, section 319 of Western Australia's *Criminal Code 1913*, as amended in 1985, provides that consent means "a consent freely and voluntarily given." It also states that consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means. Section 319 was derived directly from the proposals of the 1983 Murray Report on the Review of the Western Australia Criminal Code.<sup>42</sup>

**(d) New South Wales**

2.20 Section 61HA(4) of the New South Wales *Crimes Act 1900*, as amended in 2007, also defines consent as free and voluntary agreement. The 1900 Act provides that a person does not consent to sexual intercourse in the following circumstances: (a) they do not have the capacity to consent, including because of age or cognitive capacity; (b) they are asleep or unconscious; (c) they consent because of threats of force or terror (against them or any other person); or (d) they are unlawfully detained.<sup>43</sup> In addition, section 61HA(4) stipulates that a person does not consent to the sexual intercourse and the accused knows that they do not consent, if they give consent (a) under a mistaken belief as to the identity of the other person; or (b) under a mistaken belief that the other person is married to the person, or (c) under a mistaken belief that the sexual intercourse is for medical or hygienic purposes or under any other mistaken belief about the nature of the act induced by fraudulent means.<sup>44</sup> It also provides a number of grounds on which it may be established that a person does not consent to sexual intercourse, namely, if they are substantially intoxicated by alcohol or drugs; if they are subject to intimidatory or coercive conduct or other threat that does not involve a threat of force; or if there is an abuse of a position of authority or trust.<sup>45</sup>

**(e) Victoria**

2.21 In Victoria, consent is also defined as "free agreement." Section 36 of the Victorian *Crimes Act 1958*, as amended, contains a non-exhaustive list of circumstances in which a person does not freely agree to an act. These are where: (a) they submit because of force or the fear of force to that person or someone else; (b) they submit because of the fear of harm of any type to that person or someone else; (c) they submit because she or he is unlawfully detained; (d) they are asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing; (e) they are incapable of understanding the sexual nature of the act; (f) they are mistaken about the sexual nature of the act or the identity of the person; (g) they mistakenly believe that the act is for medical or hygienic purposes.

**(f) New Zealand**

2.22 The New Zealand *Crimes Act 1961*, as amended, also sets out a non-exhaustive list of circumstances in which a person is considered as not consenting to sexual activity. Thus, section 128A of the Act provides that a person does not consent to sexual activity: (a) if they allow the sexual activity because of force applied, the threat of the application of force, or the fear of the application of force, to them or some other person; (b) if the sexual activity occurs while they are asleep or unconscious; (c) if they are affected by alcohol or some other drug; (d) where they are affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that they cannot consent or refuse to

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<sup>42</sup> Murray Report on the *Criminal Code in Western Australia* (June 1983). See also Morgan "Oppression, Fraud and Consent in Sexual Offences" (1996) 25 *Western Australian Law Review* 223 at 227.

<sup>43</sup> Section 61HA(4) of the *Crimes Act 1900* (NSW) was inserted by section 3 of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* (NSW).

<sup>44</sup> Section 61HA(5) of the *Crimes Act 1900* (NSW) was inserted by section 3 of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* (NSW).

<sup>45</sup> Section 61HA(6) of the *Crimes Act 1900* (NSW) was inserted by section 3 of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* (NSW).

consent to the activity; (e) where they are mistaken about the identity of the other participant in the act; or (f) where they are mistaken about the nature and quality of the act. Section 128A of the Act also stipulates that a person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the act.

## **C Obligations: equality, empowerment and protection**

### **(1) Introduction**

2.23 Having set out the contextual background regarding consent and the circumstances in which consent is considered to be absent, the Commission now turns to consider the relevant provisions of the Constitution of Ireland as well as the State's international human rights obligations under the UNCRPD and the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR). The Commission then considers the various ways of meeting those obligations. In particular, the Commission discusses whether a disability-neutral approach should be adopted or whether specific provision should be made in the law of sexual offences for persons who lack capacity to consent to sexual activity.

### **(2) Obligations under the Constitution, the UNCRPD and ECHR**

2.24 In approaching this question, the Commission is aware that Article 40.1 of the Constitution of Ireland, which provides that "[a]ll citizens shall, as human persons, be held equal before the law," requires a general approach to persons with disability that is based on equality of treatment. This is also clear from Article 12 of the UNCRPD. The Commission is conscious that this is one of the first occasions on which a law reform agency has been asked to consider reform of the law on sexual offences, including capacity to consent, against the background of the UNCRPD. The Commission notes the relevance of two other provisions of the UNCRPD in this context, namely, Article 13, which deals with equal treatment in terms of access to justice, and Article 16, which deals with protection from exploitation, violence and abuse. The Commission considers that it is useful to set out the full text of Articles 5, 12, 13 and 16 of the UNCRPD and to comment on their content.

2.25 Article 5 of the UNCRPD provides:

#### **"Equality and non-discrimination**

States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

1. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
2. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
3. Specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

2.26 The Commission notes that Article 5 therefore provides that States:

- (a) shall ensure that all persons are afforded equal protection and enjoy equal benefit of the law;
- (b) shall prohibit all discrimination on the basis of disability, guarantee equal and effective legal protection against discrimination to persons with disabilities and ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination;
- (c) may take specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities and these will not be considered discriminatory.

2.27 Article 12 provides:

#### **"Equal recognition before the law**

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

2.28 The Commission notes that Article 12 therefore requires States to:

- (a) ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (Article 12.2);
- (b) provide measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (Article 12.3);
- (c) ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law, notably that the measures:
  - (i) respect the rights, will and preferences of the person,
  - (ii) are free of conflict of interest and undue influence,
  - (iii) are proportional and tailored to the person's circumstances,
  - (iv) apply for the shortest time possible and
  - (v) are subject to regular review by a competent, independent and impartial authority or judicial body (Article 12.4).

2.29 Article 13 of the UNCRPD provides:

**"Access to justice**

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

2.30 The Commission notes that Article 13 provides that States:

- (a) shall ensure effective access to justice for persons with disabilities on an equal basis with others, including:
  - (i) through the provision of procedural and age-appropriate accommodations, in order to
  - (ii) facilitate their effective role as direct and indirect participants
    - i. as witnesses
    - ii. and at investigative and other preliminary stages;
- (b) shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

2.31 Article 16 of the UNCRPD provides:

**“Freedom from exploitation, violence and abuse**

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.
5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”

2.32 The Commission notes that Article 16 therefore requires States to:

- (a) take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including by ensuring:
  - (i) appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers,
  - (ii) including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse; and
  - (iii) that protection services are age-, gender- and disability-sensitive;
- (b) take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services; and
- (c) put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

2.33 Article 5 of the UNCRPD underlines that people with disabilities must be afforded equal protection and equal benefit of the law to everyone else. It also acknowledges that specific measures may sometimes be necessary to achieve such equality.<sup>46</sup> It is also notable in this respect that Article 12 of the UNCRPD refers to both the equality principle and the obligation to protect against abuse.

2.34 Article 40.1 of the Constitution of Ireland provides that all citizens are to be held equal before the law. Article 40.1 also provides that, in its laws, the State may “have due regard to differences of capacity, physical and moral, and of social function.”<sup>47</sup> The language of Article 40.1 differs from Article 12 of the UNCRPD in particular in relation to the important question of State provision of supports to implement the principle of equality. Nonetheless, Article 40.1 of the Constitution and Article 12 of the

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<sup>46</sup> United Nations *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) at 66, available at <http://www.ipu.org/PDF/publications/disabilities-e.pdf>.

<sup>47</sup> See also *MX v Health Service Executive* [2012] IEHC 491 at paragraph 79.

UNCRPD are consistent in one important respect for the purposes of this Report; both recognise that the principle of equality may require differences of accommodation in some instances. The Commission also notes that Article 13 of the UNCRPD, which deals with access to justice, refers to “the provision of procedural and age-appropriate accommodations.” This recognises the need for certain specific arrangements to ensure equality of access to justice. Similarly, Article 16 of the UNCRPD refers to specific measures concerning exploitation, violence or abuse. This was recognised by MacMenamin J in *MX v Health Service Executive*<sup>48</sup> where he stated that while the values enunciated in the UNCRPD constitute a “paradigm shift” in the manner in which persons with disabilities are to be treated by, and before, the law, the preamble also acknowledges the diversity of persons with disabilities. Therefore, in considering the applicability and the interpretation of the UNCRPD, due regard must be had to the individual circumstances of each individual.<sup>49</sup>

2.35 The UNCRPD thus reflects the view that there is a delicate balance to be struck between undue state interference in an individual’s sexual life and the state’s responsibility to protect an individual from sexual exploitation and abuse. The Commission observes that this approach is also mirrored in the ECHR. In *X v The Netherlands*<sup>50</sup> the European Court of Human Rights (ECtHR) recognised that an adult’s right to sexual autonomy in their private life under Article 8 of the ECHR is not absolute and that a member state may properly apply standards through the criminal law with a view to protecting individuals from abuse. In that case, a 16 year old with an intellectual disability was sexually assaulted by an adult male of sound mind. Under Dutch law, only the victim of the crime could register a criminal complaint, even where the victim was incapable of doing so due to her disability. Due to this, the man could not be prosecuted. The ECtHR found that the absence of an effective criminal procedure constituted a violation by the Netherlands of its duty to secure respect for the victim’s private life under Article 8. The ECtHR concluded that although the object of Article 8 is the protection of the individual against arbitrary interference from the state there is also a positive obligation on the state to show effective respect for private life under Article 8. This obligation may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals.<sup>51</sup> In addition, the ECHR ensures that the State must uphold its responsibility to provide a remedy in law so that a complainant can seek justice where there has been a violation of the ECHR. This is consistent with the UNCRPD, which recognises that specific procedural accommodations may be required to ensure equality of access to justice.

### **(3) Persons who require protection from sexual exploitation and abuse**

2.36 As explained above, Article 16 of the UNCRPD requires states that ratify the Convention to take specific measures to protect persons with disabilities from exploitation, violence and abuse. In order to recommend appropriate protective measures, it is first necessary to identify precisely the categories of persons who are at risk of and unable to protect themselves from such exploitation and abuse.

#### **(a) Degrees of intellectual disability**

2.37 Section 5 of the *Criminal Law (Sexual Offences) Act 1993* provides protection to persons who are “mentally impaired, which is defined in section 5(5) of the 1993 Act as meaning a person who suffers 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.” As noted in Chapter 1 of this Report, the Commission is of the view that predicating capacity to consent on ability to live independently is not an accurate assumption and that an element of dependency should not necessarily preclude an ability to consent.<sup>52</sup>

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<sup>48</sup> *MX v Health Service Executive* [2012] IEHC 491.

<sup>49</sup> *Ibid* at paragraph 30.

<sup>50</sup> *X v The Netherlands* (1986) 8 EHRR 235.

<sup>51</sup> *Ibid* at paragraph 23.

<sup>52</sup> See paragraph 1.16 above.

2.38 Arguably, the predecessor of section 5 of the 1993 Act, section 4 of the *Criminal Law Amendment Act 1935*, provided more clarity as to the degrees of intellectual disability and the categories of persons who are most likely to be unable to protect themselves from sexual exploitation and abuse. Section 4 of the 1935 Act made it an offence to have unlawful carnal knowledge of “any woman or girl who is an idiot, or an imbecile, or is feeble-minded.” Although the language used in the 1935 Act is clearly objectionable in today’s setting, it is notable that each term in the 1935 Act has or had a specific meaning that was related to the extent of intellectual ability or disability.

2.39 As explained in the Introduction to this Report, adopting the WHO classification system<sup>53</sup> the term “idiot” would now be described as “profound intellectual disability” meaning that the person would have severe limits to their capacity for self-care or to guard themselves against common physical dangers. The term “imbecile” indicated an intellectual disability less extreme than “idiot” and would now often be divided into two WHO-based categories, “severe intellectual disability” and “moderate intellectual disability.” The term “feeble-minded” was used to denote the lowest degree of intellectual disability and under the WHO classification system would now be described as “mild intellectual disability.”<sup>54</sup>

2.40 The Commission accepts that the WHO classification system cannot constitute a definitive basis on which to formulate any replacement of section 5 of the 1993 Act. Nonetheless, it provides a helpful indicative guide. It suggests that, assuming appropriate educational and related supports are in place (which the UNCRPD requires), persons with severe or profound intellectual disabilities may struggle to understand the nature and consequences of sexual activity and to recognise abusive situations. The WHO analysis also suggests that while persons with moderate or mild intellectual disabilities are more likely, with appropriate educational and related supports, to have the capacity to consent to sexual activity, some may also be unable to protect themselves from sexual abuse and exploitation. Such persons may be more amenable to threats, inducements or deception which would probably be ignored by others. The Commission now turns to consider the categories of persons who are included in comparable sexual offences legislation in other jurisdictions.

**(b) Comparative analysis**

**(i) England, Wales and Northern Ireland**

2.41 In England and Wales, the *Sexual Offences Act 1956* referred to “defective” women. “Defective” was defined in section 45 of the 1956 Act as a person “suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning.”<sup>55</sup> In addition, section 1(3) of the *Sexual Offences Act 1967* did not permit a man who was suffering from severe mental handicap to consent to same-sex sexual acts.<sup>56</sup> “Severe mental handicap” had the same definition as a “defective” in the 1956 Act.<sup>57</sup> These offences carried low penalties and were

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<sup>53</sup> See the World Health Organisation’s (current) 10<sup>th</sup> Revised Version of the *International Statistical Classification of Diseases and Related Health Problems* (ICD-10), available at [www.who.org](http://www.who.org). The WHO classification system retains the general term “mental retardation”, which is no longer in general use in many countries, including Ireland. The Health Research Board’s National Intellectual Disability Database (NIDD), available at [www.hrb.ie](http://www.hrb.ie), uses the WHO classification system but employs the term “intellectual disability” rather than “mental retardation.”

<sup>54</sup> For further explanation of the meaning of WHO classifications, see the Consultation Paper (Law Reform Commission Consultation Paper on Sexual Offences and Capacity to Consent (LRC CP 63-2011), Introduction at paragraphs 10-11.

<sup>55</sup> Section 45 of the *Sexual Offences Act 1956* was substituted by section 127 of the *Mental Health Act 1959* and paragraph 29 of Schedule 3 of the *Mental Health (Amendment) Act 1982*.

<sup>56</sup> Section 1(3) of the *Sexual Offences Act 1967* was amended by paragraph 34(a) of Schedule 3 of the *Mental Health (Amendment) Act 1982*.

<sup>57</sup> Section 1(3A) of the *Sexual Offences Act 1967* as inserted by paragraph 34(b) of Schedule 3 of the *Mental Health (Amendment) Act 1982*.

not perceived as providing effective protection against abuse or exploitation.<sup>58</sup> They were confined to victims with a severe mental impairment and, as a result, did not provide protection to other vulnerable adults who had some degree of capacity to consent to sexual acts and who might be easily induced.<sup>59</sup>

2.42 The English *Sexual Offences Act 2003* now provides protection in sections 30 to 33 to persons who are unable to refuse sexual contact “because of or for a reason related to a mental disorder.” The same protection is provided in Articles 43 to 46 of the *Sexual Offences (Northern Ireland) Order 2008*. “Mental disorder” is defined broadly as “any disorder or disability of the mind.”<sup>60</sup> In its 2000 Report to the Home Office Sex Offences Review, the Law Commission for England and Wales favoured the phrase “mental disability” over “mental disorder.”<sup>61</sup> It recommended that “mental disability” should be defined as a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.”<sup>62</sup>

2.43 The offences in sections 34 to 37 of the English *Sexual Offences Act 2003* and Articles 47 to 50 of the *Sexual Offences (Northern Ireland) Order 2008* are designed to protect adults whose mental impairment is not so severe that they are unable to make a choice but who are nevertheless vulnerable to relatively low levels of inducement, threats or deception. They encompass persons whose capacity is not of such a character that it renders the complainant unable to choose whether or not to engage in the sexual activity. In other words, the provisions apply where the ability to choose is easily overridden and agreement to sexual activity can be secured through relatively low levels of inducement, threat or deception. They recognise that threats that would probably be ignored by others can assume a greater significance for a person with intellectual disability.<sup>63</sup> Thus, there is no requirement to prove that the complainant was unable to refuse because of or for a reason related to a mental disorder. It suffices to establish that the complainant had a mental disorder at the time and that the accused knew or could reasonably be expected to know that the complainant had a mental disorder. Whether the complainant actually consented or not is irrelevant. As to what might constitute an inducement, threat or deception, the Home Office Explanatory Notes to the *Sexual Offences Act 2003* state that:

“an inducement might be A promising B presents of anything from sweets to a holiday; a threat might be A stating that he will hurt a member of B’s family; and a deception might be A stating that B will get into trouble if he does not engage in sexual activity, or persuading him that it is expected that friends should engage in sexual activity.”<sup>64</sup>

**(ii) Scotland**

2.44 In Scotland, the *Sexual Offences (Scotland) Act 2009* protects persons who, by reason of a mental disorder, are unable to understand what sexual conduct is or to form a decision as to whether to engage in the conduct or communicate any such decision.<sup>65</sup> “Mental disorder” is defined as any mental

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<sup>58</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.2.1.

<sup>59</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.2.2.

<sup>60</sup> Section 79 of the English *Sexual Offences Act 2003* and section of the English *Mental Health Act 1983* as amended by section 56 of the English *Mental Health Act 2007*.

<sup>61</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.36.

<sup>62</sup> *Ibid* at paragraph 4.84.

<sup>63</sup> Voice UK, Respond and Mencap UK *Behind closed doors: preventing sexual abuse against adults with a learning disability* (2001) at 13.

<sup>64</sup> Home Office Explanatory Notes to the *Sexual Offences Act 2003* available at <http://www.legislation.gov.uk/ukpga/2003/42/notes/contents>.

<sup>65</sup> Section 17(2) of the *Sexual Offences (Scotland) Act 2009*.

illness, personality disorder or learning disability, however caused or manifested.<sup>66</sup> Section 69 of the Scottish Law Commission's 2003 *Draft Criminal Code for Scotland* contains a section on sexual exploitation of persons with a "mental disorder" which creates criminal liability where a person engages in sexual activity with, or procures for sexual activity, a person with such mental disorder as to be unable to guard against serious exploitation and who takes advantage of that person's disorder in order to engage in, or procure that person for, the activity.<sup>67</sup>

2.45 The Scottish Law Commission, in its 2006 *Discussion Paper on Rape and Other Sexual Offences*, noted that there may be a gap in Scots Law in the protection of people who have a mental disorder where the sexual activity is consensual but exploitative in a way that does not involve a breach of trust.<sup>68</sup> It asked whether, in addition to offences based on the abuse of trust, there should also be a separate offence of taking advantage of the condition of a person with a mental disorder which prevents that person from guarding against sexual exploitation.<sup>69</sup> In its subsequent 2007 *Report on Rape and Other Sexual Offences*, the Scottish Law Commission decided not to introduce such an offence on the basis that:

"there are considerable difficulties in identifying the precise mischief that the offence is to remedy. Where a person with a mental disorder is subject to threats or deceptions, the offences based on lack of consent, including attempts to commit those offences, will provide protection. Moreover, if the criminal law were to intervene where a person with a mental disorder receives inducements to have sex, which result or may result in that person consenting to sex, the outcome would be to diminish the sexual autonomy of people with mental disorders."<sup>70</sup>

2.46 Thus, the Scottish Law Commission considered that adequate protection was provided for persons who have capacity to consent to sexual activity but may still be unable to protect themselves from sexual exploitation and abuse under the general sexual offences, which includes a conclusive presumption that sexual conduct takes place without free agreement where the complainant agrees or submits to the conduct because of threats or deceptions.<sup>71</sup> In addition, the Scottish Commission drew a distinction, in terms of the effect on a person's autonomy, between threats and deceptions on the one hand and inducements, on the other.<sup>72</sup>

### **(iii) Western Australia**

2.47 In Western Australia, section 330 of the *Criminal Code 1913* sets out a number of sexual offences which may be committed against an "incapable person."<sup>73</sup> An "incapable person" is defined as "a person who is so mentally impaired as to be incapable: (a) of understanding the nature of the act the subject of the charge against the accused person; or (b) of guarding himself or herself against sexual exploitation." Under section 330, it is an offence to sexually penetrate an incapable person; to procure, incite, or encourage an incapable person to engage in sexual behaviour; to indecently deal with an incapable person; to procure, incite, or encourage an incapable person to do an indecent act; and to indecently record an incapable person. In order to be convicted of any of these offences, the offender must know or ought to know that the victim is an "incapable person." Thus, the Western Australian legislation provides protection in the form of a specific criminal offence to two categories of "mentally

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<sup>66</sup> Section 17(3) of the *Sexual Offences (Scotland) Act 2009* and section 328 of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

<sup>67</sup> Scottish Law Commission *A Draft Criminal Code for Scotland with Commentary* (2003) at 134.

<sup>68</sup> Scottish Law Commission *Discussion Paper on Rape and Other Sexual Offences* (No 131 2006) at paragraph 5.89.

<sup>69</sup> *Ibid* at paragraph 5.92.

<sup>70</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (No 209 2007) at paragraph 4.100.

<sup>71</sup> Section 13 of the *Sexual Offences (Scotland) Act 2009*.

<sup>72</sup> Section 13 of the *Sexual Offences (Scotland) Act 2009*.

<sup>73</sup> Section 330 of the *Criminal Code 1913* (WA) was inserted by section 6 of the *Acts Amendment (Sexual Offences) Act 1992* (WA).



impaired” people: (1) people who are incapable of understanding the nature of sexual activity (in most cases this group will comprise those within the WHO classification system of severe or profound intellectual disability); and (2) people who are incapable of guarding themselves against sexual exploitation (such persons may have capacity to understand the nature of sexual activity, but may nonetheless be vulnerable to abuse).

**(iv) New South Wales**

2.48 Under section 66F(3) of the New South Wales *Crimes Act 1900*, it is an offence to have sexual intercourse with a person who has a cognitive impairment, with the intention of taking advantage of that person’s cognitive impairment.<sup>74</sup> “Cognitive impairment” is defined as “(a) an intellectual disability, or (b) a developmental disorder (including an autistic spectrum disorder), or (c) a neurological disorder, or (d) dementia, or (e) a severe mental illness, or (f) a brain injury, that results in the person requiring supervision or social habilitation in connection with daily life activities.”<sup>75</sup> Like section 5(5) of the *Criminal Law (Sexual Offences) Act 1993*, the definition of “cognitive impairment” is premised on a person’s ability to live an independent life, which, as noted above, the Commission considers to be an unreliable criterion. Section 66F was not intended to apply to all people with intellectual disability and this is clear from the following extract from Parliamentary Debates on this issue:

“[i]ntellectual disability is carefully defined to attract the protections afforded by the legislation to those people whose level of disability requires such protection... The intent of these reforms is to provide protection from sexual exploitation and assault to people with a *significant* intellectual disability.”<sup>76</sup> (emphasis added)

2.49 Previously, the offence was framed in terms of having sexual intercourse with another person who has an intellectual disability, with the intention of taking advantage of that person’s vulnerability to sexual exploitation. The offence is not concerned with whether the victim *is actually* exploited, rather the focus is on the *intention* of the accused.<sup>77</sup> The New South Wales Law Reform Commission observed that such an intention is not only hard to define meaningfully, it may be extremely difficult, if not impossible, to prove and may make the section unworkable.<sup>78</sup> In 1996, the New South Wales Commission recommended the abolition of the exploitation offence in section 66F(3) as it was unable to suggest a way of overcoming the identified difficulties.<sup>79</sup>

2.50 If a person has an intellectual disability that does not result in the person requiring supervision or social habilitation in connection with daily life activities (and does not therefore fall within the definition of “cognitive impairment”), they are protected under the general sexual offences and rules relating to consent set out in section 61HA of the New South Wales *Crimes Act 1900*. That section stipulates that consent is negated if the person does not have the capacity to consent to the sexual intercourse. In addition, consent is negated if the person consents because of threats of force or terror<sup>80</sup> and it may be

<sup>74</sup> Section 66F(3) of the *Crimes Act 1900* (NSW) was amended by section 3 of the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008* (NSW).

<sup>75</sup> Section 61H(1A) of the *Crimes Act 1900* (NSW) as amended by section 3 of the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008* (NSW).

<sup>76</sup> New South Wales – *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 1987, Hon BJ Unsworth, Premier, Second Reading Speech at 15466.

<sup>77</sup> New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* (Report 80 1996) at paragraph 8.32.

<sup>78</sup> New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35 1994) at paragraph 9.18 and New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* (Report 80 1996) at paragraph 8.32.

<sup>79</sup> New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* (Report 80 1996) at paragraph 8.36.

<sup>80</sup> Section 61HA(4) of the *Crimes Act 1900* (NSW) was inserted by section 3 of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* (NSW).

established that a person does not consent where they engage in a sexual act as a result of intimidatory or coercive conduct or other threats which need not involve threats of force.<sup>81</sup>

2.51 The general sexual assault provisions in the NSW Act also include “aggravated” sexual offences. Where the prosecution can prove an aggravating offence, including the absence of consent, the legislation provides for substantially heavier maximum sentences. The fact that the victim has a cognitive impairment constitutes a circumstance of aggravation.<sup>82</sup>

**(v) Victoria**

2.52 In Victoria, sexual offences involving persons with intellectual disability (other than offences committed by carers) are dealt with in the context of generally applicable sexual offences. As noted above, under section 36 of the Victorian *Crimes Act 1958*, a person does not freely agree to an act where they are incapable of understanding the sexual nature of the act. This provides protection to persons with severe or profound intellectual disability. Persons with less severe intellectual disabilities are protected by the remaining general rules on consent in section 36 of the Act. The Victorian Law Reform Commission specifically rejected a general “exploitation offence” as exists in New South Wales, on the ground that there is too great a risk that it would unduly restrict expression of sexual rights. It concluded that the offence should be confined to specified situations in which people are particularly dependent and therefore particularly vulnerable. It should be targeted at specified caregivers, as it is reasonable to impose a special prohibition on those people who are responsible for the care and welfare of others.<sup>83</sup>

**(vi) New Zealand**

2.53 In the New Zealand *Crimes Act 1961*, people with severe or profound intellectual disabilities are protected by a specific provision which deals with sexual exploitation of a person with significant impairment. Pursuant to section 138 of the Act, it is an offence to have or attempt to have exploitative sexual connection with a person with a significant impairment. The accused must either have sexual connection with the victim knowing that they have a significant impairment or have obtained the victim’s acquiescence in, submission to, participation in, or undertaking of the connection by taking advantage of their impairment. “Significant impairment” is defined as an intellectual, mental, or physical condition or impairment (or a combination of 2 or more intellectual, mental, or physical conditions or impairments) that affects a person to such an extent that it significantly impairs their capacity: (a) to understand the nature of sexual conduct; or (b) to understand the nature of decisions about sexual conduct; or (c) to foresee the consequences of decisions about sexual conduct; or (d) to communicate decisions about sexual conduct. If a person has an intellectual disability but does not fall within the remit of section 138 of the Act, they are protected under the general provisions on consent in section 128A of the Act.

**D Meeting the requirements of the UNCRPD, the ECHR and the Constitution: a disability-neutral approach versus specific capacity provision**

2.54 The Commission now turns to consider how the aims of empowerment and protection should be reflected in the criminal law and in particular, whether the law should be disability-neutral or whether specific provision should be made for people whose capacity to consent to sexual relations is in issue.

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<sup>81</sup> Section 61HA(6) of the *Crimes Act 1900* (NSW) was inserted by section 3 of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* (NSW).

<sup>82</sup> Section 61J of the *Crimes Act 1900* (NSW).

<sup>83</sup> Law Reform Commission of Victoria *Report on Sexual Offences Against People with Impaired Mental Functioning* (No. 16 1988) at paragraph 64. This issue is discussed in further detail in Chapter 4 below.

## **(1) Ireland**

2.55 The evidential difficulties involved in prosecuting under general sexual offences where the issue of capacity to consent is in question arose, as already noted, in 2010 in *The People (DPP) v XY*.<sup>84</sup> The accused was alleged to have forced a woman whose capacity to consent was in question into performing oral sex with him. As this act does not come within the scope of section 5 of the 1993 Act (which deals with sexual intercourse and buggery only), the accused was charged with “section 4 rape” under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. Section 4 of the 1990 Act does not have regard to any issue of capacity to consent that may arise. Having regard to case law, White J concluded that there had not been an assault involving a person being forced to do something or threatened so that they had to submit. He noted in his direction to the jury that the jurors had heard the complainant use the word “force” in her evidence on the DVD and that she kept saying “no” when the accused said “go on”, but that she had not expanded on that and there was no suggestion of threat or menace. White J therefore directed “with great reluctance” that the accused be acquitted on the basis that there was no evidence of assault or hostile act on his part. Accordingly, he directed the jury to return a verdict of not guilty.

2.56 An important question arises as to whether section 5 of the *Criminal Law (Sexual Offences) Act 1993* could be repealed without a specific set of replacement provisions; in other words, whether the substance of section 5 could, with appropriate updating of language, be subsumed into the general law on sexual offences, including the general law on consent. In this respect, one submission received by the Commission in response to the Consultation Paper urged the adoption of a disability-neutral approach in relation to consent in the criminal law. The submission argued that under the UNCRPD persons with disabilities have equal rights to consent to sexual activity and should not be held to a higher standard than others when it comes to informed consent. It was submitted that all sexual offences legislation should be made disability-neutral which would require the repeal of any disability-specific offence which sets out a different standard of consent for people with disabilities when compared to other adults. In addition, the submission argued that Article 5 of the UNCRPD precludes the use of a separate standard or test of capacity for people with disabilities, for assessing consent to sexual relations. The Commission turns to examine comparative developments in this area before setting out its final recommendations on this matter.

## **(2) Comparative analysis**

### **(a) New South Wales**

2.57 In its 1996 *Report on People with an Intellectual Disability and the Criminal Justice System*, the Law Reform Commission for New South Wales noted that similar arguments were presented to it, namely, that specific sexual offences that would apply to people with intellectual disability were not required.<sup>85</sup> These were based on the following points: that people with intellectual disability are afforded sufficient protection by the general law (for example, if a person lacks capacity to consent then the sexual activity is without consent); that specific offences limit the sexual freedom of people with limited decision-making capacity; and that it is discriminatory to target a group and treat them differently from the general population.<sup>86</sup> The New South Wales Commission stated that “the general sexual assault offences, which are ‘designed to protect freedom of choice in sexual connections’ may not provide sufficient protection where the victim is ‘not capable of making a mature and rational choice of this kind.’”<sup>87</sup> It observed that the issue of whether or not specific offences for people with an intellectual disability are appropriate is controversial, because, by removing the issue of consent, limits are arbitrarily imposed on their sexual rights.

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<sup>84</sup> Central Criminal Court, 15 November 2010, *The Irish Times*, 16 November 2010. See the discussion at paragraph 1.18, above, and at paragraphs 4.07 and 5.36, below.

<sup>85</sup> Law Reform Commission for New South Wales *People with an Intellectual Disability and the Criminal Justice System* (Report 80 1996).

<sup>86</sup> *Ibid* at paragraph 8.17.

<sup>87</sup> *Ibid* at paragraph 8.16.

2.58 The New South Wales Commission rejected these equality-based arguments. It was persuaded by arguments in favour of retaining specific sexual offences which refer to the particular vulnerability of people with an intellectual disability to sexual exploitation. It was also influenced by the argument that the general provisions are difficult to prosecute successfully, particularly in relation to proving lack of consent and are therefore insufficient to protect people with an intellectual disability.<sup>88</sup> It relied on Article 7 of the 1971 UN Declaration on the Rights of Mentally Retarded Persons which acknowledged that there may be a need for restriction of the rights of people with an intellectual disability, for example, whenever they are unable, because of the severity of their disability, to exercise all their rights in a meaningful way.<sup>89</sup> The Commission also cited difficulties in obtaining sufficient evidence due to the severity of the victim's disability.<sup>90</sup> Thus, section 66F of the New South Wales *Crimes Act 1900* contains specific offences which apply where a person has sexual intercourse with another person who has a cognitive impairment (a) while they are responsible for their care; or (b) with the intention of taking advantage of that person's impairment.

**(b) Scotland**

2.59 In its 2007 *Report on Rape and Other Sexual Offences*,<sup>91</sup> which led to the *Sexual Offences (Scotland) Act 2009*, the Scottish Law Commission also considered whether a reformed law on sexual offences could exclude a specific offence concerning persons with intellectual disability. The 2007 Report referred to the Millan Committee's 2001 *New Directions Report on the Review of the Mental Health (Scotland) Act 1984* which considered whether it would be possible to enact a new definition of consent as "free agreement" (as now enacted in section 12 of the *Sexual Offences (Scotland) Act 2009*) without the need for specific provisions on capacity to consent that would apply to persons with an intellectual disability or mental ill-health.<sup>92</sup> The Millan Committee noted that such an approach could avoid the need for special offences to protect people with intellectual disability or mental ill-health, by bringing abuse of this group within the definition of generally applicable crimes, such as rape. Although the 2001 Report acknowledged that such an approach would be more consistent with the principle of non-discrimination, it recognised that it would involve a radical reform of the general law on sexual offences which would have consequences for a wider group than people whose mental health was at issue.

2.60 The Millan Committee had also noted that problems had been encountered when the existing general law covering sexual offences was applied to a person with an intellectual disability, in particular, that it was difficult to prove lack of consent of a person with a severe intellectual disability (as defined in the WHO classification system referred to in Chapter 1).<sup>93</sup> It stated:

"The fundamental problem is that most sexual offences concerning adults can only be established if a lack of consent by the victim can be proved. Where a person is severely mentally impaired, it may be difficult to establish such a lack of consent."

2.61 It gave the example of the offence of rape, where the crime is committed when a woman's will is overcome by violence or the threat of violence. It noted that if a man has sex with a woman who does not have the capacity to understand what is happening but who does not actively resist, this legal test may not be met.<sup>94</sup> The Millan Committee concluded that these problems made it difficult to prosecute

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<sup>88</sup> Law Reform Commission for New South Wales *People with an Intellectual Disability and the Criminal Justice System* (Report 80 1996) at paragraph 8.17.

<sup>89</sup> *Ibid* at paragraph 8.16.

<sup>90</sup> *Ibid* at paragraph 8.23.

<sup>91</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007).

<sup>92</sup> Scottish Executive *New Directions Report on the Review of the Mental Health (Scotland) Act 1984* (2001) at 259.

<sup>93</sup> *Ibid* at 252.

<sup>94</sup> *Ibid* at 252. The 2000 *Report of the UK Home Office Sex Offences Review* also highlighted the practical difficulties of prosecuting serious sexual offences where the victim has a severe learning disability. It quoted a passage from a contributor which stated: "The reality is that what would be rape in other cases gets downgraded to assault because the difficulty in being clear about consent reduces the potential charge to

sexual abuse cases involving adults with an intellectual disability as well as those with severe mental health problems and that these problems also led to their increased vulnerability to coercion and threats.<sup>95</sup>

2.62 Although the Millan Committee acknowledged that the Scottish equivalents of section 5 of the *Criminal Law (Sexual Offences) Act 1993*<sup>96</sup> were not used frequently, it concluded that they were useful because of the difficulties inherent in proving mainstream sexual offences involving persons with intellectual disability. Having regard to these inadequacies of the general law on sexual offences, the Millan Committee concluded that it would be more appropriate to repeal the Scottish equivalents of section 5 of the *Criminal Law (Sexual Offences) Act 1993* and to replace them with suitably updated and reformed specific sexual offences applying to persons with intellectual disability.<sup>97</sup>

2.63 In response to the 2001 Report of the Millan Committee, section 311 of the *Mental Health (Care and Treatment) (Scotland) Act 2003* was enacted, under which it was an offence to engage in a sexual act with a mentally disordered person, if at the time of the act, the mentally disordered person (a) did not consent to the act; or (b) by reason of mental disorder, was incapable of consenting to the act. It provided that a person was regarded as not consenting if they purported to consent as a result of (a) being placed in such a state of fear; or (b) being subjected to any such threat, intimidation, deceit or persuasion as vitiates the consent. In addition, a person would be incapable of consenting to a sexual act if, by reason of having a mental disorder, the person was unable to understand what the act was; form a decision as to whether to engage in the act; or communicate any such decision.

2.64 The Scottish Law Commission's 2003 *Draft Criminal Code for Scotland* recommended the repeal of the provisions of the Scottish 2003 Act, mainly on the basis that the statutory offences tended to duplicate offences which apply generally to non-consensual sexual activity.<sup>98</sup> Similarly, in its 2007 Report, the Scottish Law Commission concluded that there would not be any need for the provisions of the Scottish 2003 Act if its proposals on sexual offences involving lack of consent were implemented.<sup>99</sup> It therefore recommended the repeal without replacement of section 311 of the 2003 Act. The Scottish Commission also took the view, however, that the reformed law on sexual offences should retain a specific provision on the capacity of a person with an intellectual disability or mental ill-health to consent to sexual activity.<sup>100</sup> Accordingly, the Commission recommended that the provisions in the Scottish 2003 Act, which defined the capacity of a mentally disordered person to consent to sexual activity, should be restated in the new legislation. In this respect, section 17 of the *Sexual Offences (Scotland) Act 2009* provides that a person with an intellectual disability or mental ill-health is incapable of consenting to conduct where "by reason of mental disorder, the person is unable to do one or more of the following: (a) understand what the conduct is, (b) form a decision as to whether to engage in the conduct (or as to

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non-consensual assault rather than rape." (UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.3.8).

<sup>95</sup> Scottish Executive *New Directions Report on the Review of the Mental Health (Scotland) Act 1984* (2001) at 252 -253.

<sup>96</sup> Section 106 of the *Mental Health (Scotland) Act 1984* made it an offence for a man to have sexual intercourse (outside of marriage) with a woman who was "suffering from a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning." Section 13 of the *Criminal Law (Consolidation) (Scotland) Act 1995* provided that a male homosexual act which would not otherwise be an offence, would be a crime if one of the parties is "suffering from mental deficiency which is of such a nature or degree that he is incapable of living an independent life or of guarding himself against serious exploitation."

<sup>97</sup> Scottish Executive *New Directions Report on the Review of the Mental Health (Scotland) Act 1984* (2001) at 254-259.

<sup>98</sup> Scottish Law Commission *A Draft Criminal Code for Scotland with Commentary* (2003), commentary on section 69 at 83.

<sup>99</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007) at paragraphs 4.94-4.95.

<sup>100</sup> *Ibid* at paragraph 4.95.

whether the conduct should take place), (c) communicate any such decision.” The Commission returns to this test later in this Report.

2.65 While the Scottish Law Commission did not expressly consider the effect of the UNCRPD, it is notable that it referred extensively to the ECHR, particularly in relation to the need to ensure procedural safeguards. The Commission notes that the Scottish Commission did not refer to the ECHR in connection with its conclusion that the law should retain a specific provision on the capacity to consent to sexual activity.<sup>101</sup> Nonetheless, for the reasons already noted above and having regard to the literature mentioned in Chapter 1 of this Report which indicates that relevant persons, that is, those whose capacity is at issue, are at a greater risk of sexual exploitation and abuse than others,<sup>102</sup> the Commission considers that a specific provision on capacity to consent should be retained and is consistent with the references to both equality and protection in the ECHR and in the UNCRPD.

### **(3) Final recommendations**

2.66 The effect of the *Criminal Law (Sexual Offences) Act 2006*<sup>103</sup> is that an adult aged 17 years or over is presumed to have capacity to consent to sexual relations.<sup>104</sup> This is consistent with the general presumption of capacity in the *Assisted Decision-Making (Capacity) Bill 2013* and, in the case of relevant persons, the provision of appropriate supports can improve the person’s capacity to understand the nature of sexual activity and to recognise abusive situations. There remains, however, a small group of people who, even with the provision of suitable supports, would not have the requisite capacity to understand these issues and would be unable to protect themselves against exploitation or abuse. In addition, the lack of a clear definition in law of capacity to consent to sexual relations makes it particularly difficult to prosecute the most serious sex offences when the victim has a severe intellectual disability (as defined in the WHO classification system). For example, a successful rape prosecution relies on proving lack of consent and, in the case of victims with severe disabilities, evidential and communication difficulties may operate to frustrate a conviction. As noted above, in addition to persons who lack capacity, there are persons who have some degree of ability or capacity to consent to sexual relationships but who, even assuming provision of appropriate education and other supports, may be induced or persuaded into a sexual relationship and targeted by others for their own sexual gratification.<sup>105</sup>

2.67 The Commission recommends that specific provisions on capacity to consent to sexual activity should be incorporated into the criminal law. The provisions should state it is an offence to engage in sexual activity with a person if they lack capacity to consent to that sexual activity or whose capacity is in question.<sup>106</sup> This approach is consistent with the State’s obligations under the UNCRPD. The

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<sup>101</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007) at paragraphs 4.88 – 4.96.

<sup>102</sup> See paragraph 1.37 above.

<sup>103</sup> Section 3 of the *Criminal Law (Sexual Offences) Act 2006* was amended by section 5 of the *Criminal Law (Sexual Offences) (Amendment) Act 2007*.

<sup>104</sup> Section 3 of the *Criminal Law (Sexual Offences) Act 2006* provides that it is a criminal offence to engage or attempt to engage in a sexual act with a child under 17 years of age. Thus, any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* would apply only to persons aged 17 years or over.

<sup>105</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.2.2.

<sup>106</sup> This recommendation is without prejudice to codification principles and it may be that such a provision could form part of general provisions on consent in a criminal code in the future, rather than having a specific and independent offence. As noted in the Introduction above, this Report forms part of a general review and consolidation of the law on sexual offences currently being carried out by the Department of Justice and Equality. This approach has been adopted in Scotland in section 17 of the *Sexual Offences (Scotland) Act 2009* which supplements the general consent model of the sexual offences contained in sections 1 to 9 of the 2009 Act. At a wider level, this Report also complements the research on codification of the criminal law undertaken by the Criminal Law Codification Advisory Committee. The Criminal Law Codification Advisory

Commission considers that the combined effect of Articles 5, 12, 13 and 16 of the UNCRPD is that states that ratify the Convention are required to comply with the equality principle in the UNCRPD, including by providing appropriate supports while at the same time ensuring that effective and specific measures are in place to protect persons with disabilities from “all forms of exploitation, violence and abuse.” The Commission also considers that the detail set out in these articles of the UNCRPD would not be necessary if it was thought appropriate to replace legislative provisions such as section 5 of the *Criminal Law (Sexual Offences) Act 1993* with a generally applicable law on sexual offences, without making any accommodation to protect people who do not have capacity to consent. Rather, the UNCRPD appears to envisage specific provisions, albeit ones that conform to the detailed requirements of the UNCRPD. This approach would, in the Commission’s view, also be consistent with the considerable volume of international and Irish research cited in the Consultation Paper,<sup>107</sup> and summarised in Chapter 1 of this Report, which suggests that people with disabilities are disproportionately more susceptible to sexual abuse than the population as a whole.

2.68 *The Commission recommends that specific provisions on capacity to consent to sexual activity should be incorporated into the criminal law that is consistent with the equality principles in the UN Convention on the Rights of Persons With Disabilities and the European Convention on Human Rights but which also provides substantive and procedural protections against exploitation and abuse. The Commission recommends that these provisions should state that it is an offence to engage in sexual activity with a person who lacks capacity to consent to that sexual activity or whose capacity is in question.*

2.69 The Commission considers that a definition of capacity to consent to sexual activity should be based on a functional approach. This would ensure that a person who either lacks capacity or has limited capacity to consent is not automatically deemed incapable of consenting to sex as is currently the case under the “status-based” approach in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. This is analysed in further detail in Chapter 3, below.

2.70 *The Commission recommends that a person’s capacity to consent to sexual activity should be determined by reference to a functional test of capacity.*

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Committee was established under Part 14 of the *Criminal Justice Act 2006*. In 2011, the Department of Justice and Equality published the Advisory Committee’s inaugural *Draft Criminal Code Bill and Commentary*, available at [www.justice.ie](http://www.justice.ie) and [www.criminalcode.ie](http://www.criminalcode.ie).

<sup>107</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 4.02 – 4.14.





## CHAPTER 3 A FUNCTIONAL TEST OF CAPACITY TO CONSENT

### A Introduction

**3.01** In this Chapter, the Commission considers how a functional test of capacity, which it recommended in Chapter 2 should be incorporated into the general law on sexual offences, is to be defined in detail. The Commission discusses in Part B what it means to give consent generally. In Part C, the Commission considers case law in England and Wales which has emerged since the enactment of the English *Sexual Offences Act 2003* and the English *Mental Capacity Act 2005* and which has led to a degree of convergence between the civil and criminal law in assessing capacity to consent, but not an identical approach. In Part D, the Commission sets out the detailed components of a functional test of capacity to consent to sexual activity.

### B Relationship with capacity to marry: English case law since the *Sexual Offences Act 2003* and the *Mental Capacity Act 2005*

3.02 In the Consultation Paper, the Commission provisionally recommended that the same functional approach to capacity be taken in respect of assessing capacity to marry in the civil law and capacity to consent to sexual relations in the criminal law.<sup>1</sup> Case law in England and Wales since the enactment of the *Sexual Offences Act 2003* and the *Mental Capacity Act 2005*<sup>2</sup> has seen the convergence of the civil and criminal law in assessing capacity.<sup>3</sup> However, as Hedley J stated in *A Local Authority v H*<sup>4</sup>, “[t]he focus of the criminal law must inevitably be both act and person and situation sensitive; the essential protective jurisdiction of [the Court of Protection in civil law], however, has to be effective to work on a wider canvas.” In the UK House of Lords decision in *R v Cooper*,<sup>5</sup> a criminal prosecution, Baroness Hale stated that “it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.”<sup>6</sup> Hedley J drew a distinction between the purposes of capacity enquiries in civil and criminal law, stating:

“In criminal law, [capacity] arises most commonly in respect of a single incident and a particular person where the need to distinguish between capacity and consent may have no significance on the facts. In a case such as the present, however, capacity has to be decided in isolation from

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<sup>1</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 2.44.

<sup>2</sup> The *Assisted Decision-Making (Capacity) Bill 2013* if enacted would introduce a regime broadly comparable to the English *Mental Capacity Act 2005*.

<sup>3</sup> See for example, *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam); [2005] All ER (D) 192; *X City Council* [2006] EWHC 168 (Fam); *In the matter of MM* [2009] 1 FLR 443; *R v Cooper* [2009] UKHL 42 and; *A Local Authority v H* [2012] EWHC 49 (COP).

<sup>4</sup> *A Local Authority v H* [2012] EWHC 49 (COP) at paragraph 26. Hedley J confirmed this approach when he reiterated that capacity was issue and situation specific, so being able to decide about surgery and pain relief did not indicate an ability to decide about adoption of one’s child (*Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam)).

<sup>5</sup> *R v Cooper* [2009] UKHL 42; [2009] 4 All ER 1033.

<sup>6</sup> *Ibid* at paragraph 27.

any specific circumstances of sexual activity as the purpose of the capacity enquiry is to justify the prevention of any such circumstances arising.”<sup>7</sup>

3.03 The Commission notes that capacity to consent to sexual relationships is not a static phenomenon.<sup>8</sup> A person may be capable of consenting to some forms of sexual contact with a certain individual in a particular setting but not to other forms of sexual contact with the same, or other, individuals in other settings.<sup>9</sup> The Commission recognises that the test for capacity to consent to sexual relations is analogous to, although not the same as, the test for capacity to marry.

### **C Components of a functional test of capacity to consent to sexual activity**

3.04 In the Consultation Paper, the Commission proposed a test for assessing capacity to consent to sexual relations which contained four elements, based on the same four elements of the functional test of capacity recommended by the Commission in its 2006 *Report on Vulnerable Adults and the Law*<sup>10</sup> and adapted from the definition in section 3 of the English *Mental Capacity Act 2005*.<sup>11</sup> Although nothing in the English 2005 Act allows a decision regarding consent to sexual relations to be taken on behalf of anyone else,<sup>12</sup> its provisions are instructive to the extent that they indicate the essential ingredients of the capacity to make a decision for oneself. The definition of capacity in the 2005 Act is in line with existing common law tests and the 2005 Act does not replace them.<sup>13</sup> Broadly the same definition of capacity is also now set out in section 3(2) of the Government’s *Assisted Decision-Making (Capacity) Bill 2013*, which at the time of writing is awaiting Second Stage debate in Dáil Éireann. These four elements are: the ability to understand relevant information; the ability to retain that information; the ability to use that information in making a decision; and the ability to communicate that decision.<sup>14</sup>

3.05 In *In the matter of MM (an adult)*,<sup>15</sup> Munby J explained that the test of being able “to understand, retain and weigh up” information under section 3 of the 2005 Act is just as applicable where the question is whether an individual has the capacity to marry as it is where the question is whether he or she has the capacity to take any other decision... it is simply that such a refined analysis is probably not necessary where the issue is as simple as the question whether someone has the capacity to marry, or to consent to sexual relations.”<sup>16</sup> In other words, because for most people sexual relations is to be regarded as a fairly straightforward concept (compared for example, with a decision to litigate or undergo certain medical procedures), one would not normally need to spend too much time assessing a person’s

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<sup>7</sup> *A Local Authority v H* [2012] EWHC 49 (COP) at paragraph 22.

<sup>8</sup> Murphy and O’Callaghan “Capacity of adults with intellectual disabilities to consent to sexual relationships” (2004) 34 *Psychological Medicine* 1347 at 1356.

<sup>9</sup> Niederbuhl and Morris “Sexual knowledge and the capability of persons with dual diagnoses to consent to sexual contact” (1993) 11 *Sexuality and Disability* 295 at 305.

<sup>10</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.30.

<sup>11</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.119.

<sup>12</sup> Section 27(1)(b) of the English *Mental Capacity Act 2005*.

<sup>13</sup> Department for Constitutional Affairs *Mental Capacity Act 2005: Code of Practice* (TSO 2007) at paragraph 4.33. In *Saull v Nouvet* [2007] EWHC 2902, the court indicated that the statutory definition in the *Mental Capacity Act 2005* is to be preferred.

<sup>14</sup> These elements of a functional test have also been adopted in a number of other jurisdictions. Examples include section 17 of the *Sexual Offences (Scotland) Act 2009* and section 138 of the New Zealand *Crimes Amendment Act 2005*.

<sup>15</sup> *In the Matter of MM (an adult)* [2007] EWHC 2003.

<sup>16</sup> *Ibid* at paragraph 84. This reflects the earlier views of Munby J expressed in *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam); [2005] All ER (D) 192 at paragraphs 35-36 and *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) at paragraphs 89-90.

ability to retain, use and weigh up the information about sexual activity. However, as noted by Bodey J in *A Local Authority v AK*,<sup>17</sup> there will occasionally be cases where the degree and/or nature of the individual's impairments makes it necessary to do so, because for him or her, the decision to marry or have sexual relations is not actually a simple one. The Commission now considers each of these elements in turn.

**(1) Ability to understand relevant information**

**(a) The Consultation Paper**

3.06 In the Consultation Paper, the Commission observed that while differing tests have been adopted in other jurisdictions for making an assessment of capacity in sexual offences legislation, the minimum standard requires an ability to understand and make a decision about the nature of the act at the time of the sexual activity.<sup>18</sup> The Commission provisionally recommended that a person should be regarded as lacking capacity to consent to sexual relations if he or she is unable to understand the information relevant to engaging in the sexual act<sup>19</sup> and that relevant information would include the likely consequences of making available choices.<sup>20</sup> This proposed criterion is also contained in section 3 of the English *Mental Capacity Act 2005* and section 3(2) of the Government's *Assisted Decision-Making (Capacity) Bill 2013* and is consistent with the functional approach which defines capacity as the ability, with assistance if needed, to understand the nature and consequences of a decision within the context of the available range of choices.<sup>21</sup> It is also consistent with the common law position on capacity in the criminal context that a person cannot give a valid consent if he or she is incapable of understanding the nature of the act to which the consent is apparently given.<sup>22</sup>

**(b) The context of available choices**

3.07 In its 2006 *Report on Vulnerable Adults and the Law*, the Commission recommended that capacity should be understood in terms of an adult's cognitive ability to understand the nature and likely consequences of a decision in the context of available choices at the time the decision is to be made.<sup>23</sup> The choices available to a person at the time they are making a decision are relevant in identifying the information a person may need in order to make that decision. For example, in the case of sexual intercourse between a man and a woman, the parties may choose to reduce the risk of pregnancy by using contraception. Conversely, they may deliberately choose not to use contraception with a view to conceiving a child. In the case of two men engaging in sexual activity, they may choose to use prophylactics such as condoms in order to reduce the risk of contracting sexually transmissible infections or they may choose to engage in sexual conduct which does not involve anal penetration.

**(c) Aids to understanding**

3.08 Section 3(2) of the English *Mental Capacity Act 2005* and section 3(2) of the Government's *Assisted Decision-Making (Capacity) Bill 2013* provide that a person should not be regarded as unable to understand information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his circumstances, using simple language, visual aids or any

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<sup>17</sup> *A Local Authority v AK* [2012] EWHC B29 (COP) at paragraph 19.

<sup>18</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.07.

<sup>19</sup> *Ibid* at paragraph 5.119.

<sup>20</sup> *Ibid* at paragraph 5.119 and Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.43.

<sup>21</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 1.52.

<sup>22</sup> The common law position on capacity in the criminal law was set out in *R v Fletcher* (1886) LR 1 CCR 39, discussed above.

<sup>23</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.45.

other means. The Commission endorsed this principle in its 2005 *Consultation Paper on Capacity*<sup>24</sup> and its 2006 *Report on Vulnerable Adults and the Law*.<sup>25</sup> It stated that:

“Cognitive ability requires a level of understanding but in this instance would not rule out understanding which results from the assistance of another, for example, where a third party explains the issue in appropriate language and/or through the use of pictorial aids.”<sup>26</sup>

**(d) Relevant information**

3.09 If a functional test to determine capacity is to be based on a person’s ability to understand information relevant to the sexual act, then it is necessary to consider precisely what knowledge and skills are required for a person to be able to consent to sex. In determining the appropriate level of understanding required to establish capacity to consent to sexual relationships, the Commission acknowledges the tension that exists between the competing principles of autonomy and protection. Accordingly, the Commission considers that the threshold of understanding in a statutory definition of capacity to consent to sexual activity must be sufficiently high to protect people who do not have the ability to understand what they are consenting to even with the benefit of assisted decision-making support and accommodation but not so high that people who may have capacity to consent are prohibited from having a sexual life.<sup>27</sup> The Commission now turns to consider the approaches adopted by other countries in terms of the relevant information that should be required to be understood.

**(i) England and Wales**

3.10 In England and Wales, a low threshold of understanding was set in 2000 in *R v Jenkins*.<sup>28</sup> In that case, a care worker was acquitted of the rape of a woman with severe learning disabilities who became pregnant as a result of the sexual contact. The defence argued that she had consented to the act because she seemed to like the accused. However, the woman had no understanding of her pregnancy and could not identify many basic body parts. Coltart J ruled that the woman had consented as it was not necessary to understand the consequences of sexual intercourse. All that was required, Coltart J held, was an understanding of the act itself and that the victim simply had to submit to her “animal instincts” to be deemed to have consented.<sup>29</sup>

3.11 The decision in *Jenkins* highlighted the need to have a clear definition of capacity to consent to sexual relations and the need for an adequate level of protection of vulnerable persons with intellectual disability. In its 2000 Report to the Home Office Sex Offences Review, the Law Commission for England and Wales considered that such a low test for assessing capacity to consent did not provide sufficient protection for vulnerable adults. The English Commission therefore recommended that, in circumstances such as those in *Jenkins*, the law should state that an understanding of the sexual act alone would not be sufficient to show capacity to consent.<sup>30</sup> In proposing a statutory definition of capacity to consent, the English Law Commission considered that an understanding of whether an act is likely to cause pain or injury, how serious that would be and whether the effect is transient, long lasting or permanent is

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<sup>24</sup> Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 3.42.

<sup>25</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.43.

<sup>26</sup> *Ibid.*

<sup>27</sup> Benedet and Grant “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52 McGill LJ 243 at 287.

<sup>28</sup> *R v Jenkins* English Central Criminal Court, 10-12 January 2000. The accused was charged with rape because the offence under section 7 of the English *Sexual Offences Act 1956* (broadly, the equivalent of section 5 of the *Criminal Law (Sexual Offences) Act 1993*) of having sex with a mental “defective” only carried a 2 year sentence.

<sup>29</sup> For further analysis of this decision, see Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 5.30 – 5.31.

<sup>30</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.67.

fundamental to the concept of capacity to consent.<sup>31</sup> Accordingly, it recommended a requirement to understand the foreseeable consequences of a decision. In support of its recommendation, the English Commission noted that sexual autonomy includes a right to refuse unwanted sexual attention as well as the right to choose to engage in sexual activity.<sup>32</sup> It stated that a person's intellectual disability may render them unable to refuse that attention as effectively as those without such disability, and that lack of sex education and knowledge or understanding about sex and sexual relationships which would enable people with intellectual disability to make an informed choice contributed to this vulnerability. It concluded that if this negative aspect of autonomy is to have any real meaning for persons with mental disabilities, the criminal law needs to provide protection for them.<sup>33</sup>

3.12 The English Commission also suggested that the difficulties that arise from the inability of some intellectually disabled persons to understand pregnancy and the need to respect their right to private life under Article 8 of the European Convention on Human Rights could be addressed in a way that does not involve manipulating the meaning of capacity and, thus, removing protection from the vulnerable. It proposed that the autonomy of those with mental disabilities to engage in sexual activity could be recognised by providing that in certain circumstances, an offence would not be committed despite a lack of capacity to consent. Such an exemption might apply where (a) apparently consensual activity takes place between two people whose mental disability is such that they lack a sufficient understanding of the consequences in order to have capacity to give consent in non-exploitative circumstances and (b) where only one party lacks capacity and this occurs in non-exploitative circumstances.<sup>34</sup> Thus, although the activity would be non-consensual, it would not necessarily be criminal. The Commission has already discussed above the context in which it considers that non-exploitative sexual acts should not give rise to a prosecution.<sup>35</sup>

**3.13** The 2000 *Report of the Home Office Sex Offences Review*, which incorporated the Law Commission's Report on Consent, recommended that there should be a statutory definition of capacity to consent which reflects both knowledge and understanding of sex and its broad implications<sup>36</sup> and specifically adopted the definition proposed by the Law Commission for England and Wales.<sup>37</sup> The Home Office Report stated that a test for capacity that required little or no understanding would be too restrictive in its application to deliver protection.<sup>38</sup> It concluded that an understanding of the sexual nature of an act required an understanding that the sexual act can have reasonably foreseeable consequences such as pregnancy or disease. It emphasised the importance of requiring some degree of understanding that the sexual act has implications which may not be desirable. However, the Home Office Report did not consider it necessary to set out specific examples of knowledge as this could result in others being ignored.<sup>39</sup>

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<sup>31</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraphs 4.63 and 4.81.

<sup>32</sup> *Ibid* at paragraph 4.69. In *R v Cooper* [2009] UKHL 42, [2009] 4 All ER 1033 at paragraph 27, Baroness Hale of Richmond stated that "[a]utonomy entails the freedom and the capacity to make a choice of whether or not to [consent to sex]."

<sup>33</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.70.

<sup>34</sup> *Ibid* at paragraphs 4.71 - 4.77.

<sup>35</sup> See paragraph 1.20, above.

<sup>36</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at recommendation 30.

<sup>37</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraphs 4.71 - 4.81.

<sup>38</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.5.11.

<sup>39</sup> *Ibid* at paragraph 4.5.11.

3.14 The English *Sexual Offences Act 2003*<sup>40</sup> which followed from these reports provides that a person is unable to refuse sexual touching if they lack an understanding of the “reasonably foreseeable consequences” of the sexual touching. Rook and Ward submit that, in strict logic, the phrase “reasonably foreseeable consequences” refers to the complainant’s understanding that the sexual activity could have implications for his or her sexual health and, in the case of women, could lead to pregnancy.<sup>41</sup> The 2010 *Guidelines of the British Medical Association and the Law Society of England and Wales on assessing capacity to consent* explain the standard as requiring an “understanding of the reasonably foreseeable consequences of sexual intercourse including their knowledge (even if at a basic level) of the risks of pregnancy and sexually transmitted diseases.”<sup>42</sup> The Commission also notes that a requirement to understand the reasonably foreseeable consequences of engaging in a sexual act is consistent with the functional test of capacity in the English *Mental Capacity Act 2005* and in the Government’s *Assisted Decision-Making (Capacity) Bill 2013*. The Code of Practice for the English 2005 Act states that “relevant information” includes “the nature of the decision; the reason why the decision is needed; and the likely effects of deciding one way or another, or making no decision at all.”<sup>43</sup> It provides the following guidance:

“Relevant information must include what the likely consequences of a decision would be (the possible effects of deciding one way or another) - and also the likely consequences of making no decision at all.... In some cases, it may be enough to give a broad explanation using simple language. But a person might need more detailed information or access to advice, depending on the decision that needs to be made. If a decision could have serious or grave consequences, it is even more important that a person understands the information relevant to that decision.”<sup>44</sup>

3.15 A functional approach to capacity assesses a person’s capacity to consent on the basis of their ability to understand information relevant to the matter at hand. The Commission considers that a functional test of capacity must also have regard to the principle of equality and non-discrimination in Articles 12 and 23 of the UNCRPD. Therefore, the Commission is of the view that a functional test of capacity should be formulated against the background of the related, albeit different, issue of how the law deals with consent to sexual activity generally. Commentary on the definition of consent in the English *Sexual Offences Act 2003* is particularly helpful in this regard. Section 74 of the English 2003 Act provides that a person consents “if he agrees by choice, and has the freedom and capacity to make that choice” (as already noted, Article 3 of the *Sexual Offences (Northern Ireland) Order 2008* is expressed in identical terms). This definition of consent applies to all offences in the 2003 Act including rape, sexual assault, offences against children and offences against persons with a mental disorder impeding choice.

3.16 One commentator observed in relation to section 74 of the English 2003 Act that a person is not entirely “free” to accept a “thing” until they know every relevant detail about that thing.<sup>45</sup> In a similar vein, Herring has argued that in order for a decision to carry the weight we expect of autonomy, the decision-maker must be aware of the key facts involved in making the decision.<sup>46</sup> He stated that a person does not consent if, at the time of the sexual activity, the person (a) is mistaken as to a fact; and (b) had he or she known the truth about that fact would not have consented to it.<sup>47</sup> Herring claims that this is the

<sup>40</sup> Sections 30 and 31 of the English *Sexual Offences Act 2003* and sections 43 and 44 of the *Criminal Justice (Northern Ireland) Order 2008* contain identical provisions.

<sup>41</sup> Rook and Ward *Sexual Offences: Law and Practice* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 354.

<sup>42</sup> British Medical Association and English Law Society *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (3<sup>rd</sup> ed Law Society Publishing 2010) at 108. Discussed in the Consultation Paper (LRC CP 63-2011) at paragraph 5.39.

<sup>43</sup> Department for Constitutional Affairs *Mental Capacity Act 2005 Code of Practice* (The Stationary Office 2007) at paragraph 4.16.

<sup>44</sup> *Ibid* at paragraph 4.19.

<sup>45</sup> Cherkassky “Being informed: The complexities of knowledge, deception and consent when transmitting HIV” (2010) 74 Crim LR 242 at 243.

<sup>46</sup> Herring “Mistaken sex” (2005) Crim LR 511 at 516.

<sup>47</sup> *Ibid* at 517.

correct approach for the law to take because the right to sexual autonomy demands that we should give “due respect to the parties’ understandings of what the act means.”<sup>48</sup> This approach has, however, been criticised by some commentators as taking the element of informed consent too far and rendering it unworkable in practice, given that the list of mistaken facts could be endless.<sup>49</sup>

3.17 Rook and Ward submit that section 74 of the English *Sexual Offences Act 2003* created a new concept of consent which is now significantly wider than simply awareness of the physical nature of the act and agreement to it.<sup>50</sup> For example, many people would decide not to engage in sexual intercourse if they were aware that their sexual partner had a sexually transmitted disease or was not using contraception. The English courts have held that where a person lies about or knowingly conceals such a sexually transmissible condition, the deception is not a deception as to the “nature or purpose” of the relevant act and therefore, does not vitiate consent to sexual intercourse.<sup>51</sup> However, Rook and Ward have commented that while a deliberate deception regarding a person’s sexual health would not of itself vitiate consent, it would arguably be highly relevant to whether a complainant was freely agreeing to sex within the terms of section 74.<sup>52</sup> In other words, the knowledge that a potential sexual partner has a sexually transmitted disease is a factor that a person may take into account in the decision-making process regarding consent.

3.18 Decisions emanating from the civil courts in England, arising primarily in the exercise of their civil jurisdiction under the *Mental Capacity Act 2005*, are also instructive in considering the relevant information that should be required to be understood. In *X City Council v MB, NB and MAB*,<sup>53</sup> Munby J agreed with the test for determining capacity to consent to sexual relations set out in 1970 by the Supreme Court of Victoria in *R v Morgan*<sup>54</sup> which requires an ability to understand the nature and character of the act. He stated that knowledge and understanding of the sexual nature of the act need not be complete or sophisticated and that rudimentary knowledge of what the act comprises and of its sexual character is sufficient.<sup>55</sup> However, Munby J also noted the requirement under the English *Sexual Offences Act 2003* to understand the reasonably foreseeable consequences of the act. He concluded that, in order to have the requisite capacity to consent to sexual relations, a person must have sufficient knowledge and understanding not only of the sexual nature and character of the act, but also of the reasonably foreseeable consequences of the act.<sup>56</sup> In *Re MM (an adult)*,<sup>57</sup> Munby J found that the subject of the proceedings had capacity to consent to sexual relations as she understood the nature of the act of sexual intercourse and its risks, including pregnancy and sexually transmitted disease.

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<sup>48</sup> Herring “Mistaken sex” (2005) Crim LR 511 at 527.

<sup>49</sup> For example, Gross contends that the law should place strict limits on the kinds of mistake that undermine consent and that the criminal law is not needed to protect people “against the disappointments and humiliations of their bad judgment, their gullibility, or their too trusting nature” (Gross “Rape, moralism and human rights” (2007) Crim LR 220 at 224-225). See also Bohlander “Mistaken consent to sex, political correctness and correct policy” (2007) 71 JCL 412.

<sup>50</sup> Rook and Ward *Sexual Offences: Law and Practice* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 88.

<sup>51</sup> See the decisions of the English Court of Appeal in *R v Mohammed Dica* [2004] EWCA 1103 and *R v B* [2007] 1 Cr App R 29.

<sup>52</sup> Rook and Ward *Sexual Offences: Law and Practice* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 90.

<sup>53</sup> *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam).

<sup>54</sup> *R v Morgan* [1970] VR 337, Vic SC.

<sup>55</sup> *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) at paragraph 74. A similar finding was previously made by the New South Wales Court of Appeal in *R v Mueller* (2005) NSWCCA 47 BC200500740 at 5.

<sup>56</sup> *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) at paragraph 84.

<sup>57</sup> *In the matter of MM (an adult)* [2007] EWHC 2003 (Fam) at paragraph 98.

3.19 In *D Borough Council v AB*,<sup>58</sup> Mostyn J decided that the only information relevant to giving consent which a person must understand and retain is: (a) the mechanics of the act; (b) that there are health risks involved, including sexually transmitted infections; and (c) for heterosexual relations, that sex may result in pregnancy. In *A Local Authority v H*,<sup>59</sup> Hedley J, in interpreting section 3(1) of the English *Mental Capacity Act 2005*, which requires an ability to understand the information relevant to the decision, held that “a person must have a basic understanding of the mechanics of the physical act and clearly must have an understanding that vaginal intercourse may lead to pregnancy. Moreover, it seems to me that capacity requires some grasp of issues of sexual health.” Hedley J qualified this by holding that the knowledge required is “fairly rudimentary” and an understanding that sexual relations may lead to significant ill-health and that those risks can be reduced by taking precautions would suffice. In that case, the subject of the proceedings was unable to appreciate the health issues involved in sexual activity, even though she had suffered from a sexually transmitted disease. Her appreciation of the risks of anal and oral sex (which she had practised) was particularly lacking, as was her appreciation of how she could protect herself. The court also found that she understood that she had a choice, but had difficulty in exercising that choice.<sup>60</sup>

3.20 Hedley J also drew attention to the emotional consequences of engaging in sexual activity, stating: “Victims of sexual assault rarely refer to a physical injury, their emphasis is on emotional damage and moral violation.”<sup>61</sup> While recognising the significance of these concepts in human sexual relationships, Hedley J held that the moral aspect can have no specific role in a test of capacity. He also accepted that the emotional component is often the source of greatest damage when sexual relations are abused, stating that “[t]he act of intercourse is often understood as having an element of self-giving qualitatively different from any other human contact.” However, Hedley J concluded that the emotional component cannot be articulated into a workable test. In his view, “one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse? That seems to me an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component.”<sup>62</sup>

**(ii) Australia**

3.21 In most Australian states and territories, the knowledge required to consent to a sexual act is only that the person understands the nature of the act. As already noted, the Supreme Court of Victoria in *R v Morgan*<sup>63</sup> held that a person does not have capacity to consent to a sexual act if they do not have sufficient knowledge or understanding to comprehend either that sex may involve physical penetration of the body or that penetration is an act of sexual connection, as distinct from a totally different character. In *R v Mueller*,<sup>64</sup> the New South Wales Court of Criminal Appeal approved this *Morgan* test and added that knowledge or understanding need not be a sophisticated one. All that is required is a “rudimentary” knowledge of what the act comprises and of its character, to enable an individual to decide whether to give or withhold consent.<sup>65</sup> The Victorian Law Reform Commission observed that under this standard, most people with impaired mental functioning will have capacity to consent to sexual activity.<sup>66</sup> The *Morgan* standard is not applied in South Australia where the legislation requires an understanding of both the nature and consequences of the act.<sup>67</sup> This reflects the standard of consent in the medical field in that

<sup>58</sup> *D Borough Council v AB* [2011] EWHC 101 (COP) at paragraph 42.

<sup>59</sup> *A Local Authority v H* [2012] EWHC 49 (COP) at paragraph 23.

<sup>60</sup> *Ibid* at paragraph 28.

<sup>61</sup> *Ibid* at paragraph 20.

<sup>62</sup> *Ibid* at paragraphs 24 and 25.

<sup>63</sup> *R v Morgan* [1970] VR 337, Vic SC.

<sup>64</sup> *R v Mueller* (2005) NSWCCA 47 BC200500740.

<sup>65</sup> *Ibid* at 5.

<sup>66</sup> Victorian Law Reform Commission *Sexual Offences: Discussion Paper* (2001) at paragraph 7.2.

<sup>67</sup> Section 49 of the South Australian *Criminal Law Consolidation Act 1935*.



it requires an understanding of not only the nature of sexual penetration, but also the consequences of, or the risks and benefits associated with the act.<sup>68</sup>

**(iii) New Zealand**

3.22 In New Zealand, consent is negated in a situation where the victim is affected by an impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity. In the New Zealand *Crimes Act 1961*, a person is deemed to have a “significant impairment” if they do not have the capacity to understand the nature of sexual conduct or the nature of decisions about sexual conduct or to foresee the consequences of decisions about sexual conduct.<sup>69</sup>

**(iv) United States**

3.23 Most US states require a person to understand the sexual nature of an act and the voluntary aspect of participation in order to be considered as having capacity to consent to sexual relations.<sup>70</sup> There is no obligation to understand the morality or the consequences of the act in this test.<sup>71</sup> In 7 states, an understanding of the nature and consequences of sexual conduct is required, with the additional element of understanding the moral dimension of sexual conduct.<sup>72</sup> This test was best illustrated by the decision in *People v Easley*<sup>73</sup> where the New York Court of Appeals ruled that in addition to understanding the physiological nature of sexual activity and its consequences, an individual must also have the ability to understand and appreciate how the conduct will be “regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored.”<sup>74</sup> Arguably, such a standard is both overly restrictive and ambiguous.

**(v) Studies**

3.24 A number of studies have considered the level of knowledge that a person should have in order to be considered capable of consenting to sexual relations. Murphy and O’Callaghan examined when a person should be considered to “know enough” to be safe so that they can be protected from abuse while at the same time maintaining a right to freedom of sexual expression.<sup>75</sup> The authors used the analogy of consent to medical treatment and argued that capacity to consent to sexual relationships should similarly require people to understand what sexual relationships are, the risks, benefits and alternatives of such relationships and the fact that they have free choice about engaging in them.

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<sup>68</sup> McSherry “Sexual assault against individuals with mental impairment: Are criminal laws adequate?” (1998) 5 *Psychiatry Psychology & Law* 107 at 109.

<sup>69</sup> Section 138(6) of the New Zealand *Crimes Act 1961* as substituted by section 7 of the *Crimes Amendment Act 2005*.

<sup>70</sup> These states are California, Delaware, Florida, Kentucky, Louisiana, Maine, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas and Utah.

<sup>71</sup> The Supreme Court of New Jersey in *People v Olivio* 123 NJ 550, 589 A2d 597 (1991) noted that only an understanding of the sexual nature of the act and a voluntary decision to participate in the act is required to have the requisite capacity to give consent. The court made it clear that an understanding of the risks and consequences associated with sexual intercourse, such as pregnancy or the risk of acquiring a sexually transmitted disease, is not required in determining capacity to consent.

<sup>72</sup> These states are Alabama, Colorado, Hawaii, Idaho, Illinois, New York, Washington.

<sup>73</sup> *People v Easley* 42 NY 2d 50 (1977).

<sup>74</sup> *Ibid* at 56. This high standard was subsequently reaffirmed in *People v Cratsley* 86 NY 2d 81 (1995).

<sup>75</sup> Murphy and O’Callaghan “Capacity of adults with intellectual disabilities to consent to sexual relationships” (2004) 34 *Psychological Medicine* 1347 at 1355.

3.25 A study in the USA examined the views of over 300 psychologists on the criteria required for determining the capacity to consent to sexual relations.<sup>76</sup> Knowledge related to pregnancy, sexually transmitted diseases, basic gender differences, sexual conduct and personal safety were rated as most important. Biological and moral issues were rated as less important.

3.26 McCarthy and Thompson have observed that there is general agreement in the learning disability field that people must have free choice and that consent, if it is to be at all meaningful, must mean informed consent.<sup>77</sup> The authors also recognised that sexual relationships can have emotional and social consequences. However, they noted that such consequences vary considerably from person to person and are very difficult to either predict beforehand or measure afterwards.<sup>78</sup> Commentators have also observed that the imposition of a higher standard of knowledge is likely to lead to more convictions as in instances where understanding could not be established, the prosecution's task of proving incapacity would be an easier one.<sup>79</sup>

**(vi) Conclusion**

3.27 The Commission considers that the level of knowledge required to satisfy a test of capacity to consent to sex must strike an appropriate balance between upholding the rights of persons with intellectual disability to sexual autonomy while also protecting them from sexual exploitation. The Commission is of the view that while the standard applied by the courts of Victoria in *R v Morgan*<sup>80</sup>, adopted in most Australian jurisdictions, preserves the sexual autonomy of persons with intellectual disability by keeping requirements of understanding to a minimum (that is, an understanding of the nature of the act only), it is not adequate to provide effective protection to such persons from sexual exploitation and abuse. In making a final recommendation on this issue, the Commission is particularly influenced by the provisions of the English *Sexual Offences Act 2003* and the *Sexual Offences (Northern Ireland) Order 2008* and the similar approaches followed in South Australia and New Zealand, which require an understanding of both the nature and the reasonably foreseeable consequences of engaging in a sexual act. The Commission considers that an appreciation of the nature and consequences of sexual activity are relevant factors to be taken into account in deciding whether or not to consent to particular sexual activity.

3.28 The Commission acknowledges that requiring an ability to understand the consequences of the sexual act in addition to the sexual nature of the act will mean that a larger proportion of persons will be deemed incapable of consenting to the act.<sup>81</sup> However, as discussed in Chapter 1 of this Report, the Commission considers that the provision of sex education to persons whose capacity may be in question or who have limited or no capacity to consent goes hand in hand with a functional test for capacity to consent to sexual relations. The role of sex education in empowering people with intellectual disability was emphasised by Mostyn J in *D Borough Council v AB*<sup>82</sup> where he ordered the local authority to provide sex education to the subject of the proceedings with a view to him gaining capacity. In making the

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<sup>76</sup> Kennedy and Niederbuhl "Establishing criteria for sexual consent capacity" (2001) 106(6) *American Journal on Mental Retardation* 503.

<sup>77</sup> McCarthy and Thompson "People with Learning Disabilities: Sex, the Law and Consent" in Cowling and Reynolds (eds) *Making Sense of Sexual Consent* (Ashgate 2004) at 233.

<sup>78</sup> *Ibid* at 236.

<sup>79</sup> Graydon "Can sex be uninformed? A proposal for the reform of sexual offences against persons with intellectual disability" Paper presented to the Social Change in the 21<sup>st</sup> Century Conference, Centre for Social Change Research, Queensland University of Technology 27<sup>th</sup> October 2006 at 5.

<sup>80</sup> *R v Morgan* [1970] VR 337.

<sup>81</sup> Graydon "Can sex be uninformed? A proposal for the reform of sexual offences against persons with intellectual disability" Paper presented to the Social Change in the 21<sup>st</sup> Century Conference, Centre for Social Change Research, Queensland University of Technology 27<sup>th</sup> October 2006 at 5.

<sup>82</sup> *D Borough Council v AB* [2011] EWHC 101 (COP) at paragraphs 48-52. For further discussion of this decision, see the Consultation Paper (LRC CP 63-2011) at paragraphs 2.34-2.39.

order, he relied on section 1(3) of the English *Mental Capacity Act 2005* which stipulates that a person should not be treated as unable to make a decision unless all practicable steps are made to assist that person in making a decision.<sup>83</sup> The Commission notes that, similarly, section 8(3) of the Government's *Assisted Decision-Making (Capacity) Bill 2013* provides that a person "shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so." The Victorian Law Reform Commission emphasised the importance of knowledge about sexuality, relationships and sexual rights and safety in assisting people with cognitive impairment to develop appropriate sexual and self-protective behaviours and that this in turn, may reduce their risk of assault by people known to them.<sup>84</sup>

3.29 Graydon has observed that there may be a causal link between having received sex education and achieving capacity to consent.<sup>85</sup> She also argued that for people who currently do not understand the consequences of sex but who would be able to acquire that knowledge given appropriate education, introduction of a more stringent standard of knowledge actually supports autonomous decision making.<sup>86</sup> Murphy and O'Callaghan also maintain that there needs to be better provision of ongoing sex education in order to allow people with intellectual disability to exercise their sexual rights, while at the same time protecting themselves from abuse.<sup>87</sup> As noted in the Consultation Paper<sup>88</sup> and in submissions received by the Commission in response to the Consultation Paper, there is a general desire by service providers to have policies and procedures in place aimed at empowering people to realise their sexual rights. Currently, the provision of sex-education is a voluntary step taken by the service provider and for the most part, the policies on sexuality have focused on protection rather than empowering clients and providing them with information on sexuality and relationships.<sup>89</sup> The Commission is of the view that sex education should include training in the areas of assertiveness, empowerment and recognising the differences between appropriate and inappropriate requests from others.<sup>90</sup>

3.30 Having reflected further upon the proposed test for capacity to consent to sexual relations, the Commission believes that there is merit in qualifying the "consequences" required to be understood by a person. The Commission is reluctant to set the threshold of understanding too high by requiring a person to understand all the consequences of engaging in a sexual act before they can be deemed capable of consenting to the act. Accordingly, the Commission recommends that a person should be required to understand only the "reasonably foreseeable" consequences of engaging in a sexual act in order to have capacity to consent to that act. Such a requirement would uphold the protective function of the criminal law in respect of adults who may not have the capacity to consent to sexual relations, while also ensuring that adults are not unfairly precluded from participating in sexual relationships where they have the requisite understanding of what such relationships involve. The Commission reiterates in this context the

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<sup>83</sup> *D Borough Council v AB* [2011] EWHC 101 (COP) at paragraph 49.

<sup>84</sup> Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (2004) at paragraph 6.61. See also Disability Discrimination Legal Service *Beyond Belief, Beyond Justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice* Final report of Stage One of the Sexual Offences Project (2003) at 43-45.

<sup>85</sup> Graydon "Can sex be uninformed? A proposal for the reform of sexual offences against persons with intellectual disability" Paper presented to the Social Change in the 21<sup>st</sup> Century Conference, Centre for Social Change Research, Queensland University of Technology 27<sup>th</sup> October 2006 at 6.

<sup>86</sup> *Ibid* at 7.

<sup>87</sup> Murphy and O'Callaghan "Capacity of adults with intellectual disabilities to consent to sexual relationships" (2004) 34 *Psychological Medicine* 1347 at 1356.

<sup>88</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 4.22.

<sup>89</sup> *Ibid* at paragraph 4.23.

<sup>90</sup> Westcott "The abuse of disabled children: A review of the literature" (1991) 17(4) *Child Care, Health and Development* 243.

importance of the provision of suitable assistance such as sex education (as envisaged in the UNCRPD) to maximise capacity to consent.

**3.31** *The Commission recommends that the functional test of capacity to consent to sexual acts should require that the relevant person can choose to agree to the sexual act involved (including where he or she can so choose arising from the provision to him or her of suitable decision-making assistance) because he or she has sufficient understanding of the nature and reasonably foreseeable consequences of the sexual act involved.*

**(2) Ability to retain the information**

**(a) The Consultation Paper**

3.32 The Commission provisionally recommended in the Consultation Paper that for a person to be regarded as having capacity to consent to sexual relations, he or she must be able to retain information about the nature and consequences of engaging in sexual acts.<sup>91</sup>

**(b) Discussion**

3.33 By definition, the intellectual functioning of people with intellectual disability is impaired.<sup>92</sup> Similarly, overall intellectual impairment may temporarily accompany mental illness, while there is evidence of psychotic symptoms. It has been recognised that specific cognitive abilities related to decision-making, such as memory, communication and problem-solving, comprise complex processes. For example, “memory” involves the acquisition, retention and retrieval of information. Retention refers to the period of time between encoding information and recollection of that information. This information is retrieved when a person brings the information from short-term or long-term memory back into awareness.<sup>93</sup> The inclusion in a statutory definition of capacity of a criterion of ability to retain relevant information would recognise that in the absence of an ability to store and retain information, a person is unable to process information in the normal sense and loses the ability to weigh options and consider choices.

3.34 This criterion derives from the requirement in section 3 of the English *Mental Capacity Act 2005* of an ability to retain information.<sup>94</sup> The same requirement has also been included in section 3(2) of the Government’s *Assisted Decision-Making (Capacity) Bill 2013*. The criterion of ability to retain relevant information in section 3 of the English 2005 Act reflects the approach adopted by the common law, particularly in the context of capacity to consent to medical treatment and capacity to litigate.<sup>95</sup> Section 3(3) of the English 2005 Act provides that the ability to retain information for a short period only should not automatically disqualify a person from making the decision.<sup>96</sup> The provision requires a person to have the ability to retain the relevant information for long enough to make a choice or take an effective decision.<sup>97</sup> The length of time will therefore depend on what is necessary for the decision in question. The

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<sup>91</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.119.

<sup>92</sup> Murphy and Clare “Adults’ Capacity to Make Legal Decisions” in Carson and Bull (eds) *Handbook of Psychology in Legal Contexts* 2<sup>nd</sup> ed (Wiley 2003) at 35.

<sup>93</sup> *Ibid.*

<sup>94</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.119.

<sup>95</sup> See for example, *In Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 at 295; *Re MB (Medical Treatment)* [1997] 2 FLR 426 at 437; *Lister v Brutton & Co (No. 1)* [2002] EWCA Civ 1889, at paragraph 26.

<sup>96</sup> The Commission also endorsed this approach in its *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.43.

<sup>97</sup> Ashton, Letts, Oates and Terrell *Mental Capacity The New Law* (Jordan Publishing 2006) at paragraph 2.59.

failure of the English 2005 Act to define for how long the information must be retained has been criticised as having the potential to cause confusion for those seeking to assess a person's capacity.<sup>98</sup>

3.35 The English Court of Protection has provided some guidance on the criterion of ability to retain information enshrined in section 3(3) of the English *Mental Capacity Act 2005*. In *A Local Authority v H*,<sup>99</sup> a number of restrictions were placed on the liberty of an autistic woman with mild learning difficulties to prevent her from engaging in sexual relations (which she would otherwise willingly do) as she did not have capacity to consent and such sexual relations would be potentially exploitative and damaging. The court found that the woman was highly sexualised and vulnerable, having previously engaged in sexual behaviour with others which she did not always consent to. During her compulsory admission to hospital, attempts had been made to ascertain what she understood about sexual relations and to give some education in issues of self protection. Hedley J held that she lacked the mental capacity to engage in sexual relations, on the basis that she did not understand the health implications of sexual relations and could not effectively deploy the information she had understood into her decisions. He found that as a result of her learning difficulties and impaired memory, the subject of the proceedings had difficulty retaining information. However, Hedley J observed that with patient explanation and repetition, she would be able to retain basic information and did not make the finding of incapacity on the basis of her difficulties in retaining information.<sup>100</sup>

3.36 By contrast, in the context of sexual offences the Law Commission for England and Wales expressed concerns regarding the criterion of the ability to retain information relevant to a decision, specifically in circumstances where a person had some limited short-term memory problems.<sup>101</sup> The English Commission was of the view that it was not possible simply to transfer the test recommended for the assessment of mental incapacity for the purpose of substituted decision-making in the civil law, without change, into the criminal law. In this regard, it noted that unlike the civil law, the fact-finding process is administered largely by juries and the relevant tests must be clear and simple for the benefit of jurors.

3.37 The English Commission adopted essentially the same functional approach to capacity in respect of consent to sexual relationships as it had in its 1995 report on *Mental Incapacity*.<sup>102</sup> However, given that consenting to sexual activity is perceived to be a visceral, rather than a cerebral, process of decision-making, it proposed using simplified language "more apt to describe the process of deciding to consent to sexual activity, as opposed to deciding upon a course of conduct with civil legal consequences."<sup>103</sup> The English Commission acknowledged that some of the issues which a person requires the capacity to understand in civil law matters may be very complicated and that there is a need to protect those who might appear to understand but cannot retain the necessary information for long enough to make a proper decision.<sup>104</sup> Finally, the English Commission placed emphasis on the State's

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<sup>98</sup> Ashton, Letts, Oates and Terrell *Mental Capacity The New Law* (Jordan Publishing 2006) at paragraph 2.60.

<sup>99</sup> *A Local Authority v H* [2012] EWHC 49 (COP) at paragraph 29.

<sup>100</sup> *Ibid.* Similarly, in *D v R and S* [2010] EWHC 2405 (COP) at paragraph 144, Henderson J observed that deficiencies in understanding and memory could be addressed by the provision of the necessary information in simple language.

<sup>101</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.59.

<sup>102</sup> Law Commission for England and Wales *Mental Incapacity* (Law Com No 231 1995) at paragraphs 3.14 – 3.17. The elements of this proposed test were incorporated into section 3 of the English *Mental Capacity Act 2005*.

<sup>103</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.59.

<sup>104</sup> *Ibid* at paragraph 4.58.

obligations under the right to private life in Article 8 of the European Convention on Human Rights associated with sexual autonomy.<sup>105</sup> It concluded that:

“The criminal law is concerned with whether or not a valid consent *has been* given. If A, who is unable to retain much information, decides to consent, on the basis of so much of the relevant information as he or she is capable of remembering, why should A be deemed incapable to make that decision if, when making it, he or she understood (for example) with whom sexual intercourse would take place, and wanted this to occur?”<sup>106</sup>

3.38 The English Commission considered that in those circumstances, a requirement of an ability to retain information relevant to the decision could result “in a person being inaccurately deemed incapable of giving consent... when suffering from short-term memory problems.”<sup>107</sup> Accordingly, it recommended that the test of capacity to consent to sexual relations in the criminal law should not include the requirement to retain information.<sup>108</sup> The tests of capacity in the English *Sexual Offences Act 2003* and the *Sexual Offences (Northern Ireland) Order 2008* do not contain such a requirement. Similarly, the capacity provision in section 17 of the *Sexual Offences (Scotland) Act 2009* does not contain a criterion of ability to retain information.

3.39 A number of submissions received by the Commission in response to the Consultation Paper had reservations in respect of this proposed criterion. In particular, concerns were expressed regarding the length of time a person should be required to retain information relevant to engaging in a particular sexual act. Other difficulties identified in submissions include: how the retention of the information would be ascertained; by whom it would be ascertained; and under what conditions it would be ascertained. The Commission recognises these difficulties, particularly that of deciding on a qualifying period of time and considers that a criterion of ability to retain information could overly complicate a test for capacity to consent to sexual relations.<sup>109</sup> Since a capacity test in the criminal law will be applied by juries (unlike in the civil law context), clarity and simplicity is of the utmost importance.

3.40 In addition, the Commission considers that if a person is required to understand the nature and consequences of sexual activity at the time at which that activity is taking place, it is implicit that the person is required to retain that information and it is therefore unnecessary to include a specific criterion of retention. The Commission is also influenced by the arguments propounded by the Law Commission for England and Wales, in particular, the potential for a requirement of an ability to retain relevant information to undermine the sexual autonomy of persons with intellectual disability. Accordingly, having further considered this criterion, the Commission does not recommend the inclusion of such a requirement in a capacity test relevant to sexual offences.

**3.41** *The Commission recommends that the functional test of capacity to consent to sexual acts should not include a specific requirement that the person is able to retain the information related to the understanding of the nature and reasonably foreseeable consequences of the sexual act involved.*

### **(3) Decision-making ability**

#### **(a) The Consultation Paper**

**3.42** In the Consultation Paper, the Commission provisionally recommended that in addition to having the ability to understand the information relevant to engaging in a sexual act, a person would lack

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<sup>105</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.58.

<sup>106</sup> *Ibid* at paragraph 4.60.

<sup>107</sup> *Ibid* at paragraph 4.61.

<sup>108</sup> *Ibid* at paragraph 4.62.

<sup>109</sup> A similar concern was expressed by the Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraphs 4.50 - 4.51.

capacity to consent to sexual relations if he or she was unable to weigh up that information as part of the process of deciding to engage in the sexual act.<sup>110</sup>

**(b) Discussion**

3.43 In its 2006 *Report on Vulnerable Adults and the Law*, the Commission recommended that a statutory definition of capacity should focus on functional cognitive ability.<sup>111</sup> It stated that cognitive ability concerns the ability to arrive at a decision by weighing relevant information in the balance. In its 2005 *Consultation Paper on Vulnerable Adults and the Law: Capacity*, the Commission espoused the view that an adult is capable of making a decision for themselves if they are able to understand information relevant to the decision and to make an informed decision based on that information.<sup>112</sup>

3.44 The specific criterion of ability to weigh up information as part of a decision-making process is derived from section 3 of the English *Mental Capacity Act 2005* which informed a comparable provision in section 3(2) of the Government's *Assisted Decision-Making (Capacity) Bill 2013*. This requirement recognises the existence of cases where a person can understand the nature and effects of a decision but the effects of their intellectual disability may prevent them from applying that information in the decision-making process. In *A Local Authority v H*,<sup>113</sup> Hedley J acknowledged that the question of using and weighing information stipulated in section 3(1) of the 2005 Act is a difficult concept in the context of human sexual relations, since choices are generally made rather more by emotional drive and instinct than by rational choice. However, he noted that the rational element has been for most people, assimilated into instinct and the control of emotional drive.<sup>114</sup> He explained this aspect of the functional test as a determination of whether a person is able to effectively deploy the knowledge they have acquired into a specific decision-making act. Hedley J concluded that the subject of the proceedings before him would struggle to satisfy this criterion "partly through an incomplete knowledge base and partly through an inability to deploy the knowledge she has when... she was sexually aroused."<sup>115</sup>

3.45 Legislation in other countries also includes an assessment of decision-making ability. In its 2000 Report on *Consent in Sex Offences*,<sup>116</sup> which formed part of the Report of the Home Office Sex Offences Review<sup>117</sup> and which led to the enactment of the English *Sexual Offences Act 2003*, the Law Commission for England and Wales drew upon Thorpe J's discussion of decision-making capacity in *Re C (Adult: Refusal of Treatment)*.<sup>118</sup> Thorpe J analysed decision-making capacity in three stages (albeit in the context of capacity to consent to medical treatment): first, comprehending and retaining information regarding the nature, purpose and effects of the proposed treatment; second, believing it; and third, weighing it in the balance of risks and need to arrive at a choice. The Law Commission summarised Thorpe J's test as "an inability to use or negotiate information which has been understood."<sup>119</sup> It recommended that for the purposes of any non-consensual sexual offence, a person should be regarded as lacking capacity to consent to an act if, at the material time, he or she is unable, by reason of mental

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<sup>110</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.119.

<sup>111</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.43.

<sup>112</sup> Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 3.41.

<sup>113</sup> *A Local Authority v H* [2012] EWHC 49 (COP) at paragraph 30.

<sup>114</sup> *Ibid* at paragraph 30.

<sup>115</sup> *Ibid* at paragraph 30.

<sup>116</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.35.

<sup>117</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000).

<sup>118</sup> *Re C (Adult: Refusal of Treatment)* [1994] 1 All ER 819.

<sup>119</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.35.

disability, to make a decision for himself or herself on whether to consent to the act.<sup>120</sup> The phrase “at the material time” reflects a functional approach to assessment by accommodating both partial and fluctuating capacity.<sup>121</sup>

3.46 In recommending a statutory definition of capacity to consent to sexual relationships, the UK Home Office Sex Offences Review endorsed the definition proposed by the Law Commission.<sup>122</sup> It stipulated that a person should be able to relate their knowledge of the nature and consequences of engaging in a sexual act to their own life and to have an appreciation of what these consequences would mean for them.<sup>123</sup> The English *Sexual Offences Act 2003* provides that a person is unable to refuse sexual touching if they lack the capacity to choose whether to agree to the touching. Section 30(2)(a) of the 2003 Act provides that a person lacks such capacity if he or she “lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason”. A similar provision is contained in Article 43(2)(a) of the *Sexual Offences (Northern Ireland) Order 2008*.

3.47 In Scotland, a statutory test of being incapable of consenting to a sexual act by reason of mental disorder was provided in section 311(4) of the *Mental Health (Care and Treatment) (Scotland) Act 2003*.<sup>124</sup> Like the legislation in England, Wales and Northern Ireland, section 311(4) of the 2003 Act also set down a criterion of ability to form a decision as to whether to engage in sexual conduct or whether the conduct should take place. In recommending a consent model to govern sexual offences, the Scottish Law Commission was of the view in 2007 that there was value in also having a provision on the capacity of someone with a mental disorder to give consent and recommended restating section 311(4) of the 2003 Act.<sup>125</sup> Accordingly, the criterion of ability to form a decision is included in section 17 of the *Sexual Offences (Scotland) Act 2009*, which deals with capacity to consent to sexual conduct.

3.48 In *R v Cooper*<sup>126</sup>, the UK House of Lords drew a distinction between having the capacity to understand and having the capacity to make a decision or choose between alternatives. In *Cooper*, the complainant, a 28 year old woman with an emotionally unstable personality disorder, met the defendant while she was in a distressed and agitated state. The defendant offered to help her and she went with him to a friend’s house where he gave her crack cocaine. He asked her to engage in sexual activity with him and she did so. The defendant was charged with an offence under section 30 of the English *Sexual Offences Act 2003*. Baroness Hale (who delivered the principal judgment in the case) cited a line of authority in respect of refusal of medical treatment to demonstrate that case law on capacity has for some time recognised that, to be able to make a decision, a person must be able to weigh that information in the balance to arrive at a choice. In particular, she referred to *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)*<sup>127</sup> where Charles J concluded that a patient was unable to use and weigh the relevant information, and thus, the competing factors, in the process of arriving at her decision whether to undergo a blood transfusion.

3.49 Baroness Hale held that the words “for any other reason” in section 30 of the English *Sexual Offences Act 2003* are clearly capable of encompassing a wide range of circumstances in which a person’s mental disorder may rob them of the ability to make an autonomous choice, even though they

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<sup>120</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.44. See also recommendation at paragraph 4.84.

<sup>121</sup> *Ibid* at paragraph 4.34.

<sup>122</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000), recommendation 30.

<sup>123</sup> *Ibid* at paragraph 4.5.12.

<sup>124</sup> Section 311 of the *Mental Health (Care and Treatment) (Scotland) Act 2003* was repealed by section 61 and schedule 6 of the *Sexual Offences (Scotland) Act 2009*.

<sup>125</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007) at paragraph 4.95.

<sup>126</sup> *R v Cooper* [2009] UKHL 42; [2009] 4 All ER 1033 at paragraph 24.

<sup>127</sup> *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)* [2005] 1 All ER 387 at paragraph 63.



may have sufficient understanding of the information relevant to making it.<sup>128</sup> She noted that the complainant, “even in her agitated and aroused state, might have been quite capable of deciding whether or not to have sexual intercourse with a person who had put her in the vulnerable and terrifying situation in which she found herself ... [on the day in question].”<sup>129</sup> In other words, the test of capacity is “situation specific.” Baroness Hale concluded that an irrational fear that prevented the exercise of choice could be equated with a lack of capacity to choose.<sup>130</sup> The House of Lords therefore allowed the Crown’s appeal and upheld the defendant’s original conviction.<sup>131</sup>

**(c) Conclusion**

3.50 The Commission is satisfied that capacity to consent to a sexual act necessarily involves an ability to form a decision about whether or not to engage in the act. The decision-making process entails weighing relevant information that has been acquired and understood in order to arrive at a choice in the context of available choices at the time the decision is to be made. The Commission considers that in addition to the right to choose to engage in sexual activity, sexual autonomy includes a right to refuse unwanted sexual attention.<sup>132</sup> The Commission recognises in this context that a person’s intellectual disability may render him or her unable to decide to refuse sexual attention as effectively as those without such a disability, with the result that his or her right to sexual autonomy is diminished, rather than enhanced.

**3.51** *The Commission recommends that the functional test of capacity to consent to sexual acts should include a requirement that the person is able to weigh up relevant information in deciding whether to engage in the sexual act involved.*

**(4) Communicative ability**

**(a) The Consultation Paper**

3.52 In the Consultation Paper, the Commission provisionally recommended that in order to demonstrate capacity to consent to sexual relations, a person must have the ability to communicate his or her decision whether or not to engage in the sexual activity. The crux of this criterion is whether a person can communicate their decision by talking, using sign language or by any other means.<sup>133</sup>

**(b) Discussion**

3.53 The position in other common law jurisdictions appears to be that where an individual cannot communicate their decision in any way, by talking, using sign language or any other means, the individual is considered to be unable to make a decision for themselves.<sup>134</sup> This criterion also derives from section 3 of the English *Mental Capacity Act 2005*.<sup>135</sup> The rationale for its inclusion in the statutory definition of capacity is explained in the Explanatory Notes as follows:

“This is intended to be a residual category and will only affect a small number of persons, in particular some of those with the very rare condition of “locked-in syndrome”. It seems likely that people suffering from this condition can in fact still understand, retain and use information and so

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<sup>128</sup> *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)* [2005] 1 All ER 387 at paragraph 25.

<sup>129</sup> *R v Cooper* [2009] UKHL 42; [2009] 4 All ER 1033 at paragraph 26.

<sup>130</sup> *Ibid* at paragraphs 24 - 31.

<sup>131</sup> *Ibid* at paragraph 32.

<sup>132</sup> For further discussion on this point, see Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.69.

<sup>133</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.119.

<sup>134</sup> The British Medical Association and the Law Society *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* 3<sup>rd</sup> ed (Law Society Publishing 2010) at 29.

<sup>135</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.119.

would not be regarded as lacking capacity under subsection (1)(a) to (c). Some people who suffer from this condition can communicate by blinking an eye, but it seems that others cannot communicate at all. *Subsection (1)(d)* treats those who are completely unable to communicate their decisions as unable to make a decision. Any residual ability to communicate (such as blinking an eye to indicate “yes” or “no” in answer to a question) would exclude a person from this category.”<sup>136</sup>

3.54 In addition to affecting people with “locked-in syndrome”, this provision “clearly covers people with physical disorders of the brain, for example, head injuries or strokes, which prevent them communicating as well as people with disorders of the mind which have the same effect.”<sup>137</sup> Jones has noted that it will be rare for such people to be unable to communicate their decision by any means.<sup>138</sup>

**3.55** In its 2006 *Report on Vulnerable Adults and the Law*, the Commission noted that in a limited number of circumstances, an adult may be unable to communicate their wishes to third parties.<sup>139</sup> The Commission opined that an inability to communicate choices may have the unavoidable consequence of removing decision-making autonomy.<sup>140</sup> Accordingly, it recommended that the ability to communicate effectively by some means needs to be taken into account in statutorily defining capacity.<sup>141</sup> The criterion is also now set out in section 3(2) of the Government’s *Assisted Decision-Making (Capacity) Bill 2013*.

3.56 The Law Commission for England and Wales also recognised the need to protect persons who may be unable to communicate their decisions in the context of the criminal law. It considered that in order to provide the necessary legal protection to a person unable to communicate decisions, such a person needs to be treated as if he or she lacked the capacity to make a decision.<sup>142</sup> Accordingly, the English *Sexual Offences Act 2003* asserts that a person is unable to refuse sexual touching if he or she is unable to communicate their choice whether to agree to the touching.<sup>143</sup> An identical provision is contained in Article 43(2)(b) of the *Criminal Justice (Northern Ireland) Order 2008*. The issue of communicative ability in section 30(2)(b) of the English 2003 Act was addressed in *Hulme v Director of Public Prosecutions*.<sup>144</sup> In that case, the complainant suffered from cerebral palsy and had a mental age below her actual age of 27 years. The accused was charged under section 30 of the English *Sexual Offences Act 2003*. At trial, the complainant gave evidence that the accused touched her “private parts”, that she did not know what to do or say but that the touching made her feel sad, hurt and upset. The accused accepted that the complainant suffered from a mental disorder but contended that the prosecution had failed to demonstrate that the complainant lacked the capacity to choose whether to agree to the touching. The English High Court found that the complainant understood the nature of sexual relations but did not have the capacity to understand that she could refuse to be touched sexually and communicate that decision. Accordingly, it was held that an offence had been committed under section 30 of the 2003 Act.

3.57 The criterion of communicative ability in the context of the English *Sexual Offences Act 2003* was also discussed by the UK House of Lords in *R v Cooper*,<sup>145</sup> where the court held that communicative

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<sup>136</sup> Explanatory Notes to the English *Mental Capacity Act 2005* at paragraph 27, available at <http://www.legislation.gov.uk/ukpga/2005/9/notes/contents>.

<sup>137</sup> *R v Cooper* [2009] 4 All ER 1033 at paragraph 29.

<sup>138</sup> Jones *Mental Capacity Act Manual* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 26.

<sup>139</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.49.

<sup>140</sup> *Ibid* at paragraph 2.50.

<sup>141</sup> *Ibid* at paragraphs 2.50 - 2.51.

<sup>142</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.42.

<sup>143</sup> Sections 30(2)(b), 31(2)(b), 32(2)(b) and 33(2)(b) of the English *Sexual Offences Act 2003*.

<sup>144</sup> *Hulme v Director of Public Prosecutions* [2006] EWHC 1347.

<sup>145</sup> *R v Cooper* [2009] UKHL 42; [2009] 4 All ER 1033.

ability should not be confined to a physical inability to communicate. Baroness Hale stressed that, when drafting the 2003 Act, Parliament had in mind an inability to communicate which was the result of or associated with a disorder of the mind and that there was no warrant for limiting it to a physical inability to communicate.<sup>146</sup>

**3.58** Scotland's comparable capacity legislation accommodates a lack or deficiency in a faculty of communication which cannot "be made good by human or mechanical aid."<sup>147</sup> Section 311(4) of the *Mental Health (Care and Treatment) (Scotland) Act 2003* provided that a person is incapable of consenting to an act if the person is unable to communicate their decision as to whether to engage in the act.<sup>148</sup> This requirement was carried over into section 17 of the *Sexual Offences (Scotland) Act 2009* which also alludes to the ability of a person to communicate their decision as to whether to engage in the conduct. Similarly, in New Zealand, section 138(6) of the *Crimes Act 1961*<sup>149</sup> includes in its definition of "significant impairment", capacity to communicate decisions about sexual conduct.

**(c) Conclusion**

3.59 The Commission remains of the view that in order to provide the necessary legal protection to those unable to communicate their decisions, the ability to communicate effectively by some means should be an element of a functional test for capacity to consent to sexual relations.<sup>150</sup> This would recognise that although a person has the ability to make a decision, they may be unable to communicate that decision. It would also acknowledge that in many cases where an adult's communication abilities are limited, they may have developed forms of indicating their wishes to others.<sup>151</sup>

3.60 *The Commission recommends that the functional test of capacity to consent to sexual acts should include a requirement that the person is able to communicate his or her decision (whether by talking, using sign language or any other means).*

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<sup>146</sup> *R v Cooper* [2009] UKHL 42; [2009] 4 All ER 1033 at paragraph 30.

<sup>147</sup> Section 1(6)(e) of the *Adults with Incapacity (Scotland) Act 2000*.

<sup>148</sup> Section 311 of the *Mental Health (Care and Treatment) (Scotland) Act 2003* was repealed by section 61 and schedule 6 of the *Sexual Offences (Scotland) Act 2009*.

<sup>149</sup> Section 138(6) of the New Zealand *Crimes Act 1961* was substituted by section 7 of the *Crimes Amendment Act 2005*.

<sup>150</sup> The Commission expressed a similar view in its 2006 *Report on Vulnerable Adults and the Law* in relation to the development of a statutory definition of capacity (Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.50).

<sup>151</sup> Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 2.49.



### A Introduction

4.01 In this Chapter, the Commission discusses the specific sexual offences that should be included in legislation intended to replace the limited range of offences in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. In Part B, the Commission examines the vulnerability of relevant persons to exploitation or abuse, including by those in a position of trust or authority over them. The Commission then discusses the specific offences it recommends should be enacted to replace section 5 of the 1993 Act. These include offences that broadly correspond to existing generally applicable sexual offences, as set out in the *Criminal Law (Rape) Acts 1981 and 1990*, and they also deal with circumstances where a person is in a position of trust or authority. Part C addresses a number of specific elements of the offences, including whether they should involve strict liability, defences to the proposed offences and the penalties that should apply to them.

### B Research on exploitation and abuse and the range of specific offences

#### (1) Research on the prevalence of exploitation or abuse

4.02 Research has found that people with intellectual disability are particularly at risk of sexual abuse and exploitation in care settings and in the context of relationships of trust and dependency. Irish research addressing sexual abuse by people in positions of trust or authority is limited. A three-year survey published in 1990 concerning sexual violence involving adults with an intellectual disability reported that, in 5 of the 13 cases, the abuse was intra-familial.<sup>1</sup> Another Irish study from 2005, which investigated sexual abuse in intellectual disability services over a 15 year period, reported that apart from peers with intellectual disability, the majority of perpetrators of abuse were relatives and to a lesser extent, staff members and familiar persons.<sup>2</sup> The study also indicated that the most common locations for abuse were the family home (37%) and day service settings (23%). Abuse was also found to occur in residential facilities (10%).<sup>3</sup> In its 2011 Report *Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure*, the Rape Crisis Network Ireland noted that survivors of sexual violence with disabilities who attended rape crisis centres between 2008 and 2010, disclosed that one third of perpetrators were friends, acquaintances or neighbours and over one quarter were family members.<sup>4</sup> In particular, 41% of survivors with a learning disability disclosed that friends, acquaintances

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<sup>1</sup> Dunne and Power "Sexual abuse and mental handicap: Preliminary findings of a community-based study" (1990) 3 *Mental Handicap Research* at 111-125 as referred to in McGee, Garavan, deBarra, Conroy *The SAVI Report. Sexual Abuse and Violence in Ireland. A national study of Irish experiences, beliefs and attitudes concerning sexual violence* (Liffey Press 2002) at 252-253. The SAVI Survey reported that out of 3,000 randomly selected telephone respondents, approximately a third disclosed some form of unwanted sexual contact.

<sup>2</sup> McCormack, Kavanagh, Caffrey, Power "Investigating Sexual Abuse: Findings of a 15-Year Longitudinal Study" (2005) 18 *Journal of Applied Research in Intellectual Disabilities* 217 at 222.

<sup>3</sup> *Ibid* at 223.

<sup>4</sup> Rape Crisis Network Ireland *Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure* (October 2011) at 36.

or neighbours perpetrated the sexual violence against them.<sup>5</sup> 19% of survivors with learning disabilities disclosed that the sexual violence was perpetrated by a family member.<sup>6</sup>

4.03 A large-scale study carried out across the south east of England of sexual abuse of people with learning disabilities found that about one sixth of these cases were perpetrated by family members, a sixth by service workers or volunteers and another sixth by known and trusted people within the community, often occupying “pillar of the community” roles.<sup>7</sup> Very few cases of abuse by strangers were reported.<sup>8</sup> The remaining cases (42%) were perpetrated by other service users.<sup>9</sup> A high percentage of abuse was found to have occurred in the complainant’s home, which emphasised the vulnerability of complainants in places where one would have hoped they were safe.<sup>10</sup> The study also found that abuse by family members is less likely to be disclosed and, even if concerns are raised, they are less likely to be acted upon.<sup>11</sup> In terms of the professional care setting, it has also been suggested that abusers may deliberately seek employment within the care sector in order to be in a position to abuse persons with an intellectual disability or otherwise “at-risk” persons.<sup>12</sup>

4.04 The Commission recognises the need to acknowledge the level of implicit trust and dependency present in relationships of trust and authority, the resulting risk of abuse and exploitation and the inhibition of ability to seek help in an abusive situation.<sup>13</sup> The Commission also emphasises the importance of recognising the harmful impact and traumatic psychological effects on victims of sexual

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<sup>5</sup> Rape Crisis Network Ireland *Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure* (October 2011) at 39.

<sup>6</sup> *Ibid* at 39.

<sup>7</sup> Brown, Stein and Turk “The Sexual Abuse of Adults with Learning Disabilities: Results of a two year incidence survey” (1993) 6(3) *Mental Handicap Research* 193 at 208.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*.

<sup>10</sup> In the first survey, 48% of all reported abuse occurred in the victim’s home (Brown, Stein and Turk “The Sexual Abuse of Adults with Learning Disabilities: Results of a two year incidence survey” (1993) 6(3) *Mental Handicap Research* 193 at 207). In the second survey, this figure rose to 57% (Brown, Stein and Turk “The Sexual Abuse of Adults with Learning Disabilities: Report of a second two year incidence survey” (1995) 8(1) *Mental Handicap Research* 3 at 15). In addition, in both surveys, 14% of all reported abuse was found to have occurred in the victim’s day placement.

<sup>11</sup> Brown, Stein and Turk “The Sexual Abuse of Adults with Learning Disabilities: Report of a second two year incidence survey” (1995) 8(1) *Mental Handicap Research* 3 at 17. See also, Carmody “Invisible Victims: Sexual Assault of People with an Intellectual Disability” (1991) 17(2) *Australia and New Zealand Journal of Developmental Disabilities* 229, Sobsey and Mansell “The prevention of sexual abuse of people with developmental disabilities” (1990) 18(2) *Developmental Disabilities Bulletin* 51 and Wilson *Violence Against Disabled Women. Report on a Consultation by Women’s Aid of the Feasibility of Carrying out Research* (Women’s Aid 2001).

<sup>12</sup> Voice UK, Respond and Mencap UK *Behind closed doors: preventing sexual abuse against adults with a learning disability* (2001) at 11.

<sup>13</sup> McCarthy and Thompson have noted that the wide consensus amongst professionals in the learning disability field about the unacceptability of sexual relationships between staff and clients is not shared by all people with learning disabilities themselves. They observed that people with learning disabilities are sometimes positive about the possibility of having relationships with staff, even those who may have been sexually abused by staff. The authors argue that a broad concern about the welfare of people with learning disabilities needs to consider not only the damage done to them in such relationships, but also the damage done by ending such relationships (McCarthy and Thompson “People with Learning Disabilities: Sex, the Law and Consent” in Cowling and Reynolds (eds) *Making Sense of Sexual Consent* (Ashgate 2004) at 232).

violations that are perpetrated by persons in a position of trust and authority.<sup>14</sup> Such violations should be specifically recognised to reflect the devastating effects of the breach of trust implicit in the abuse.<sup>15</sup> The Commission considers that a relationship of trust or authority creates a power imbalance between the parties to the relationship. This power imbalance can undermine the ability of the person in the weaker position to give free consent to sexual acts. The Commission therefore endorses the view that a sexual relationship between a person who either lacks capacity to consent or has capacity but is nonetheless vulnerable to abuse and exploitation and a person in a position of trust or authority over them is intrinsically unequal and should be considered unacceptable.<sup>16</sup> The law should acknowledge this inequality and the high risk of abuse and exploitation which flows from it.

**4.05** The Commission recognises that exploitative sexual relationships can also arise where both parties to a sexual act lack capacity to consent to it. The Consultation Paper cited an Irish study which revealed that of 171 substantiated cases of sexual abuse of learning disabled people, 42% involved perpetrators who themselves had a learning disability.<sup>17</sup> Another Irish study which investigated sexual abuse in intellectual disability services found that the majority of perpetrators were peers with intellectual disability.<sup>18</sup>

## **(2) The range of sexual activity that should be included**

4.06 Section 5 of the *Criminal Law (Sexual Offences) Act 1993* fails to deal with the range of sexual activity and sexual exploitation that the general law on sexual offences, notably the offences in the *Criminal Law (Rape) Acts 1981 and 1990*, has already addressed. In the Consultation Paper, the Commission provisionally recommended that any replacement of section 5 of the 1993 Act should cover all forms of sexual acts rather than limiting the offence to attempted or actual penetrative acts of sexual intercourse, buggery and acts of gross indecency between males.<sup>19</sup> The Commission considered that this should include sexual offences which are non-penetrative and sexual acts which exploit a person's vulnerability. This view was echoed in submissions received by the Commission in response to the Consultation Paper. As noted above, an Irish study of sexual abuse in intellectual disability services over a fifteen year period, found that sexual touching, rather than penetration, was the most common type of abuse.<sup>20</sup>

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<sup>14</sup> Forster "Sexual offences law reform in Pacific Island countries: Replacing colonial norms with international good practice standards" (2009) 33 *Melb U L Rev* 833 at 838.

<sup>15</sup> For a discussion of the impact of sexual abuse on people with intellectual disability, see O'Callaghan, Murphy and Clare "The impact of abuse on men and women with severe learning disabilities and their families" (2003) 31 *British Journal of Learning Disabilities* 175.

<sup>16</sup> See also Voice UK, Respond and Mencap UK *Behind closed doors: preventing sexual abuse against adults with a learning disability* (2001) at 11.

<sup>17</sup> McGee, Garavan, deBarra, Conroy *The SAVI Report. Sexual Abuse and Violence in Ireland. A national study of Irish experiences, beliefs and attitudes concerning sexual violence* (Liffey Press 2002) at 253. Another study highlighted that men and women with intellectual disability need to be provided with the skills necessary to identify what constitutes abuse and what actions to take to prevent it. The findings of this study were congruent with research which indicates that perpetrators with a disability victimise men and women at similar rates and that living in congregate settings results in significant risks (Furey and Niesen "Sexual Abuse of Adults with Mental Retardation by Other Consumers" (1994) 12(4) *Sexuality and Disability* 285).

<sup>18</sup> McCormack, Kavanagh, Caffrey, Power "Investigating Sexual Abuse: Findings of a 15-Year Longitudinal Study" (2005) 18 *Journal of Applied Research in Intellectual Disabilities* 217 at 222.

<sup>19</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.122.

<sup>20</sup> This figure amounted to 59%. Sexual touching and masturbation together accounted for two-thirds (65%) of all episodes of abuse. Penetrative and attempted penetrative abuse together accounted for almost a third (31%) of episodes (McCormack, Kavanagh, Caffrey, Power "Investigating Sexual Abuse: Findings of a 15-Year Longitudinal Study" (2005) 18 *Journal of Applied Research in Intellectual Disabilities* 217 at 222 – 223).

4.07 The failure of section 5 of the 1993 Act to provide appropriate protection for persons with limited decision-making capacity from sexual exploitation and abuse was, as already noted, highlighted by White J in 2010 in *The People (DPP) v XY*.<sup>21</sup> In that case, the accused was alleged to have forced a woman whose capacity to consent was at issue into performing oral sex with him. As this act does not come within the scope of section 5 of the 1993 Act (which deals with sexual intercourse and buggery only), the accused was charged under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. Section 4 of the 1990 Act does not have regard to any issue of capacity to consent that may arise. On this issue, White J noted that “[i]t seems to me that the Oireachtas when they introduced the 1993 Act did not fully appreciate the range of offences needed to give protection to the vulnerable.” In directing the jury to acquit the defendant, he stated that the judiciary could not fill “a lacuna in the law.”

4.08 The Commission notes that sections 30 to 44 of the English *Sexual Offences Act 2003* and the comparable offences in Articles 43 to 57 of the *Sexual Offences (Northern Ireland) Order 2008* prohibit a wide range of sexually exploitative acts involving persons who lack capacity or whose capacity is open to question. They extend beyond sexual intercourse and indecent assault to sexual touching of such a person, causing or inciting the person to engage in sexual activity, engaging in sexual activity in the presence of such a person and causing him or her to watch sexual activity.

### **(3) Approaches to persons in positions of trust and authority in other jurisdictions**

4.09 Against the backdrop of the studies discussed above, most countries have recognised the vulnerability of persons with intellectual disability to abuse in the context of relationships of care and trust by legislating for a separate offence which prohibits certain relationships between persons with intellectual disability and persons in a position of trust or authority over them.<sup>22</sup> Sections 38 to 41 of the English *Sexual Offences Act 2003* and Articles 51 to 54 of the *Sexual Offences (Northern Ireland) Order 2008* create specific offences where the offender is involved in a person’s care. In *R v Bradford*,<sup>23</sup> the defendant was a social worker who had sexual intercourse with the complainant when she was suffering from post-natal depression. He was convicted under section 38 of the English *Sexual Offences Act 2003* and this is an illustration of how the English 2003 Act has widened protection for persons who are vulnerable because of their mental state. The position of trust and responsibility enjoyed by a care worker is an element of the offence, as opposed to simply an aggravating factor.<sup>24</sup> The offences in sections 38 to 41 of the 2003 Act have been described as necessary to protect those whose capacity is in question or who lack capacity, regardless of their ability to choose whether or not to take part in sexual activity, whose actions may be influenced by their familiarity with, or dependence upon, a care worker.<sup>25</sup> In Scotland, section 46 of the *Sexual Offences (Scotland) Act 2009* is framed in terms of the sexual abuse of trust of a mentally disordered person and applies to persons who provide care services to the complainant. In recommending that there should be a specific breach of trust offence in relation to people with mental disorders, the Scottish Law Commission, in its 2007 *Report on Rape and Other Sexual Offences*, stated that “it would be of value for people who provide and receive care services if there is provision which deals specifically with their situation.”<sup>26</sup> A number of Australian jurisdictions have also introduced offences that apply to an accused who perpetrated a sexual offence against a person with a cognitive impairment while responsible for their care.<sup>27</sup>

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<sup>21</sup> Central Criminal Court, 15 November 2010, *The Irish Times* 16 November 2010. See also the discussion of the case at paragraphs 1.18 and 2.55, above, and paragraph 5.36, below.

<sup>22</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.108.

<sup>23</sup> [2006] EWCA Crim 2629.

<sup>24</sup> Rook and Ward *Sexual Offences: Law and Practice* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 380.

<sup>25</sup> Sentencing Guidelines Council *Sexual Offences Act 2003: Definitive Guideline* (2007) at 20.

<sup>26</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences* (No. 209 2007) at paragraph 4.121.

<sup>27</sup> See for example, section 66F(2) and (6) of the *Crimes Act 1900* (NSW) as amended by section 3 of the *Crimes Amendment (Cognitive Impairment – Sexual Offences) Act 2008* (NSW); sections 51 and 52 of the



4.10 The Commission considers that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should include not only generally applicable offences that mirror the general law of sexual offences, that is, those in the *Criminal Law (Rape) Act 1981 and 1990*, but also specific offences aimed at persons who engage in sexual acts with a person who either lacks capacity to consent or has capacity but is nonetheless vulnerable to abuse and exploitation while they are in a position of trust or authority over that person. The fact that the complainant consented to the sexual activity should be irrelevant in this context.<sup>28</sup> As Lord Falconer put it in the House of Lords debate during the passage of the English *Sexual Offences Act 2003*:

“Consent here is totally irrelevant. It plays no part in the ingredients of the offences. To put it simply, the elements required for an offence are the relationship of care between the defendant and the victim, and the occurrence of sexual activity... shades of consent are difficult to prove in these circumstances. Furthermore... the power is with the carer.”<sup>29</sup>

#### **(4) Autonomy and protection**

4.11 The Commission accepts that such offences may limit the autonomy of the persons concerned to express freely their sexuality and could, arguably, be regarded as being in conflict with the equality standard in Article 12 of the UNCRPD. However, it considers that this is overborne by the need, recognised in Article 16 of the UNCRPD, to prevent the sexual abuse and exploitation of people who are vulnerable by reason of their intellectual disability. The Commission considers that legislating for specific offences, including those involving persons in a position of trust or authority, is appropriate where persons may be open to abuse and exploitation and that, when used in conjunction with a functional test of capacity, strikes an appropriate balance between the competing objectives of empowerment and protection.

4.12 The Commission acknowledges that it might be suggested that these specific offences, in particular those applicable to people in a position of trust or authority, involve some element of discrimination in that those who hold such a position are not free to engage in sexual conduct with persons in their care. However, the Commission is of the view that to afford such a freedom to those who hold a position of trust is to risk the exploitation of the persons in need of protection. In this regard, the Commission places emphasis on Article 16 of the UNCRPD which requires states that ratify the Convention to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse. The Commission also notes the State's positive obligations under Article 3 of the ECHR to

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*Crimes Act 1958* (Vic) as amended by section 16 of the *Crimes (Sexual Offences) Act 2006* (Vic); and section 126 of the *Criminal Code Act 1924* (Tas).

<sup>28</sup> See examination of legislation in other countries which contains a specific offence pertaining to carers or people in a position of trust or authority in the Commission's *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011, Chapter 5). In most countries which have such an offence, consent is not a defence. See for example, section 38 of the English *Sexual Offences Act 2003*, section 46 of the *Sexual Offences (Scotland) Act 2009* and section 66F of the *Crimes Act 1900* (NSW) as amended by section 3 of the *Crimes Amendment (Cognitive Impairment – Sexual Offences) Act 2008*. One exception is section 153.1 of the *Canadian Criminal Code* which criminalises sexual contact with a person with a disability in circumstances where a relationship of authority or dependency exists between the accused and the person with a disability. The offence includes a requirement that the complainant did not consent (voluntarily agree) to the sexual contact. Given that the crime of sexual assault in the *Canadian Criminal Code* already criminalises sex without consent, without requiring proof of “disability” and one of the listed power relationships, it has been argued that the offence in section 153.1 does not provide any additional protection to persons with limited capacity. As a result, the provision has rarely been used since its introduction. For further discussion of this provision, see Benedet and Grant “Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief” (2007) 52 McGill LJ 243 at 250. In relation to consent, see also Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (2004) at paragraphs 6.42 – 6.58.

<sup>29</sup> House of Lords Debate 28 April 2003, available at <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030428/text/30428-22.htm>.

ensure that its legal system provides protection from assault from other individuals and not just agents of the state.<sup>30</sup>

4.13 This approach is also consistent with the equality guarantee in Article 40.1 of the Constitution, which prohibits invidious discrimination only, and which permits account to be taken of different circumstances such as the potential for abuse or exploitation (to which the UNCRPD also refers). In this respect, the decision of the Supreme Court in *MD (Minor) v Ireland*<sup>31</sup> discusses reconciling the principle of equality with the need for adequate protection in a comparable setting. In that case, the Supreme Court held that the Oireachtas was entitled to have regard to the danger of pregnancy for teenage girls when enacting section 5 of the *Criminal Law (Sexual Offences) Act 2006*. Section 5 of the 2006 Act provides that a female child under 17 shall not be guilty of an offence under the *Criminal Law (Sexual Offences) Act 2006* by reason only of her engaging in an act of sexual intercourse. This does not apply to a male child under 17 and the applicant, who had been charged with an offence under section 3(1) of the 2006 Act, had contended that the provision was gender biased and discriminatory. The Court held that the Oireachtas was entitled to consider the differences of capacity, physical or moral and differences in social function as provided for in Article 40.1 of the Constitution. The Court stated:

“Thus, strict equality is the norm laid down by Article 40.1. However, the Article recognises that perfectly equal treatment is not always achievable, rather the Article recognises that applying the same treatment to all human persons is not always desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves.”<sup>32</sup>

4.14 On the basis of the Supreme Court’s analysis, it is equally arguable that the Oireachtas would be entitled to have regard to the differences in social function between people who are in a position of trust or authority in respect of a person who either lacks capacity to consent or whose capacity is open to question and may be vulnerable to abuse or exploitation. In particular, regard should be had to the evidence discussed above of a higher risk of exploitation, by comparison with the general population, of such persons.

#### **(5) Final recommendation**

4.15 The Commission concludes that the most effective way of ensuring that a person who either lacks capacity to consent or whose capacity is open to question is protected from sexual exploitation or abuse, while also recognising their capacity to enter into sexual relationships, is to legislate for specific offences to replace the limited range of penetrative offences currently set out in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. These offences would include generally applicable offences that mirror those in the *Criminal Law (Rape) Act 1981 and 1990*. These are (a) an assault that is accompanied by circumstances of indecency on the part of the defendant (equivalent to sexual assault under section 2 of the *Criminal Law (Rape) (Amendment) Act 1990*, which replaced the common law offence of indecent assault); (b) a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person (this is equivalent to aggravated sexual assault under section 3 of the *Criminal Law (Rape) (Amendment) Act 1990*); (c) penetration other than sexual intercourse (this is in general equivalent to “section 4 rape” under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*); and (d) sexual intercourse (this is equivalent to rape under section 2 of the *Criminal Law (Rape) Act 1981*, assuming as with the other three that there is no consent).

4.16 The offences should also take account of specific elements that involve exploitation or abuse, such as inducements, threats or tricks. They would also deal separately with persons who occupy positions of trust or authority. As already discussed in this Report such a range of offences have been legislated for in other common law jurisdictions referred to in this Report, including the offences set out in sections 30 to 44 of the English *Sexual Offences Act 2003* and Articles 43 to 57 of the *Sexual Offences*

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<sup>30</sup> For example, see *A v United Kingdom* [1998] ECHR 85.

<sup>31</sup> *MD (Minor) v Ireland* [2012] IESC 10.

<sup>32</sup> *Ibid* at paragraph 42.

(Northern Ireland) Order 2008. The Commission has concluded, and so recommends, that the specific offences contained in the English 2003 Act and the Northern Ireland 2008 Order are a suitable model for the offences that should replace section 5 of the *Criminal Law (Sexual Offences) Act 1993*. Sections 5, 6 and 7 of the draft *Criminal Law (Sexual Offences and Capacity to Consent) Bill* appended to this Report are intended to give effect to this recommendation.

4.17 *The Commission recommends that the specific offences which should replace the limited offences in section 5 of the Criminal Law (Sexual Offences) Act 1993 should mirror the four generally applicable sexual offences in the Criminal Law (Rape) Act 1981 and 1990. The Commission also recommends that the offences should take account of specific elements that involve exploitation or abuse, such as inducements, threats or tricks. The Commission also recommends that the offences should also deal separately with persons who occupy positions of trust or authority. The Commission also recommends that these proposed offences should be modelled on those in sections 30 to 44 of the English Sexual Offences Act 2003 and Articles 43 to 57 of the Sexual Offences (Northern Ireland) Order 2008.*

## **C Specific elements of the offences**

### **(1) Position of trust or authority**

4.18 Having regard to the research discussed above, the Commission acknowledges that there is a variety of circumstances in which an exploitative relationship can arise involving a person who lacks capacity or whose capacity is in question. In the Consultation Paper, the Commission expressed the view that a position of trust or authority should be defined in similar terms to section 1 of the *Criminal Law (Sexual Offences) Act 2006*.<sup>33</sup> Section 1 of the 2006 Act defines a “person in authority” as a parent, stepparent, guardian, grandparent, uncle or aunt of the victim; any person who is in *loco parentis* to the victim; or any person who is, even temporarily, responsible for the education, supervision or welfare of the victim. Having further considered this proposed definition and having regard to the serious implications for a person convicted of such an offence, the Commission has reached the view that those who come within its scope should be more clearly defined. It is helpful in this regard to examine the types of relationships that other countries have characterised as being potentially exploitative.

4.19 In England, Wales and Northern Ireland, it is an offence for a “care worker” to engage in sexual activity with a person with a mental disorder who is under their care. Section 42 of the English *Sexual Offences Act 2003* and Article 55 of the *Sexual Offences (Northern Ireland) Order 2008* identify a number of ways that a person may be involved in the care of another. The offence applies where the complainant is in residential care or receiving services provided by the National Health Service or another medical body and the nature of the accused’s employment by the care or service provider has brought them or is likely to bring them into regular face to face contact with the complainant. The offence also applies to those who provide care, assistance or services to the complainant in connection with their mental disorder, whether or not in the course of employment, and as such, have had or are likely to have regular face to face contact with the complainant. Guidance issued by the UK Home Office on the interpretation of the 2003 Act states that the definition of “care worker” covers not only doctors, nurses and social workers but also receptionists, cleaning staff, advocates or voluntary helpers.<sup>34</sup> Similarly, under section 46(2) of the *Sexual Offences (Scotland) Act 2009*, it is an offence for providers of care services or employees, contractors or managers of health services in which a mentally disordered person is being given medical treatment, to intentionally engage in sexual activity with that person.<sup>35</sup>

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<sup>33</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.121.

<sup>34</sup> UK Home Office “Circular 021/2004: Guidance on Part 1 of the English *Sexual Offences Act 2003*” (Home Office London 2004) at paragraph 181.

<sup>35</sup> The provision of care services refers to anything done by way of such services by a care service, an employee of a care service or in the course of a service provided by a care service, whether by virtue of a contract of employment or any other contract or in such other circumstances as may be specified in an order made by the Scottish Ministers.

4.20 Comparable offences in Australia have a similarly broad remit. For example, in New South Wales, the definition of a “person responsible for care” in section 66F of the *Crimes Act 1900* (NSW)<sup>36</sup> covers voluntary carers, health professionals, educators, home carers and supervisors of a person with a cognitive impairment. In Victoria, it is an offence for a worker at a facility that provides programs specially designed to meet the developmental or educational needs of persons with a cognitive impairment to take part in an act of sexual penetration with a person with a cognitive impairment who is residing at or attending the facility.<sup>37</sup> “Worker” is defined in section 50 of the *Crimes Act 1958* (Vic)<sup>38</sup> as “a person who delivers, or assists in delivering, at a facility (whether as an employee or as a volunteer or in any other capacity) a program specially designed to meet the developmental or educational needs of persons with a cognitive impairment residing at the facility or attending the facility to take part in the program.” It is also an offence under the *Crimes Act 1958* (Vic) for a provider of medical or therapeutic services to take part in an act of sexual penetration with a person with a cognitive impairment.<sup>39</sup> The 1958 Act sets out different legal consequences depending on whether or not the services were provided in connection with the complainant’s disability.<sup>40</sup>

4.21 The *Canadian Criminal Code RSC 1985* provides for the offence of sexual exploitation of a person with a disability.<sup>41</sup> The offence applies to persons who are in a “position of trust or authority towards a person with a mental or physical disability” or “persons with whom a person with a mental or physical disability is in a relationship of dependency.” The Code does not provide any further guidance as to the scope of these categories of persons.

4.22 In its 1990 *Report on Sexual Offences Against the Mentally Handicapped*, the Commission recommended that sexual activity between participants who both suffer from mental handicap or mental illness should not constitute an offence, unless the acts in question constitute a criminal offence by virtue of some other provision of the law.<sup>42</sup> In its 2000 Report to the Home Office Sex Offences Review, the Law Commission for England and Wales also recognised that while a sexual relationship between two people, both of whom have intellectual disabilities, may not intrinsically involve any abuse, depending upon the circumstances, a particular relationship might be abusive.<sup>43</sup> The English Commission suggested that where both parties to a sexual act lack capacity, there should only be criminal culpability where there was evidence of abuse or exploitation.<sup>44</sup> In its 2000 Report, the UK Home Office Sex Offences Review stated that “[i]f an abuser is capable of telling right from wrong, and has the capacity to know about sex and understand broadly its consequences, he or she should not be immune from prosecution, nor should such behaviour be condoned by carers.”<sup>45</sup> The Commission considers that although such persons may be in a

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<sup>36</sup> Section 66F of the *Crimes Act 1900* (NSW) was amended by section 3 of the *Crimes Amendment (Cognitive Impairment – Sexual Offences) Act 2008* (NSW).

<sup>37</sup> Section 52 of the *Crimes Act 1958* (Vic) as amended by section 17 of the *Crimes (Sexual Offences) Act 2006* (Vic).

<sup>38</sup> Section 50 of the *Crimes Act 1958* (Vic) was amended by section 15 of the *Crimes (Sexual Offences) Act 2006* (Vic).

<sup>39</sup> Section 51 of the *Crimes Act 1958* (Vic) as amended by section 16 of the *Crimes (Sexual Offences) Act 2006* (Vic).

<sup>40</sup> These consequences are discussed at paragraphs 4.29-4.30 below.

<sup>41</sup> Section 153.1 of the *Canadian Criminal Code RSC 1985*.

<sup>42</sup> Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990) at paragraph 35.

<sup>43</sup> Law Commission for England and Wales *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) at paragraph 4.27.

<sup>44</sup> The UK Home Office agreed with this principle (UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.7.1).

<sup>45</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.7.2.

position of trust in respect of a complainant, it would be unfair and indeed, unworkable, to include them in the list of persons who occupy positions of “trust or authority.” Rather, it would be more appropriate to prosecute such persons with the sexual offences in the *Criminal Law (Rape) Act 2981 and 1990*.

4.23 The Commission is concerned to ensure that a barrier is not created between people with intellectual disability and the wider community. Accordingly, the Commission does not propose having an overly inclusive category of offenders. The research in this area clearly indicates that people with intellectual disabilities are most at risk from those who *directly care for and support* them. It must be emphasised that most family members, carers and health professionals are entirely innocent of sexually abusing or exploiting those in their care and that the vast majority of carers treat such persons with respect. Nonetheless, the legislation must take account of the situations where people with intellectual disability are most vulnerable and where there is the greatest potential for abuse and exploitation, having regard to studies in this area. The Commission is conscious that in certain circumstances, a power differential can persist over time and over a break in contact between the individuals. Accordingly, the Commission is of the view that there is merit in expressly providing that the definition of a person “in a position of trust or authority” includes a person who was previously responsible for the education, supervision or welfare of the victim but no longer is.

4.24 The Commission has therefore concluded, and so recommends, that the offences recommended in this Report concerning a position of trust or authority should apply to parents, stepparents, guardians, grandparents, uncles, aunts, children, nephews and nieces of; or any person whom is in *loco parentis* to; or persons who directly care for and support, the complainant. This should include persons who were in a position of trust or authority in respect of the complainant but were not in such a position at the time of the alleged offence.

4.25 *The Commission recommends that “a person in a position of trust or authority” should be defined as “parents, stepparents, guardians, grandparents, uncles, aunts, children, nephews and nieces of; any person who is in loco parentis to; or persons who directly care for and support, the victim.” The Commission recommends that this should include persons who were in a position of trust or authority in respect of the complainant but were not in such a position at the time of the alleged offence.*

## **(2) Whether the offences should involve strict liability**

4.26 In the Consultation Paper, the Commission provisionally recommended that offences concerning persons in a position of trust or authority should involve strict liability<sup>46</sup> and that the defence of reasonable mistake as to a person’s capacity should not be available to such persons.<sup>47</sup> The Commission is conscious of the constitutional context in which the issue of strict liability must be considered, bearing in mind the decision of the Supreme Court in *CC v Ireland (No.2)*.<sup>48</sup> In that case, the Supreme Court considered the constitutional validity of section 1(1) of the *Criminal Law Amendment Act 1935* which dealt with sexual offences between an adult, that is, a person over 17, and a young girl, that is, under 15. The Court declared section 1(1) of the 1935 Act unconstitutional because it did not include a defence of

<sup>46</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 5.121.

<sup>47</sup> *Ibid* at paragraph 5.123.

<sup>48</sup> *CC v Ireland (No.2)* [2006] IESC 33; [2006] 4 IR 1. For a critique of this decision see Prendergast “The Constitutionality of Strict Liability in Criminal Law” (2011) 18(1) DULJ 285; Prendergast “Strict Liability and the Presumption of *Mens Rea* after *CC v Ireland*” (2011) 46(1) *Irish Jurist* 211; and McAuley *Report of the Criminal Law Rapporteur for the Legal Protection of Children* (Government Publications 2007). The Report recommended the reversal of *CC v Ireland (No.2)* [2006] IESC 33; [2006] 4 IR 1 by way of constitutional amendment. The same recommendation was made by the Joint Oireachtas Committee on Child Protection in its 2006 *Report on Child Protection* at 81. No such provision was included in the *Thirty-First Amendment of the Constitution (Children) Bill 2012*, which provides for the insertion of Article 42A, concerning children, into the Constitution. The 2012 Bill was approved in a referendum held in 2012. In *Jordan v Attorney General*, High Court, 18 October 2013, the High Court (McDermott J) rejected a challenge to the referendum outcome brought pursuant to the *Referendum Act 1994*. At the time of writing, Article 42A does not yet form part of the Constitution as the High Court decision in the *Jordan* case may be appealed to the Supreme Court.

“honest mistake” as to age. The Court found that section 1(1) of the 1935 Act was capable of criminalising a “mentally innocent” person and that criminalising the “mentally innocent” for a serious offence carrying a possible life sentence was constitutionally impermissible. Hardiman J stated:

“I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or the dignity of the individual or as meeting the obligation imposed on the state by Article 40.3.1<sup>o</sup> of the Constitution.”<sup>49</sup>

4.27 In response to the Supreme Court’s ruling, the Oireachtas almost immediately enacted an “honest mistake” defence to the offence of defilement of a child under 15 years of age in section 2(3) of the *Criminal Law (Sexual Offences) Act 2006*.<sup>50</sup>

4.28 In the care worker offences in sections 38 to 41 of the English *Sexual Offences Act 2003*, once it is proven that the complainant had a mental disorder, it is presumed that the defendant knew or could reasonably have been expected to know that the complainant had a mental disorder. This presumption may be rebutted where sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know of the mental disorder. Unlike the defence in sections 30 to 33 of the 2003 Act, it is not open to an accused to argue that although he or she knew of the fact of the complainant’s mental disorder, they did not know that because of it, the complainant was likely to be unable to refuse. The same rebuttable presumption is contained in Articles 51 to 54 of the *Sexual Offences (Northern Ireland) Order 2008*. In Scotland, where an accused is charged with the offence of sexual abuse of trust of a mentally disordered person under section 47 of the *Sexual Offences (Scotland) Act 2009*, the onus lies on the defence to establish that the accused reasonably believed that the complainant did not have a mental disorder. Similarly, in New South Wales, it is for the defence to prove that the accused person who was responsible for the care of the complainant did not know that the complainant had a cognitive impairment.<sup>51</sup>

4.29 In its 2004 *Final Report on Sexual Offences Law and Procedure*,<sup>52</sup> the Victorian Law Reform Commission recommended that, in respect of offences where the accused is a provider of medical or therapeutic services, the prosecution should not be required to prove that the accused was aware of the victim’s cognitive impairment where the medical or therapeutic services are related to the cognitive impairment. However, it stated that the accused should be allowed to raise the defence that they had an honest and reasonable belief that the victim did not have a cognitive impairment. The Victorian Commission noted that a reasonable belief that a person did not have a cognitive impairment is more likely to arise in the context of therapeutic than medical services.<sup>53</sup> The availability of such a defence was to cover the rare situation where a person providing medical or therapeutic services to a person with a cognitive impairment was not aware that the person had a cognitive impairment.<sup>54</sup> The Victorian Law Reform Commission gave the example of a physical therapist who conducts an exercise class with a group of people with various disabilities but may be unaware of the nature of their various disabilities. In this situation, the therapist might engage in a sexual act with a person with a cognitive impairment without being aware that the person had a cognitive impairment.<sup>55</sup> The Victorian Commission recommended that

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<sup>49</sup> *CC v Ireland (No 2)* [2006] IESC 33; [2006] 4 IR 1 at paragraph 49.

<sup>50</sup> Sections 2 and 3 of the *Criminal Law (Sexual Offences) Act 2006* contain a defence of honest belief that at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the relevant age. In considering whether or not the defendant had an honest belief, the court must have regard to the presence or absence of reasonable grounds for holding such a belief which guarantees that the defendant’s belief will be appraised both subjectively and objectively.

<sup>51</sup> Section 66F(7) of the *Crimes Act 1900* (NSW) as amended by section 3 and schedule 1 of the *Crimes Amendment (Cognitive Impairment – Sexual Offences) Act 2008* (NSW).

<sup>52</sup> Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (2004).

<sup>53</sup> *Ibid* at paragraph 6.47.

<sup>54</sup> *Ibid* at paragraph 6.48.

<sup>55</sup> *Ibid*.

where the services are not related to the cognitive impairment, the service provider should not be guilty of the offence unless they knew that the victim had a cognitive impairment.

4.30 This recommendation was implemented in section 51 of the *Crimes Act 1958* (Vic)<sup>56</sup> under which, where the services provided by the accused were related to the complainant's cognitive impairment, the prosecution is not required to prove that the accused was aware of the complainant's cognitive impairment. However, it is a defence for the accused to prove that at the time at which the offence is alleged to have been committed, he or she believed on reasonable grounds that the complainant did not have a cognitive impairment. A similar defence is available to an accused who provided services that were not related to the complainant's cognitive impairment, but there is no requirement to prove that their belief was reasonable. Notably, the defence does not apply to workers at a facility who deliver or assist in delivering a programme specially designed to meet the developmental or educational needs of persons with a cognitive impairment residing at the facility or attending the facility to take part in the program, under section 52 of the *Crimes Act 1958* (Vic).<sup>57</sup>

4.31 The Commission recognises that the research discussed above indicates the prevalence of abuse in care settings and the consequent need to provide adequate protection for persons who lack capacity or have limited capacity from sexual abuse or exploitation by those whom they trust.

4.32 The legislation proposed in this Report must, however, balance two competing goals. On the one hand, it should not prevent people who have capacity to consent from participating in non-exploitative sexual relationships. On the other hand, the statistics suggest that sexual exploitation of people with intellectual disability by people in a position of trust or authority over them is unfortunately, relatively common. The Commission retains the view that the high incidence of sexual abuse of people with intellectual disability coupled with the low levels of reporting, suggests that the law should do more to protect them.<sup>58</sup> The Commission also notes that, in the context of sexual offences against children, sections 2 and 3 of the *Criminal Law (Sexual Offences) Act 2006*, enacted in the wake of the Supreme Court decision in the CC case discussed above, place the burden of proof on the defence to prove that the accused honestly believed that the child had attained the relevant age at the time of the alleged offence. On this basis, the Commission has concluded that, in the context of an offence where the accused was in a position of trust or authority, it should be presumed that the accused knew that the relevant person did not have capacity to consent unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know that the relevant person did not have the capacity to consent. In other situations, the defence currently provided for in section 5(3) of the *Criminal Law (Sexual Offence) Act 1993* should remain.

4.33 *The Commission recommends that, in the context of an offence where the defendant was in a position of trust or authority, it shall be presumed that the defendant knew that the relevant person did not have capacity to consent unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know that the relevant person did not have the capacity to consent. The Commission also recommends that where the defendant is not in a position of trust or authority it should remain, as currently provided in section 5(3) of the Criminal Law (Sexual Offence) Act 1993, that it is a defence for the defendant to show that at the time of the alleged commission of the offence he or she did not know and had no reason to suspect that the relevant person did not have the capacity to consent.*

### **(3) Existence of a prior sexual relationship**

4.34 The Commission is aware of the fine line between protecting people from sexual exploitation and inhibiting their autonomy to enjoy a fulfilling sexual life. For example, in many situations a person who

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<sup>56</sup> Section 51 of the *Crimes Act 1958* (Vic) was amended by section 16 of the *Crimes (Sexual Offences) Act 2006* (Vic).

<sup>57</sup> Section 52 of the *Crimes Act 1958* (Vic) was amended by section 17 of the *Crimes (Sexual Offences) Act 2006* (Vic). See also section 126 of the *Criminal Code Act 1924* (Tas).

<sup>58</sup> The Victorian Law Reform Commission reached a similar conclusion in its Final Report on Sexual Offences (Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (2004) at 337).

lacks capacity is cared for by their partner. The Commission notes that under section 44 of the English *Sexual Offences Act 2003*, Article 57 of the *Sexual Offences (Northern Ireland) Order 2008* and section 47(2) of the *Sexual Offences (Scotland) Act 2009*, it is a defence for the accused to prove that a sexual relationship existed prior to the provision of care services by the accused. The purpose of this defence is to protect an individual whose sexual partner develops a disability such as dementia.<sup>59</sup> In its 2000 Report, the UK Home Office Sex Offences Review opined that in circumstances where individuals retain some capacity to consent, it would be wrong and unreasonable to intrude into the private life of such couples.<sup>60</sup> It is also a defence under those provisions that the parties were married or were civil partners. In certain Australian jurisdictions, where a person is charged with having sexual relations with a person who has a cognitive impairment while they were responsible for their care, it is generally a defence that the parties were married, *de facto* partners or in a significant relationship at the time of the act.<sup>61</sup>

4.35 While the Commission acknowledges these developments in other common law countries, it considers that a situation where a sexual relationship between a person who either lacks capacity to consent or has capacity to consent but is nonetheless vulnerable to abuse and exploitation and a person who is in a position of trust or authority over them, pre-dated the relationship of trust or authority, could also be exploitative. Therefore, the Commission recommends that the fact that the sexual offence in question occurred within a marriage or a civil partnership which pre-dated the relationship of care should not in itself be a defence.

4.36 *The Commission recommends that the fact that the sexual offence in question occurred within a marriage or a civil partnership which pre-dated the relationship of care should not in itself be a defence.*

#### **(4) Penalties**

4.37 Section 5 of the 1993 Act currently prescribes a maximum penalty of 10 years imprisonment where a person is convicted of having sexual intercourse or committing an act of buggery. In the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery, a person is liable on conviction on indictment to a maximum term of three years imprisonment in the case of a first conviction and in the case of a second or any subsequent convictions to a maximum of five years.<sup>62</sup> A male person who commits or attempts to commit an act of gross indecency with another male person is liable to a term of imprisonment not exceeding two years.<sup>63</sup>

4.38 In its 1990 *Report on Sexual Offences Against the Mentally Handicapped*,<sup>64</sup> the Commission recommended that there should be higher penalties where an offence is committed by persons in charge of, or employed in, institutions or where the accused person had the care or charge of the other participant. As noted in the Consultation Paper, section 5 of the *Criminal Law (Sexual Offences) Act 1993* does not provide for any higher penalties in such a situation, which means that there is currently no distinction between accused persons who are in a position of trust or authority and those who have no relationship with the victim.<sup>65</sup> The Commission notes that some Australian jurisdictions, namely, Western

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<sup>59</sup> Rook and Ward *Sexual Offences: Law and Practice* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 336.

<sup>60</sup> UK Home Office *Setting the Boundaries: Reforming the law on sex offences* (Home Office London 2000) at paragraph 4.8.17.

<sup>61</sup> See for example, section 66F(7) of the *Crimes Act 1900* (NSW) as amended by section 3 of the *Crimes Amendment (Cognitive Impairment – Sexual Offences) Act 2008* (NSW); sections 51(1) and 52(1) of the *Crimes Act 1958* (Vic) as amended by sections 16 and 17 of the *Crimes (Sexual Offences) Act 2006* (Vic); and section 126 of the *Criminal Code Act 1924* (Tas).

<sup>62</sup> Section 5(1) of the *Criminal Law (Sexual Offences) Act 1993*.

<sup>63</sup> Section 5(2) of the *Criminal Law (Sexual Offences) Act 1993*.

<sup>64</sup> Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990) at paragraph 36. The possibility of increased sanctions for abuse by an institutional carer was mooted by the Department of Justice in its Discussion Paper *The Law on Sexual Offences* (Stationery Office 1998) at paragraph 9.5.2.

<sup>65</sup> LRC CP 63-2011 at paragraph 5.121.



Australia<sup>66</sup> and Queensland<sup>67</sup> treat the fact that an offender is in a position of trust or authority over the victim as an aggravating factor in sentencing.

4.39 An alternative approach, based on the concept of “ostensible consent”, has been adopted in England and Wales. In the English *Sexual Offences Act 2003*, offences involving care workers<sup>68</sup> are distinguished from the other two groups of “mental disorder” offences on the ground that they primarily relate to ostensibly consensual sexual activity with persons over 16 that is only criminal because of the care worker relationship.<sup>69</sup> The maximum penalties prescribed in the 2003 Act where the perpetrator of the offence is a care worker are therefore lower than those arising from other “mental disorder” offences. The English Sentencing Guidelines Council articulates the distinction in the following way:

“These offences are primarily designed to be charged where victims have the capacity to choose and where there is no clear evidence of inducement, threat or deception. The maximum penalties, therefore, are lower than those arising from the other two groups of ‘mental disorder’ offences and it follows that starting points for sentencing should be proportionately lower.”<sup>70</sup>

4.40 Other common law jurisdictions which provide for a specific carer offence such as Northern Ireland,<sup>71</sup> Scotland,<sup>72</sup> New South Wales,<sup>73</sup> Victoria<sup>74</sup> and the Australian Northern Territory<sup>75</sup> also prescribe lower penalties in respect of carers.

4.41 A number of submissions received by the Commission in response to the Consultation Paper expressed the view that sentencing provisions should distinguish between sexual offences which involve penetration and those which do not. The English *Sexual Offences Act 2003* makes such a distinction in that the maximum penalties applicable are determined by the nature of the sexual activity. In the case of offences against persons with a mental disorder impeding choice<sup>76</sup> and offences of procuring sexual activity with a person with a mental disorder by inducement, threat or deception,<sup>77</sup> the offence is indictable only with a maximum sentence of life imprisonment where the sexual activity involves penetration. Where the activity does not involve penetration, the offence is prosecutable either summarily or on indictment with a maximum sentence of 14 years imprisonment on indictment.<sup>78</sup> Similarly, in the case of offences involving care workers,<sup>79</sup> the maximum sentence is 14 years where the act is penetrative. In the case of

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<sup>66</sup> Section 330 of the *Criminal Code Act 1913* (WA).

<sup>67</sup> Section 216 of the *Criminal Code Act 1899* (Qld).

<sup>68</sup> Sections 38-41 of the English *Sexual Offences Act 2003*.

<sup>69</sup> Sentencing Guidelines Council *Sexual Offences Act 2003: Definitive Guideline* (2007) at 68.

<sup>70</sup> *Ibid.*

<sup>71</sup> Sections 51-54 of the *Sexual Offences (Northern Ireland) Order 2008*.

<sup>72</sup> Sections 46 and 48 of the *Sexual Offences (Scotland) Act 2009*.

<sup>73</sup> Section 66F of the *Crimes Act 1900* (NSW) as amended by section 3 of the *Crimes Amendment (Cognitive Impairment – Sexual Offences) Act 2008* (NSW).

<sup>74</sup> Sections 51 and 52 of the *Crimes Act 1958* (Vic) as amended by sections 16 and 17 of the *Crimes (Sexual Offences) Act 2006* (Vic).

<sup>75</sup> Section 130 of the *Criminal Code Act 1983* (NT).

<sup>76</sup> Sections 30 and 31 of the English *Sexual Offences Act 2003*.

<sup>77</sup> Sections 34 and 35 of the English *Sexual Offences Act 2003*.

<sup>78</sup> The offences of engaging in sexual activity in the presence of a person with a mental disorder impeding choice (section 32), causing a person with a mental disorder impeding choice to watch a sexual act (section 33) and using inducements, threats or deception to procure the presence of or to cause a person with a mental disorder to watch (sections 36 and 37) are prosecutable either summarily or on indictment with a maximum sentence of 10 years imprisonment on indictment.

<sup>79</sup> Section 38 of the English *Sexual Offences Act 2003*.

non-penetrative acts by a care worker, the maximum sentence on indictment is 10 years. This reflects the principle that offences involving sexual penetration are more serious than non-penetrative sexual assault.

4.42 Having considered this matter the Commission agrees with the general approach adopted in other jurisdictions that distinctions in terms of the sentences that should apply may be drawn between the many circumstances in which the offences being considered in this Report occur. A number of jurisdictions have, as noted, taken account of these differences by providing for differentiated maximum penalties on conviction. The Commission considers, however, that it is not necessary to provide for separate maximum sentences to take account of, for example, whether the offence was committed by a person in a position of trust or authority or whether the offence involves particularly aggravated forms of abuse of exploitation. This is because the proposed offences in this Report are intended to mirror the existing general sexual offences and these offences already include maximum penalties on conviction that are sufficient to allow for a range of aggravating factors.

4.43 Thus, the current maximum sentence under the *Criminal Law (Rape) Acts 1981 and 1990* is life imprisonment for three of the offences on which the proposed offences in this Report are mirrored, namely, (a) aggravated assault, (b) rape under section 4 of the 1990 Act and (c) rape. These offences may be prosecuted on indictment only. As already noted, section 5 of the 1993 Act currently provides for up to 10 years for sexual intercourse or buggery with a person with a “mental impairment”.

4.44 The current maximum sentences under the *Criminal Law (Rape) Acts 1981 and 1990* for sexual assault, the fourth offence on which the proposals in this Report are mirrored, are: (a) on summary conviction, 12 months and/or Class A fine (under the *Fines Act 2010*, currently a maximum €5,000 fine); and (b) on conviction on indictment, 14 years where the assault was of a child and 10 years in any other case. As is clear, sexual assault may be prosecuted either summarily or on indictment. Section 5 of the 1993 Act provides: (a) in the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery with a relevant person (that is a person who lacks capacity or whose capacity is in question), imprisonment for up to 3 years for a first conviction and up to 5 years for a second or subsequent conviction; (2) in the case of a male person who commits or attempts to commit an act of gross indecency with another male person who is a relevant person, up to 2 years.

4.45 The Commission notes that the approach taken in the English 2003 Act and the Northern Ireland 2008 Order is to provide for identical penalties in respect of the offences concerning relevant persons as already provided for under the general law on sexual offences. This Commission agrees with this general approach, which is consistent with the approach that there should, in general, be equal treatment and protection. The Commission notes, however, that the maximum penalty under Irish law for three of the general sexual offences is life imprisonment. For this reason, the Commission has concluded that it is sufficient that any aggravating (or mitigating) factors would be considered in the course of the sentencing process<sup>80</sup> and that it is not therefore necessary to provide in the legislation that is intended to replace section 5 of the 1993 Act for differentiated sentencing maxima.

4.46 As to the fourth offence, the equivalent of sexual assault, the Commission also considers that, bearing in mind that the maximum sentence that can be imposed on conviction on indictment is 14 years, it is also not necessary to provide for any differentiated sentencing provision. Thus, the sentence to be imposed in a specific case will be a matter for the sentencing judge.

4.47 The Commission notes that the fourth offence may be tried either summarily or on indictment. In this context the Commission has concluded that it should remain the case, as is currently the position under section 5(4) of the 1993 Act, that the consent of the Director of Public Prosecutions should be required for any prosecution of the offences recommended in this Report.<sup>81</sup>

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<sup>80</sup> For a discussion of the relevant sentencing principles that apply, see the Commission’s *Report on Mandatory Sentences* (LRC 108-2013), Chapter 1.

<sup>81</sup> The Commission notes that, in *Kelly and Buckley v Ryan* [2013] IEHC 321, the High Court (Hogan J) held that the common law right of a private prosecutor to prosecute an indictable offence remains in place. The Commission understands that, at the time of writing, this decision is under appeal to the Supreme Court.

4.48 *The Commission recommends that the penalties on conviction for the offences recommended in this Report that are to replace section 5 of the Criminal Law (Sexual Offences) Act 1993 should correspond to the penalties for the four comparable sexual offences which they are intended to mirror. The Commission also recommends that it should continue to be the case that the consent of the Director of Public Prosecutions is required for any prosecution of the offences recommended in this Report.*



### A INTRODUCTION

5.01 In the Consultation Paper, the Commission made a number of provisional recommendations aimed at reform of the pre-trial criminal procedure system and the trial process as it affects the offences under consideration in this Report.<sup>1</sup> The Commission also discussed the position of defendants who may require assistance and support to enhance their participation in criminal trials and invited submissions on this issue.<sup>2</sup> In this Chapter, the Commission builds on the analysis in the Consultation Paper and makes final recommendations on this aspect of the law.

5.02 In Part B of this Chapter, the Commission outlines the right under international law of access to justice of persons who do not have capacity to give evidence. In Part C, the barriers facing people who require support and accommodation to give evidence in the early stages of the criminal justice process, namely reporting and investigation of sexual abuse, are discussed. Part D analyses the challenges facing such persons during the trial process and the support measures that are available in Ireland and in other countries to assist witnesses in giving evidence. Finally, in Part E, the position of defendants who may require assistance and support to enhance their participation in the criminal trial process is examined.

### B Reporting and investigation of sexual abuse

5.03 Article 13 of the UNCRPD has particular resonance in the context of this Chapter. It requires states that ratify the Convention to ensure effective access to justice for persons with disabilities on an equal basis with others. This includes through the provision of procedural and age-appropriate accommodations in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. In order to meet this obligation, states are obliged to promote appropriate training for those working in the field of administration of justice, including police and prison staff. In addition, Article 16 of the UNCRPD requires states that ratify the Convention to put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and where appropriate, prosecuted.

5.04 Of further relevance in this regard is Article 6 of the ECHR which guarantees the right of an accused to a fair trial. The effect of these various provisions is that rules of evidence and procedure need to be sufficiently flexible in order to hear the accounts of complainants in a manner which recognises the individual complainant's requirements while at the same time, ensuring that the accused's right to a fair trial is upheld.<sup>3</sup>

5.05 The literature in this area indicates that people with intellectual disability can find themselves confronted by a number of barriers when reporting abuse.<sup>4</sup> In this Part, the Commission discusses these barriers and examines how other countries have attempted to provide support to such persons when they report abuse.

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<sup>1</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 6.34, 6.40 and 6.49.

<sup>2</sup> *Ibid* at paragraph 6.97.

<sup>3</sup> *Ibid* at paragraph 6.38.

<sup>4</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 54-88.

5.06 The absence of data on the incidence of sexual abuse involving people with intellectual disability and the progress of such cases through the criminal justice system means that there are significant gaps in the knowledge of the experiences of people with intellectual disability.<sup>5</sup> This difficulty was recently highlighted in a 2012 study conducted by University College Cork (the 2012 UCC study) which observed that few agencies in the criminal justice system in Ireland appear to be monitoring or keeping records of people with intellectual disability who are victims of abuse.<sup>6</sup> The 2012 UCC study also noted that since there is no systematic recording of cases which come to trial at District and Circuit Court level, it is difficult to identify cases where a person may have had a significant intellectual disability.<sup>7</sup>

**(1) Barriers to reporting abuse**

5.07 As noted in Chapter 1 of this Report, incidences of sexual abuse against people with disabilities are under-reported. The following reasons have been identified for the particularly low rates of reporting of crimes amongst people with disabilities:

- A lack of knowledge amongst people with intellectual disability about how to report a crime and a lack of access to support to assist them to do so<sup>8</sup> - research indicates that without some form of advocacy or individualised support, people with disabilities are often very unlikely to report a crime.<sup>9</sup>
- Fear of the criminal justice system and in particular, the consequences of reporting and of authority - some people with intellectual disability believe that their report will not be taken seriously or that reporting a crime may result in an encroachment on their independence. In some cases, the victim may want to play down the incident for fear of causing more trouble.<sup>10</sup>
- People with intellectual disability often experience difficulties when reporting abuse due to deficits in memory and problems with communication. The evidence indicates that members of An Garda Síochána do not receive adequate training to enable them to identify the nature of a person's intellectual disability and the supports that could facilitate their communication of the facts.<sup>11</sup>
- Victims with intellectual disability can experience uncertainty about whether an incident should be defined and reported as abuse in the first place.<sup>12</sup>

5.08 Studies also indicate that people with disabilities are often more likely to report abuse to a third party than directly to the police, leaving the judgement about whether to engage law enforcement agencies in the hands of carers, service providers and families.<sup>13</sup> The danger of this is that third parties may choose to do nothing. One commentator suggests that one possible reason for the lack of reporting in this context is the perception that "abuse in residential settings or when the perpetrator is close to the victim is looked upon as a private or family matter."<sup>14</sup>

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<sup>5</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 123.

<sup>6</sup> *Ibid* at 122-123.

<sup>7</sup> *Ibid* at 123.

<sup>8</sup> *Ibid* at 56.

<sup>9</sup> *Ibid* at 119.

<sup>10</sup> *Ibid* at 107.

<sup>11</sup> *Ibid* at 107-109.

<sup>12</sup> *Ibid* at 56.

<sup>13</sup> *Ibid* at 56.

<sup>14</sup> Lewin "Who cares about disabled victims of crime? Barriers and facilitators for redress" (2007) 4(3) *Journal of Policy and Practice in Intellectual Disabilities* 170 at 170.

5.09 A study commissioned by Australia's Office of the Public Advocate also found that many institutional crimes against people with intellectual disabilities are not reported due to peer pressure amongst staff not to report, uncertainty amongst staff about what types of incidents should be reported to the police and which should be dealt with internally and concerns from staff that they did not want to put the person with learning disabilities through the stress of dealing with the criminal justice system.<sup>15</sup> Thus, joint working between health and social care providers, disability services and An Garda Síochána may be critical in the identification and reporting of abuse. In Ireland, there are no clear procedures addressing joint working between agencies in this regard (although clients of the HSE are covered by its *Trust In Care* policy which provides the framework for the treatment of allegations of abuse within health and social care services).<sup>16</sup> In England, guidelines for multi-agency working in protecting people with intellectual disability from abuse are set out in *No Secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse*, published by the UK Department of Health and the Home Office in 2000.<sup>17</sup> This document and its Welsh counterpart, *In Safe Hands*,<sup>18</sup> provide for the development of local inter-agency policies, procedures and joint protocols for the purposes of safeguarding adults and establish the local social services authority as the lead agency.

5.10 Finally, as noted in Chapter 1 of this Report, difficulties communicating with police and lawyers<sup>19</sup> and lack of appropriate information about the criminal justice process<sup>20</sup> can constitute barriers to reporting sexual abuse. It has been recognised that early identification of a person's competencies and needs and early appointment of a support person and the provision of information can facilitate the reporting of abuse through to assistance during the trial.<sup>21</sup>

## **(2) Barriers to prosecuting abuse**

5.11 Of the cases of sexual abuse that are reported, a very low proportion are taken to court and prosecuted. This is reflected in the literature which demonstrates how reports of abuse made by people with disabilities are often not listened to or taken seriously by the police.<sup>22</sup>

5.12 A study undertaken by Mencap in the UK estimated that there were approximately 1,400 suspected cases of sexual abuse against people with learning disabilities each year, but only a quarter of these were investigated by the police and less than 1% were prosecuted successfully.<sup>23</sup> In the Consultation Paper, the Commission noted that there is a lack of data on both the incidence and characteristics of sexual assault of people with intellectual disability in Ireland<sup>24</sup> and that this arguably

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<sup>15</sup> Johnson, Andrew and Topp *Silent Victims; a study of people with intellectual disabilities as victims of crime* (Office of the Public Advocate 1988) at 29-30 and 41.

<sup>16</sup> Health Service Executive *Trust In Care Policy for Health Service Employers on Upholding the Dignity and Welfare of Patients/Clients and the Procedure for Managing Allegations of Abuse against Staff Members* (2005).

<sup>17</sup> Department of Health and Home Office (UK) *No Secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* (2000).

<sup>18</sup> National Assembly for Wales *In Safe Hands: Implementing Adult Protection Procedures in Wales* (2000).

<sup>19</sup> Victorian Law Reform Commission *Sexual Offences: Interim Report* (2003) at paragraph 3.29.

<sup>20</sup> *Ibid* at paragraph 3.32.

<sup>21</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 70.

<sup>22</sup> *Ibid* at 58.

<sup>23</sup> Mencap *Barriers to Justice A Mencap study into how the criminal justice system treats people with learning disabilities* (1997).

<sup>24</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.09.

impedes legal and policy development in this area.<sup>25</sup> However, research conducted by the Prosecution Policy Unit of the Office of the Director of Public Prosecutions in Ireland confirmed the low prosecution rate in cases involving complainants with intellectual disability.<sup>26</sup>

5.13 It has been observed that attitudes of police officers may have an important effect in bringing about an effective response when people with intellectual disability are victims of crime and they need to access the criminal justice system.<sup>27</sup> Negative police perceptions about people with disabilities, not least regarding their capacity to be reliable witnesses, have been shown to be key in understanding how incidents of abuse are subsequently dealt with.<sup>28</sup> Studies suggest that police officers often endorse general stereotypes about people with intellectual disabilities being vulnerable and lacking the capacity to be competent witnesses.<sup>29</sup> There is a widely held perception amongst police that people with disabilities lack the capacity to be credible reporters of crime and therefore, poor witnesses.<sup>30</sup> For example, an Australian study reported that police officers had difficulty in identifying when a sexual assault complainant had an intellectual disability and were confused about how to respond.<sup>31</sup> Many of the officers interviewed for the study repeated social stereotypes portraying women with intellectual disability as highly sexualised and lacking credibility. It has been contended that the attitudes of the police towards credibility, honesty, tendency to crime and sexuality of people with intellectual disability may be particularly influential in their assessment of information provided by a person with intellectual disability, the decision to investigate further and the extent of any subsequent investigation.<sup>32</sup> Research has revealed that although people with intellectual disability may have difficulties with memory and communication and may be prone to suggestibility, few experience difficulties with all three and alternative questioning approaches have been shown to elicit more accurate information.<sup>33</sup> Thus, police need to appreciate different ways in which people with intellectual disability communicate.

5.14 In addition, awareness of and the ability to distinguish between, intellectual disability and mental illness varies, which in turn shapes police practices.<sup>34</sup> A failure to recognise a victim's intellectual disability and therefore, their rights and requirements, has serious ramifications for the equitable treatment of people with disabilities by the criminal justice system.<sup>35</sup> A study conducted on special

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<sup>25</sup> A similar observation was made by the Victorian Law Reform Commission (Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) at paragraph 6.62). The Victorian Commission recommended that a working group be convened by the Department of Justice in Victoria to establish an integrated process for the collection of statistics relating to sexual offences and that cognitive impairment be a particular focus of this endeavour. It recommended that the working group would comprise representatives from the Victoria Police, the Office of the Director of Public Prosecutions, the courts and other relevant stakeholders (Victorian Law Reform Commission *Sexual Offences: Final Report* (2004), recommendations 4 and 168).

<sup>26</sup> The results of this research are set out in the Consultation Paper (LRC CP 63-2011) at paragraphs 6.09-6.11.

<sup>27</sup> Bailey, Barr and Bunting "Police attitudes toward people with intellectual disability: an evaluation of awareness training" (2001) 45(4) *Journal of Intellectual Disability Research* 344 at 346.

<sup>28</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 60.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* at 61.

<sup>31</sup> Keilty and Connelly "Making a Statement: An exploratory study of barriers facing women with an intellectual disability when making a statement about sexual assault to police" (2001) 16 *Disability and Society* 273.

<sup>32</sup> Bailey, Barr and Bunting "Police attitudes toward people with intellectual disability: an evaluation of awareness training" (2001) 45(4) *Journal of Intellectual Disability Research* 344 at 345.

<sup>33</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 61.

<sup>34</sup> *Ibid* at 60.

<sup>35</sup> *Ibid* at 61.



measures introduced in the UK for vulnerable and intimidated witnesses noted that police often experienced difficulty in the early identification of vulnerable witnesses, with some people not being identified as requiring special measures until they reached court, by which point it was too late to put any intervention in place.<sup>36</sup> This finding reinforces the importance of communication between different agencies in the criminal justice system and engagement between the police and the Courts Service, victim support organisations and health and social care agencies who may be working with the individual.<sup>37</sup>

5.15 A study in the UK suggested that training for police on the use of intermediaries and other special measures may help to improve the uptake and utilisation of these provisions in appropriate instances.<sup>38</sup> Having regard to the perception that people with intellectual disability would not be reliable witnesses, it was suggested that awareness training related to cases involving victims and witnesses whose capacity is in question be considered. Training in relation to communication with these groups of court users and support measures available to them was also suggested.<sup>39</sup>

5.16 At present, members of An Garda Síochána receive training in relation to engaging with people with mental ill-health as part of their overall training in the Garda College which includes input from external experts.<sup>40</sup> Delahunt has observed that Gardaí are now more specifically trained than senior legal practitioners in the techniques of interviewing persons with intellectual disability.<sup>41</sup> Despite this, there are reports of the use of inappropriate interviewing techniques by Gardaí who do not have the requisite level of understanding of the complainant's intellectual disability.<sup>42</sup> There is a lack of standardisation in practice amongst Gardaí when dealing with persons with intellectual disability. It appears that while many Gardaí are now trained in specialist interviewing techniques, it is not always clear whether the trained officer will be the one who deals with the person with intellectual disability who reports abuse, or whether there will always be someone available who is trained to communicate with such persons.<sup>43</sup> The 2012 UCC study demonstrated that it is sometimes officers who deal with the abuse of children who also deal with victims with intellectual disability, reinforcing the infantilisation of people with intellectual disability.<sup>44</sup>

5.17 Structural barriers have also been identified as contributing to the low prosecution rate of sexual offences against people with intellectual disability.<sup>45</sup> In this regard, early disclosure of a victim's intellectual disability is vital in order for the judiciary to be able to make judgements about the need for special measures and decide whether and how to tailor communication.<sup>46</sup> International studies have shown that communication and joint working between agencies in this regard is often lacking. For

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<sup>36</sup> Burton, Evans and Sanders *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* (UK Home Office 2006) at vi and vii.

<sup>37</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 61.

<sup>38</sup> McLeod, Philpin, Sweeting, Joyce and Evans *Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity Report 2: Before Court* (Ministry of Justice 2010) at 48.

<sup>39</sup> *Ibid* at 42.

<sup>40</sup> Mental Health Commission and An Garda Síochána *Report of the Joint Working Group on Mental Health Services and the Police* (2009) at 6.

<sup>41</sup> Delahunt "Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992" (2011) 16(1) *The Bar Review* 2 at 5, fn 32.

<sup>42</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 108.

<sup>43</sup> *Ibid* at 107.

<sup>44</sup> *Ibid* at 125.

<sup>45</sup> *Ibid* at 124.

<sup>46</sup> McLeod, Philpin, Sweeting, Joyce and Evans *Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity Report 3: At Court* (Ministry of Justice 2010) at 28.

example, a UK study revealed failures of the police to communicate a victim's impairment and their need for special measures to court service personnel.<sup>47</sup> In Ireland, the *Garda Síochána Policy on the investigation of sexual crime against children* states that members responding to incidents of sexual crime involving persons with a disability (including intellectual disability) should be mindful of this additional sensitivity and should be conscious that the incident may require interagency intervention (for example, between the HSE and specific NGOs).<sup>48</sup> However, there are no clear guidelines regarding the procedure for reporting and investigation of sexual abuse concerning people with intellectual disability and inter-agency co-operation between criminal justice agencies such as An Garda Síochána, the Office of the Director of Public Prosecutions and the Courts Service, and health, social care and disability services.

### **(3) Developments in other jurisdictions**

5.18 Having regard to the difficulties faced by persons who require support and accommodation to report sexual abuse, including the attitudes of the police, there have been a number of developments in other countries which attempt to provide support to such persons when they report abuse. In order to address the negative perceptions of law enforcement agencies towards people with intellectual disability regarding their capacity to act as reliable witnesses, some countries have developed disability awareness programmes. Disability awareness training has been shown to lead to a positive shift in attitudes towards people with intellectual disability.<sup>49</sup> For example, in New South Wales, a project has been developed through research involving police officers to improve the communication of police with people with learning disabilities. The outcome of the project, entitled "Cleartalk" was a set of modules to be used in training police how to communicate more effectively with people with intellectual disabilities.<sup>50</sup>

5.19 Most support measures relate to the court process and are dealt with below in Part D of this Chapter. However, one of the first interventions that police can be required to make is to engage an intermediary or a supporter where they feel the victim requires it. Such persons can assist in communication between the witness and the police at the investigation stage. In England and Wales, the *Intermediary Procedural Guidance Manual* sets out the procedure for the pre-trial appointment of an intermediary. When it has been decided that a witness requires the assistance of an intermediary, the police, defence solicitor or Crown Prosecution Service may contact the Intermediary Register in order to match the witness to an intermediary. When an intermediary is required to assist a witness during pre-trial preparation, this should be the person who is proposed to be the intermediary at trial under section 29 of the English *Youth Justice and Criminal Evidence Act 1999*.<sup>51</sup>

5.20 The Appropriate Adult Scheme in Scotland is being increasingly used in the justice system (although the scheme does not have a statutory footing) and is offered to witnesses, victims and accused persons who are described as "mentally disordered."<sup>52</sup> Appropriate Adults facilitate communication between a mentally disordered person and the police. A study of court users in England noted that victims with learning disabilities and mental illness found themselves less anxious and intimidated when a familiar

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<sup>47</sup> Burton, Evans and Sanders *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* (UK Home Office 2006) at 38-39. See also McLeod, Philpin, Sweeting, Joyce and Evans *Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity Report 3: At Court* (Ministry of Justice 2010) at 24. See also Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 75.

<sup>48</sup> An Garda Síochána *Garda Síochána Policy on the investigation of sexual crime against children* (2010) at 31.

<sup>49</sup> Bailey, Barr and Bunting "Police attitudes toward people with intellectual disability: an evaluation of awareness training" (2001) 45(4) *Journal of Intellectual Disability Research* 344.

<sup>50</sup> Brennan and Brennan *Cleartalk: police responding to intellectual disability* (New South Wales: Charles Sturt University 1994) available at <http://www.criminologyresearchcouncil.gov.au/reports/25-92-3.pdf>.

<sup>51</sup> Office for Criminal Justice Reform *Intermediary Procedural Guidance Manual* (2005), Section 3 at paragraph 17.

<sup>52</sup> See <http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult>.

person was with them when they reported a crime.<sup>53</sup> It also enabled police to flag their vulnerability and need for support at an early stage.

5.21 Similar measures have been adopted in Australia. For example, in Victoria, the Independent Third Person programme is a service provided to people with a cognitive disability or mental illness during interviews with the police.<sup>54</sup> In New South Wales, people with disabilities are categorised as “vulnerable persons” under the *Law Enforcement Powers and Responsibilities Regulation 2005* and have the right to a support person when being interviewed by the police, whether they are a victim or an offender. The support person can be “a carer, case worker, legal representative, guardian or... interpreter.”<sup>55</sup>

#### **(4) Concluding comments and final recommendations**

5.22 The barriers faced by people who require support and accommodation to report sexual abuse can mean that they often fail to report such abuse. When such abuse is reported, negative perceptions of their capacity to act as witnesses often operate to hamper the successful prosecution of the abuse. The Commission agrees with the view expressed by the authors of the 2012 UCC study that support should be available for people with disabilities throughout the criminal justice process from the point of reporting the crime.<sup>56</sup> The Commission is of the view that the Irish criminal justice system does not contain adequate support to facilitate the reporting and successful prosecution of sexual abuse against people with intellectual disability. Since An Garda Síochána are the gateway to the criminal justice system, the Commission considers that the provision of disability awareness training to Gardaí is crucial to changing stereotypical attitudes and identifying appropriate responses to victims of sexual abuse with intellectual disability.<sup>57</sup>

5.23 Article 13(2) of the UNCRPD requires states that ratify the Convention to promote appropriate training for those working in the administration of justice in order to ensure effective access to justice for persons with disabilities. Although, as noted above, members of An Garda Síochána receive some training in this regard, it appears to be limited to dealing with people with mental ill-health as opposed to people with intellectual disability generally. The Commission is of the view that further guidance and training should be provided to the Gardaí in relation to early identification of intellectual disability and the availability of support measures. Disability awareness training could be provided by disability organisations such as the National Disability Authority and would assist members of the Garda Síochána to identify complainants with intellectual disability early in the criminal justice process and recognise when appropriate supports need to be put in place, such as having a support person present during the initial interview. The Commission therefore recommends the provision of disability awareness training to members of An Garda Síochána by the National Disability Authority. The training should include guidance regarding identification of intellectual disability and the availability of support measures during the reporting and investigative stages of the criminal justice system and during the criminal trial process.

*5.24 The Commission recommends the provision of disability awareness training to members of An Garda Síochána by the National Disability Authority. The training should include guidance regarding identification of persons who may require support and accommodation to report abuse and the availability of support measures during the reporting and investigative stages of the criminal justice system and during the criminal trial process. The Commission also recommends that provision should be made for the presence of a support person during police interviews to assist people who require support and accommodation to report abuse.*

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<sup>53</sup> McLeod, Philpin, Sweeting, Joyce and Evans *Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity Report 2: Before Court* (Ministry of Justice 2010) at 6.

<sup>54</sup> See <http://www.publicadvocate.vic.gov.au/services/108/>.

<sup>55</sup> See [http://www.police.nsw.gov.au/community\\_issues/disabilities](http://www.police.nsw.gov.au/community_issues/disabilities).

<sup>56</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 9.

<sup>57</sup> *Ibid* at 67.

5.25 Given that people with intellectual disability are often more likely to report abuse to a third party rather than directly to An Garda Síochána, joint working between health and social care providers and An Garda Síochána may be critical in the identification and reporting of abuse. An inter-agency approach which fosters joint working would facilitate reporting of abuse and ensure that on-going support is provided to the complainant as they move through the criminal justice system. In addition, such an approach would contribute to the early identification of a court user's needs and catalyse subsequent provision of support throughout the court case.<sup>58</sup> The Commission therefore recommends that the national standards recommended by the Commission at paragraph 1.54 of this Report should also include the development of an inter-agency procedure between An Garda Síochána and other criminal justice agencies, health, social care and disability services, and the Courts Service and the DPP, to respond to reports of, and to investigate, abuse or exploitation against adults who require support and accommodation and to ensure early identification of a witness' needs and the provision of appropriate special measures.

5.26 *The Commission recommends that the national standards recommended by the Commission at paragraph 1.52 of this Report should also include the development of an inter-agency procedure between An Garda Síochána and other criminal justice agencies and health, social care and disability services to respond to reports of, and to investigate, abuse or exploitation against adults who require support and accommodation and to ensure early identification of a witness' needs and the provision of appropriate special measures.*

5.27 Having regard to the lack of knowledge amongst people who require support and accommodation about reporting abuse, the criminal justice system generally and their right to support measures, the Commission recommends that the national standards should also cover the delivery of information and education to such persons regarding the criminal justice system. The provision of education is also consistent with the objective of empowering people who require practicable assisted decision-making support and accommodation. Education programmes should include information about how to report abuse, how the criminal justice system works, how to access it, what happens at different stages of the criminal justice procedure, the rights of victims of sexual abuse and how to access support.<sup>59</sup>

5.28 *The Commission recommends that the national standards recommended by the Commission at paragraph 1.52 of this Report should also cover the delivery of information and education to persons who require practicable assisted decision-making support and accommodation to access the criminal justice system. Education programmes should include information about how to report abuse, how the criminal justice system works, how to access it, what happens at different stages of the criminal justice procedure, the rights of victims of sexual abuse and how to access support.*

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<sup>58</sup> McLeod, Philpin, Sweeting, Joyce and Evans *Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity Report 1: overview and recommendations* (Ministry of Justice 2010) at iii.

<sup>59</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 116 and 137.

## **C The criminal trial process**

### **(1) Introduction**

5.29 The criminal trial process and evidentiary rules are not currently designed to facilitate people who require decision-making support to give evidence. The requirements of repeated testimony under oath and the ability to be cross-examined are not always well-suited to the particular needs and capacities of people who require such supports.<sup>60</sup> In this Part, some of the main issues facing adults who may require extra supports during the criminal trial process are examined. The Commission discusses how challenges facing complainants who require support to give evidence, such as their competency as reliable witnesses and credibility to give evidence, have tended to create difficulties for securing convictions in sexual offence cases. An overview of support measures currently available in Ireland are then discussed, followed by an analysis of developments in England, Wales and Northern Ireland. The Commission then examines more closely particular types of special measures and in that context, considers whether existing safeguards in the criminal justice process are sufficient to protect complainants from unnecessary distress while giving evidence and whether additional safeguards should be introduced.

### **(2) Challenges facing people who require and accommodation in the criminal trial process**

5.30 As a result of the challenges such as deficits in memory and problems with communication,<sup>61</sup> court users with mental ill-health and intellectual disability often experience particular difficulties when giving evidence in court, with the result that their competency as reliable witnesses can be called into question.<sup>62</sup> In addition, since the criminal trial process was not designed to facilitate the testimony of persons with intellectual disability, an inability to operate within the confines and withstand the rigours of the traditional trial process can result in a finding of diminished credibility as regards the testimony of persons with intellectual disability.<sup>63</sup>

5.31 Attitudinal barriers also contribute to the marginalisation of people with intellectual disability in the criminal justice system. The judiciary and legal practitioners are often unaware of the capabilities and capacity of people with intellectual disability and often make unfavourable judgements regarding their reliability as witnesses.<sup>64</sup> As a result, convictions in cases involving complainants with intellectual disability become more difficult to secure. Further difficulties arise in cases involving sexual violence where a complainant's prior sexual history may be introduced by the defence and the complainant is subjected to rigorous cross-examination.<sup>65</sup> In addition, a study conducted in England and Wales indicated that many court users with intellectual disability and mental ill-health found that legal terminology impeded their understanding of the court process but that difficulties with understanding were reduced where legal representatives were aware of their particular mental health issue or intellectual disability and where special measures were available to them when giving evidence in court.<sup>66</sup>

5.32 Having regard to these challenges, the Commission is of the view that the criminal trial process requires modification in order to empower people who may require support and accommodation to give

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<sup>60</sup> Benedet and Grant "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill LJ 515 at 515.

<sup>61</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.04.

<sup>62</sup> *Ibid* at paragraph 6.15.

<sup>63</sup> Benedet and Grant "Hearing the sexual assault complaints of women with mental disabilities: evidentiary and procedural issues (2007) 52 McGill LJ 515 at 524 and 543.

<sup>64</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 127.

<sup>65</sup> *Ibid* at 127.

<sup>66</sup> McLeod *et al.* *Court experience of adults with mental health conditions, learning disabilities and limited mental capacity* (Ministry of Justice 2010). See also Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.15.

evidence and facilitate them in delivering their testimony. However, the Commission is of the view that while it may be necessary to make reasonable accommodation in the criminal trial process for such people, this should not infer a lack of capacity to give evidence.<sup>67</sup> Concerns about the reliability and credibility of evidence should be viewed as part of the overall objective in advocating a functional, situational assessment of capacity.

### **(3) Overview of support measures in Ireland**

5.33 In Ireland, a series of measures have been enacted to provide support specifically to victims of sexual crimes. For example, a complainant has a right to be accompanied to court.<sup>68</sup> Legal aid is also available for victims of the most serious sexual offences.<sup>69</sup> In addition, victims of sexual offences have a right of separate legal representation in respect of applications to introduce evidence relating to their previous sexual history.<sup>70</sup>

5.34 The publication of the *Victims Charter* by the Department of Justice, Equality and Law Reform in 1999 and the establishment of the Commission for the Support of Victims of Crime marked important policy developments for crime victims in Ireland.<sup>71</sup> A review of the Charter was undertaken in 2005 by the Commission for the Support of Victims of Crime, and in 2010 a revised *Victims Charter and Guide to the Criminal Justice System* was produced.<sup>72</sup> However, it is not yet known whether people with intellectual disability have derived any benefit from these developments.<sup>73</sup> There is only one reference to victims with disabilities in the Charter. In the Garda section, it is stated that if a victim has any form of disability, their special needs or requirements will be taken into account.<sup>74</sup> This provision may be contrasted with the specific provision for enhanced service for vulnerable victims *The Code of Practice for Victims of Crime* in England and Wales, which has legal authority. The definition of a “vulnerable victim” includes a victim who suffers from a mental disorder or otherwise has a significant impairment of intelligence and social functioning.<sup>75</sup>

**5.35** Part III of the *Criminal Evidence Act 1992* introduced a series of measures designed to assist witnesses in the context of trials for sexual and violent offences. The 1992 Act was introduced following the recommendations of the Commission in its *Report on Child Sexual Abuse*<sup>76</sup> and *Report on Sexual Offences against the Mentally Handicapped*.<sup>77</sup> Under section 13(1) of the 1992 Act, the court may allow a person with a “mental handicap” (other than the accused) to give evidence through a live television link. According to section 13(3), while evidence is being given through a live television link pursuant to section 13(1) (except through an intermediary), neither the judge, nor the barrister or solicitor concerned in the

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<sup>67</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.38.

<sup>68</sup> Section 6 of the *Criminal Law (Rape) Act 1981* as inserted by section 11 of the *Criminal Law (Rape) (Amendment) Act 1990*.

<sup>69</sup> Section 26(3)(b) of the *Civil Legal Aid Act 1995*.

<sup>70</sup> Section 34 of the *Sex Offenders Act 2001*.

<sup>71</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 45.

<sup>72</sup> Department of Justice and Law Reform *Victim's Charter and Guide to the Criminal Justice System* (2010).

<sup>73</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 45.

<sup>74</sup> Department of Justice and Law Reform *Victim's Charter and Guide to the Criminal Justice System* (2010) at 17.

<sup>75</sup> Office for Criminal Justice Reform *The Code of Practice for Victims of Crime* (2005) at 4.

<sup>76</sup> Law Reform Commission *Report on Child Sexual Abuse* (LRC 32-1990).

<sup>77</sup> Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990).

examination of the witness, shall wear a wig or gown.<sup>78</sup> Section 14 provides that the court may order that questions be put to a witness through an intermediary, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require it. These measures apply to children under 18<sup>79</sup> and persons with a “mental handicap” who do not meet the age requirement.<sup>80</sup> The 1992 Act also provided for the abolition of the need for the testimony to be given on oath or by affirmation as long as the witness is capable of giving an intelligible account<sup>81</sup> and the elimination of mandatory corroboration of the witness’ testimony.<sup>82</sup>

5.36 Section 16(1)(b) of the *Criminal Evidence Act 1992*,<sup>83</sup> which did not come into force until 2008,<sup>84</sup> allows for the admission of a video recorded statement to be taken close in time to the alleged sexual offence, provided the witness is available at trial for cross-examination. It only applies to those in respect of whom such an offence is alleged to have been committed and is therefore confined to complainants. There is a legislative presumption that the video recording “shall” be admitted unless the court is of the opinion that it would be contrary to the interests of justice to do so or that it would result in unfairness to the accused. Section 16(1)(b) of the 1992 Act was applied for the first time in 2010 in *The People (DPP) v XY*.<sup>85</sup> Section 16(2) provides that the admission of the pre-recorded statement must not risk any unfairness to the accused and should be in the interests of justice. Section 16(3) requires that in estimating the weight, if any, to be attached to any statement contained in a video- recording, regard must be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise. Section 15 of the 1992 Act allows for the accused to view the video prior to the hearing.

5.37 There is very little data in the Irish context about how people who require support and accommodation to give evidence experience these special measures and whether they lead to a more “just” outcome. The 2012 UCC study proposed that an in-depth investigation of the special measures set out in the 1992 Act be conducted in order to assess to what extent they are working (or not) for people with disabilities.<sup>86</sup> Despite the existence of special measures under the 1992 Act, the 2012 UCC study emphasised the need to ensure a systemised and individualised form of support at all stages of the criminal justice process for people with disabilities.<sup>87</sup>

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<sup>78</sup> If a person with a mental disorder is giving evidence via a television link in respect of a victim impact statement, the same rule applies (section 5 of the *Criminal Procedure Act 2010*).

<sup>79</sup> Section 257 of the *Children Act 2001* raised the qualifying age from 17 to 18 in the appropriate sections of Part III of the *Criminal Evidence Act 1992*.

<sup>80</sup> Section 19 of the *Criminal Evidence Act 1992*. While section 5 of the *Criminal Law (Sexual Offences) Act 1993* applies to persons with a “mental impairment” which is defined as a “disorder of the mind, whether through mental handicap or mental illness”, the 1992 Act refers only to “mental handicap.” This suggests that the 1992 Act only applies to persons with an intellectual disability and does not extend to persons with a mental illness.

<sup>81</sup> Section 27 of the *Criminal Evidence Act 1992*.

<sup>82</sup> Section 28 of the *Criminal Evidence Act 1992*. Section 7 of the *Criminal Law (Rape) (Amendment) Act 1990* gives the trial judge discretion to decide, in light of the evidence, if a warning is required. A corroboration warning should now only be given to the jury if there is an evidential basis for believing that the complainant’s testimony is unreliable.

<sup>83</sup> Section 16(1) of the *Criminal Evidence Act 1992* was amended by section 20 of the *Criminal Justice Act 1999*.

<sup>84</sup> The reasons for the delay are explained in Delahunt “Video Evidence and s. 16(1)(b) of the Criminal Evidence Act 1992” (2011) 16(1) *The Bar Review* 2 at 2.

<sup>85</sup> Central Criminal Court, 15 November 2010, *The Irish Times*, 16 November 2010. See the discussion of the case at paragraphs 1.18, 2.55 and 4.07, above. See also “Improved measures needed for vulnerable witnesses in court” *The Irish Times* 7 December 2010.

<sup>86</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 7.

<sup>87</sup> *Ibid* at 8.

#### **(4) Overview of developments in England, Wales and Northern Ireland**

5.38 The English *Youth Justice and Criminal Evidence Act 1999* contains a range of special measures which can be ordered by a court and are designed to assist vulnerable and intimidated witnesses.<sup>88</sup> The 1999 Act implemented some of the recommendations made in 1998 by the UK Home Office in its report, *Speaking up for Justice*. The eligibility provisions set out in section 16 of the 1999 Act state that a witness in criminal proceedings (other than the accused) is eligible for assistance if the court considers that the quality of their evidence is likely to be diminished by reason of a mental disorder<sup>89</sup> or a significant impairment of intelligence and social functioning.<sup>90</sup> In determining whether a witness requires assistance, the court is obliged to consider any views expressed by the witness. “Quality” encompasses completeness, coherence and accuracy.<sup>91</sup> A complainant in respect of a sexual offence is eligible for assistance under section 17(4) of the 1999 Act.

5.39 Under section 19 of the 1999 Act, a party to the proceedings may make an application for the court to give a special measures direction in relation to a witness (other than the accused) or the court may, of its own motion, raise the issue.<sup>92</sup> Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17 of the 1999 Act, the court is obliged to determine whether any, and if so which, of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness, and give a direction in that regard. In determining the content of the special measures direction, the court must consider all the circumstances of the case, including any views expressed by the witness and whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings. Section 32 of the 1999 Act provides that where, in a trial on indictment, evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

5.40 The special measures available to eligible witnesses under the 1999 Act include:

- screens, to shield the witness from the accused (section 23);
- giving evidence by live-link (section 24);<sup>93</sup>
- evidence given in private (section 25);
- removal of wigs and gowns (section 26);
- video-recorded evidence in chief (section 27);<sup>94</sup>

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<sup>88</sup> The provisions of the *Youth Justice and Criminal Evidence Act 1999* in England and Wales were replicated in the *Criminal Evidence (Northern Ireland) Order 1999*.

<sup>89</sup> Section 16(2)(a)(i) of the *Youth Justice and Criminal Evidence Act 1999* states that “mental disorder” is defined in accordance with the *Mental Health Act 1983*, namely “any disorder or disability of the mind.”

<sup>90</sup> Section 16(1)(b) and (2) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>91</sup> Section 16(5) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>92</sup> The English *Criminal Procedure Rules 2011*, which came into force in England and Wales in 2011, affect procedures used in magistrates’ courts, the Crown Court, the Court of Appeal and the Criminal Division. The 2011 Rules consolidated, with amendments, the *Criminal Procedure Rules 2010*, as amended by the *Criminal Procedure (Amendment) Rules 2010* and the *Criminal Procedure (Amendment No 2) Rules 2010*. The 2011 Rules amended the time limits for making applications, and giving notices in connection with, special measures for vulnerable witnesses. The time limits in rule 29.3 in making an application for a direction or order for special measures to assist a witness or defendant to give evidence were also extended.

<sup>93</sup> When the court makes a direction for the use of a live link under section 24 of the 1999 Act, it can now also direct that a person specified by the court, essentially a support person, can accompany the witness when they are giving evidence by live link (section 24 of the *Youth Justice and Criminal Evidence Act 1999* as amended by section 102 of the *Coroners and Justice Act 2009*).



- video-recorded cross-examination or re-examination (section 28);
- examination of witness through an intermediary for vulnerable witnesses (section 29); and
- aids to communication (section 30).

5.41 Also, section 53 of the 1999 Act enables the witness to receive assistance from an intermediary in explaining questions and communicating answers “so far as is necessary to enable them to be understood by the witness or person in question.”<sup>95</sup>

5.42 The validity of special measures was examined by the UK House of Lords in 2005 in *R v Camberwell Green Youth Court*.<sup>96</sup> The court stated that it was difficult to see anything in the 1999 Act which was inconsistent with the principles of Article 6 of the ECHR. In the case before the court, all of the evidence had been produced at the trial in the presence of the accused, some of it in pre-recorded form and some of it by contemporaneous television transmission. The accused could see and hear all of the evidence and had every opportunity to challenge and question the witness against him at the trial itself. The court confirmed that the ECHR does not guarantee a right to face to face confrontation.<sup>97</sup>

5.43 In 2006, the UK Home Office published a report which examined whether special measures were working and contained the results of evaluative research from criminal justice agencies in England and Wales.<sup>98</sup> The 2006 Report revealed that video-recorded evidence and the live television link were highly regarded by practitioners and vulnerable witnesses who used them. Some practitioners had reservations about televised evidence because they thought it was less convincing than “live” evidence. However, the Report stated that there was no evidence to indicate that acquittals are more likely using these methods.<sup>99</sup> In addition, it was reported that while prosecutors were aware of the argument that pre-recorded evidence had less impact than live evidence, none claimed that it led to a lower conviction rate.<sup>100</sup> The 2006 Report also cited studies which indicate that the medium of presentation of evidence has no overall impact on the proportion of guilty verdicts.<sup>101</sup> However, the 2006 Report observed that one of the largest groups that still fall through the net are mentally disordered and learning disabled witnesses and that they could benefit significantly from pre-recorded cross-examination, which is yet to be implemented.<sup>102</sup>

5.44 A study conducted in 2010 on behalf of the UK Ministry of Justice provided an in-depth exploration of the court experience of adults with mental health conditions, learning disabilities and limited

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<sup>94</sup> Under section 22A of the 1999 Act, the court is now required to admit the complainant’s video-recorded statement, when an application to have it admitted is made under section 27 of the 1999 Act, unless that requirement would not maximise the quality of the complainant’s evidence. Section 22A was inserted by section 101 of the *Coroners and Justice Act 2009*. The restrictions in section 27 of the 1999 Act on a witness giving additional evidence-in-chief after the witness’ video-recorded statement have also been relaxed (section 27 of the *Youth Justice and Criminal Evidence Act 1999* as amended by section 103 of the *Coroners and Justice Act 2009*).

<sup>95</sup> Section 29(2) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>96</sup> *R v Camberwell Green Youth Court* [2005] HRLR 9.

<sup>97</sup> *Ibid* at paragraph 49.

<sup>98</sup> Burton, Evans and Sanders *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* (UK Home Office 2006).

<sup>99</sup> *Ibid* at vii.

<sup>100</sup> *Ibid* at 55.

<sup>101</sup> See Davies “The impact of television on the presentation and reception of children’s testimony” (1999) 22 *International Journal of Law and Psychiatry* 241.

<sup>102</sup> Burton, Evans and Sanders *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* (UK Home Office 2006) at 43.

mental capacity.<sup>103</sup> The results of the study indicated that special measures have substantially improved the experience of court users with mental health conditions, learning disabilities and limited mental capacity,<sup>104</sup> but it made a number of recommendations to enhance the effectiveness of special measures. It was noted that strong multi-agency working facilitated provision of special measures but was thwarted by poor provision in certain courts and resistance to their use among some members of the judiciary and barristers.<sup>105</sup> The results indicated that where court users' needs were identified to judges or an intermediary was present, judges adapted communication in the courtroom. A failure to adapt communication methods affected court users' comprehension and acceptance of case outcomes. It was noted in this regard that judges' limited awareness of communication strategies could be improved through training to raise awareness and improve their capabilities in accommodating needs in the courtroom.<sup>106</sup> It was also recommended that the role of intermediaries should be better promoted among legal representatives and the judiciary.<sup>107</sup> The study also stated that a higher level of awareness is needed among court staff and legal representatives of the different agencies available to support court users' needs. It was suggested that regular meetings between courts, the police and support organisations (such as those held at the Central Criminal Court) could improve the level of support provided for court users and encourage better co-ordination between services.<sup>108</sup>

5.45 Having broadly outlined the assistance currently afforded to people with intellectual disability in Ireland under Part III of the *Criminal Evidence Act 1992* and developments in England, Wales and Northern Ireland, the Commission now turns to consider particular forms of assistance with a view to determining whether any improvements could be made to the Irish criminal trial process to better facilitate people who may require support and accommodation to give evidence.

#### **(5) Pre-trial cross-examination and re-examination**

5.46 The aim of pre-trial recording of examination-in-chief is to allow evidence to be taken close in time to the alleged incident which allows greater detail to be recorded and minimises trauma for witnesses during the trial process. Arguably however, the beneficial effects of pre-trial recording of examination-in-chief are undermined by the requirement in section 16(1)(b) of the *Criminal Evidence Act 1992* that the witness must be available in court for cross-examination. In this regard, Delahunt has observed that where a number of years have passed, the difficulties for a witness with an intellectual disability or a child witness, in remembering and relaying details of what is likely to have been a traumatic event, are not assisted by splitting their testimony in two and requiring the witness to be available for cross-examination after the expiry of such a lengthy period of time.<sup>109</sup>

5.47 Thus, in the Consultation Paper, the Commission suggested that it might be desirable to allow cross-examination of the complainant at the same time as the giving of evidence-in-chief and noted that pre-recording of cross-examination could limit the distress associated with the experience.<sup>110</sup> The Commission accordingly invited submissions on whether the *Criminal Evidence Act 1992* should be

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<sup>103</sup> McLeod, Philpin, Sweeting, Joyce and Evans *Court experience of adults with mental health conditions, learning disabilities and limited mental capacity* (Ministry of Justice 2010).

<sup>104</sup> *Ibid* at i.

<sup>105</sup> *Ibid* at iv.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* at 42.

<sup>108</sup> *Ibid* at 44.

<sup>109</sup> Delahunt "Video Evidence and s. 16(1)(b) of the Criminal Evidence Act 1992" (2011) 16(1) *The Bar Review* 2 at 5. See also Delahunt "Improved measures needed for vulnerable witnesses in court" *Irish Times* 7 December 2010.

<sup>110</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.30.

amended to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act for special measures in the criminal trial process.<sup>111</sup>

5.48 Submissions received by the Commission in response to the Consultation Paper which addressed this point were generally supportive of introducing pre-trial recording of cross-examination. It was felt that pre-trial cross-examination would minimise pre-trial delays and additional stress and that a person with intellectual disability should be afforded the right to request or refuse having their entire evidence video-recorded. Concerns were expressed however, regarding the defendant's right to a fair trial and practical and procedural problems in carrying out cross-examination prior to a trial. Another concern was raised that full pre-trial recording of evidence may in fact be detrimental to securing convictions as it is often considered that the complainant makes more of an impression on jurors when he or she appears in person.<sup>112</sup> The Commission now turns to consider in greater detail, the arguments in favour of and against the introduction of full pre-recording of evidence.

**(a) Comparative analysis**

**(i) England, Wales and Northern Ireland**

5.49 The taking of pre-trial depositions was suggested in 1989 by the UK Home Office in the Report of the Advisory Group on Video Evidence (also known as "The Pigot Report").<sup>113</sup> The UK *Criminal Justice Act 1991* incorporated the proposals of the Pigot Report but only in relation to examination-in-chief evidence. The law has been updated since then however, and the *Youth Justice and Criminal Evidence Act 1999* now provides for video-recorded examination-in-chief and cross-examination. Section 28 of the 1999 Act permits a witness' cross-examination and re-examination to be recorded at a pre-trial hearing for screening at the trial. At the time of writing, section 28 has not been commenced, however, and there are as yet no regulations or practice directions for the use of pre-recording. The legislation envisages that it would take place under conditions virtually identical to a normal trial, although without a jury. The recording must be made in the absence of the defendant but in circumstances where he can see and hear the witness being examined and communicate with his legal representative.<sup>114</sup> Section 28 provides that the judge and legal representatives acting in the proceedings must be able to see and hear the examination of the witness. The court may direct that the video recorded cross-examination is not to be admitted as evidence if any of these requirements or any rules of court have not been complied with.<sup>115</sup> Once the witness has been cross-examined, they may not be called back for further cross-examination without leave of the court.<sup>116</sup> Leave may be granted only if a new matter has arisen which the party seeking further cross-examination could not have discovered with reasonable diligence before the original recording, or if for some other reason the proposed cross-examination is in the interests of justice.<sup>117</sup>

5.50 The implementation of section 28 of the 1999 Act to allow pre-recording has been widely opposed<sup>118</sup> and in 2004, the UK government announced that it would not implement the section.<sup>119</sup>

<sup>111</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.34.

<sup>112</sup> There is a feeling that "juries prefer theatre to film" (Stern *The Stern Review: Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales* (Government Equalities Office and Home Office 2010) at 16).

<sup>113</sup> UK Home Office *Report of the Advisory Group on Video Evidence* (1989).

<sup>114</sup> Section 28(2) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>115</sup> Section 28(4) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>116</sup> Section 28(5) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>117</sup> Section 28(6) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>118</sup> Henderson, Hanna, Davies "Pre-recording Children's Evidence: The Western Australian Experience" [2012] Crim LR 3 at 4.

<sup>119</sup> This decision appears to have been influenced by the 2003 Birch Report commissioned by the Home Office, which concluded that pre-recording was unnecessary: see Henderson, Hanna, Davies "Pre-recording Children's Evidence: The Western Australian Experience" (2012) 1 Crim LR 3 at 4.

Following another review of the law in 2009,<sup>120</sup> the Government opted to retain section 28. There has been a commitment from the Government to implement this special measure subject to the successful development of rules of procedure and practitioner guidance.<sup>121</sup> For the moment however, witnesses who have made a recording suitable for use as evidence-in-chief must still attend court to be cross-examined, unless the parties agree to the admission of evidence<sup>122</sup> or their evidence can be admitted in statement-form under the hearsay provisions of the UK *Criminal Justice Act 2003*.<sup>123</sup> The corresponding provision in Northern Ireland, Article 16 of the *Criminal Evidence (Northern Ireland) Order 1999* has not yet been implemented either.<sup>124</sup>

**(ii) New Zealand**

5.51 In its 1996 Discussion Paper on *The Evidence of Children and Other Vulnerable Witnesses*, the New Zealand Law Commission suggested the introduction of pre-trial recording of the cross-examination of child complainants and witnesses who are shown to have “an inability to retain and recall information over time.”<sup>125</sup> The proposals received strong support from a wide range of community groups and some practitioners but were met with almost unanimous opposition from defence lawyers.<sup>126</sup> Accordingly, in its final report, the Law Commission did not recommend the introduction of pre-trial cross-examination “[u]ntil more is known about the experiences of other jurisdictions with pre-trial cross-examination.”<sup>127</sup> Video-recorded cross-examination or re-examination is therefore not included as a special measure in New Zealand. Despite this, the provisions dealing with the use of alternative ways of giving evidence in the New Zealand *Evidence Act 2006* do not prohibit the use of pre-trial cross-examination.<sup>128</sup> Section 103 of the 2006 Act empowers the court to direct that a witness is to give evidence-in-chief and be cross-examined in an alternative way. Such a direction may be made on the grounds of the physical, intellectual, psychological, or psychiatric impairment of the witness. In giving the direction, the judge must have regard to the need to ensure a fair trial, the views of the witness, the need to minimise stress on the witness and the need to promote the recovery of the complainant from the alleged offence. Since the 2006 Act came into force in 2007, pre-trial cross examination has been permitted in a small number of cases in the New Zealand High Court and District Court in respect of adult and child witnesses.<sup>129</sup>

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<sup>120</sup> Home Office *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures* (HMSO 2007).

<sup>121</sup> UK Ministry of Justice *Government response to the improving the criminal trial process for young witnesses consultation* (25 February 2009).

<sup>122</sup> Section 27(4)(ii) of the *Youth Justice and Criminal Evidence Act 1999*.

<sup>123</sup> Rook and Ward *Sexual Offences Law & Practice* 4<sup>th</sup> ed (Sweet & Maxwell 2010) at 790.

<sup>124</sup> The Northern Ireland Law Commission in its *Report on Vulnerable Witnesses in Civil Proceedings* noted that the fact that the provision has yet to be successfully implemented in criminal proceedings, and it considered that it would be unwise to recommend that video-recorded cross-examination and re-examination is made available for eligible witnesses in civil proceedings but advised that it would reconsider this position should the provision be commenced in the criminal context (Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011)).

<sup>125</sup> New Zealand Law Commission *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26 1996) at 146.

<sup>126</sup> New Zealand Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1 1999) at 459.

<sup>127</sup> *Ibid* at 460.

<sup>128</sup> Tinsley and McDonald “Use of alternative ways of giving evidence by vulnerable witnesses: Current proposals, issues and challenges” (2011) 42 VUWLR 705 at 707.

<sup>129</sup> *Ibid*.

5.52 The New Zealand Court of Appeal recently considered the issue of pre-recorded special hearings in *M v R*.<sup>130</sup> The court ruled that the District Court had jurisdiction to order a pre-recording of evidence, but that it would take a “compelling” case to make such an order, even in the case of a child witness,<sup>131</sup> as the benefits to the witness were outweighed by fair trial considerations.<sup>132</sup> The Court succinctly identified the following fair trial considerations: (a) the need of the accused to display his hand before trial; (b) disclosure is traditionally haphazard and tardy and may occur after the pre-recording of the evidence; (c) the only advantage to the complainant witness is that it gets the matter out of the way earlier; (d) there would be an increase in the allocation of court resources due to the double hearing and counsel would have to prepare for the trial twice; (e) the use of pre-recorded special hearings is likely to cause delays in the finalisation of the trial for the accused and, by the use of court facilities, a delay in other trials; (f) defence counsel would be denied the opportunity to tailor his or her cross-examination depending on the reaction of the jury; (g) the procedure would make it difficult for a jury to ask questions; and (h) often complainants would need to be recalled to give evidence a second time as new matters became evident.<sup>133</sup> However, it has been observed that the experience in Western Australia, where a system of full pre-recording has been in place since 1992, does not confirm the majority of concerns raised by the New Zealand Court of Appeal.<sup>134</sup>

**(iii) Australia**

5.53 In Western Australia, full pre-recording has been normal practice with child witnesses since the early 1990s.<sup>135</sup> In addition to children, pre-recording of evidence may take place where a witness who, in the opinion of the court, suffers a particular vulnerability and who, by order of the court, is classified as a special witness.<sup>136</sup> The judge has power to require the child or special witness to attend to give further evidence “in clarification of the evidence on the visual recording”<sup>137</sup> but this power is rarely used.<sup>138</sup> Like in the UK, the judge, counsel and the defendant are present in court during the pre-recording. The defendant must be able to see the child and communicate with counsel but always remains out of the child’s sight.<sup>139</sup>

5.54 In a 2012 study of the Western Australian system (albeit restricted to the pre-recording of children’s evidence), it was observed that practitioners and the judiciary were “overwhelmingly positive” about the scheme and believed that rather than imperilling defendants, it can be of real advantage to

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<sup>130</sup> *M v R* [2011] NZCA 303.

<sup>131</sup> *Ibid* at paragraph 41.

<sup>132</sup> *Ibid* at paragraph 59.

<sup>133</sup> *Ibid* at paragraphs 34-40.

<sup>134</sup> Sleight “Managing Trials for Sexual Offences – A Western Australian Perspective” (AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney 2011) at 13.

<sup>135</sup> Henderson “Innovative Practices in Other Jurisdictions” in Hanna, Davies, Henderson, Crothers, Rotherham *Child Witnesses in the Criminal Courts: A Review of Practice and Implications for Policy* (The New Zealand Law Foundation 2010) at 117.

<sup>136</sup> Section 106R(3)(a) and section 106R of the *Evidence Act 1906* (WA).

<sup>137</sup> Section 106T(3) of the *Evidence Act 1906* (WA).

<sup>138</sup> Sleight “Managing Trials for Sexual Offences – A Western Australian Perspective” (AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney 2011) at 11. In *Tanner v R* [2001] WADC 207, a District Court judge ordered the complainant to be recalled for further cross-examination where new counsel appointed to appear at a re-trial (after a successful appeal against conviction) applied to further examine the complainant. Counsel was required to present details of the further cross-examination required to satisfy the judge that it was in the interests of justice to have the complainant recalled.

<sup>139</sup> Section 106K of the *Evidence Act 1906* (WA).

them.<sup>140</sup> The 2012 study noted that commentators and Western Australian practitioners and judges cite two major advantages of pre-recording the evidence of children, namely, stress reduction and improved quality of evidence and advantages to the trial process.<sup>141</sup> While the Commission is conscious to avoid conflation of issues affecting children with those affecting adults who may require support and accommodation to give evidence, and to avoid infantilisation of such adults, the studies dealing with children are helpful for the purposes of this Report as the legislation also applies to people with intellectual disability. The success of full pre-recording of evidence-in-chief and cross-examination in Western Australia prompted other Australian states to introduce the system.<sup>142</sup> Full pre-recording was introduced in Queensland in 2003 and made mandatory in 2006.<sup>143</sup> It was also introduced in the Northern Territory in 2004<sup>144</sup> and in South Australia in 2010.<sup>145</sup> In Victoria, the whole of the evidence, including cross-examination and re-examination, of young or cognitively impaired complainants in sexual offence proceedings must be given at a special hearing, recorded as an audiovisual recording, and presented to the court in the form of that recording.<sup>146</sup> This provision applies unless the prosecution makes an application to have the complainant give direct testimony and the court is satisfied that the complainant is aware of their right to have their evidence taken at a special hearing and audiovisually recorded, and they are able to and wish to give direct testimony.<sup>147</sup>

**(iv) United States**

5.55 In the United States, special provisions for child witnesses are included in the *Federal Rules of Evidence*<sup>148</sup> which include rules governing pre-trial cross-examination. The rules require specific evidence that the child is likely to be unable to testify through fear or would suffer emotional trauma from testifying in open court. The defendant is entitled to be present unless the order is based on evidence that the child is unable to testify in his physical presence. In this case, two-way CCTV is to be used to enable the defendant and the child to see each other during the testimony. The stringent requirements for specific evidence of apprehended fear or trauma and for visual confrontation have been dictated by constitutional constraints.<sup>149</sup> In particular, the Sixth Amendment to the American Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...”. In *Maryland v Craig*,<sup>150</sup> the US Supreme Court approved state legislation which permitted the child witness and the prosecuting and defence lawyers to withdraw to another room, with the judge, jury and defendant watching on a video link. The court found that the Confrontation Clause does not guarantee an absolute right to a face-to-face encounter with witnesses at trial.

**(b) Discussion**

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<sup>140</sup> Henderson, Hanna, Davies “Pre-recording Children’s Evidence: The Western Australian Experience” (2012) 1 Crim LR 3 at 6.

<sup>141</sup> *Ibid* at 8-10.

<sup>142</sup> The Australian Law Reform Commission recommended that the option of pre-recording of evidence should be available in relation to the evidence of all adult complainants of sexual assault (Australian Law Reform Commission Report 114 Family Violence – A National Legal Response (2010) at paragraph 26.182).

<sup>143</sup> Section 21A (in relation to “special witnesses”) and section 21AK (in relation to children) of the *Evidence Act 1977* (Qld).

<sup>144</sup> Section 21B(2)(b) of the *Evidence Act 1977* (NT).

<sup>145</sup> Sections 13A(2)(b) and 13C(1)(a) of the *Evidence Act 1929* (SA).

<sup>146</sup> Sections 369-370 of the *Criminal Procedure Act 2009* (Vic).

<sup>147</sup> Section 370(2) of the *Criminal Procedure Act 2009* (Vic).

<sup>148</sup> Federal Rules of Evidence 18 USC at paragraph 3509.

<sup>149</sup> Hoyano “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?” [2001] CLR 948 at 950.

<sup>150</sup> *Maryland v Craig* 497 US 836 (1990).

5.56 The advantages of full pre-recording of evidence were identified in a 2010 New Zealand study as follows:

- (i) It enhances the quality of the evidence because it preserves the evidence early and avoids issues of memory deterioration over time;
- (ii) It reduces the stress of waiting for a trial and of appearing in a formal courtroom;
- (iii) It reduces the time and expense of jury trial since (a) the recording is edited of inadmissible material and of pauses for breaks, etc. and (b) the recording session takes place without jurors present or other witnesses waiting. The reduced staff required should also be easier to assemble, allowing more flexible use of CCTV equipment and court facilities;
- (iv) It reduces the number of aborted trials, since the prosecution can withdraw if the witness fails to come up to proof at the pre-trial, and increases guilty pleas before trial where the pre-recorded evidence proves strong.<sup>151</sup>

5.57 The 2010 New Zealand study also found that professionals from all levels and disciplines like the idea of pre-recording and agreed that there were no philosophical objections to full pre-trial recording of evidence.<sup>152</sup> It highlighted that the main concerns with pre-recording amongst practitioners were the purely practical issues of developing effective procedures and guidance and arranging prosecutorial and third party disclosure with the necessary speed.

5.58 A further study from New Zealand in 2012 also noted that pre-recording opponents are principally concerned about possible adverse effects on defendants.<sup>153</sup> Opponents of the special measures directions in the English 1999 Act contend that they might breach the guarantee of a fair trial in Article 6 of the ECHR and in particular, the right of a defendant to examine witnesses against him under Article 6(3)(d). In this regard, Hoyano has commented that:

“[o]ne may predict with some confidence that arguments that a fair trial requires direct confrontation with a child or vulnerable adult witness in a ‘one shot’ trial will be treated sceptically both in England and in Strasbourg. Pre-trial cross-examination in principle should comply with Article 6, as the proceedings will be controlled by the trial judge with full participation of the defence ensured, the same minimum conditions held to be constitutional by most American courts.”<sup>154</sup>

5.59 In England and Wales, there was a concern in relation to section 28 of the *Youth Justice and Criminal Evidence Act 1999* that disclosure could not be given to the defence sufficiently quickly to enable there to be an early pre-trial hearing.<sup>155</sup> However, it has been suggested that there is no theoretical reason why quicker disclosure timetables could not be introduced.<sup>156</sup> Also, pre-recording has the advantage of enabling defence counsel to prepare the rest of the trial knowing the strength and details of the evidence of the prosecution’s most important witness.<sup>157</sup> In another study, conducted in 2010, practitioners in Western Australia believed that foreknowledge of the strength of the witness’ evidence

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<sup>151</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 165.

<sup>152</sup> *Ibid* at 129.

<sup>153</sup> Henderson, Hanna, Davies “Pre-recording Children’s Evidence: The Western Australian Experience” (2012) 1 Crim LR 3 at 10.

<sup>154</sup> Hoyano “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?” [2001] CLR 948 at 959.

<sup>155</sup> Henderson, Hanna, Davies “Pre-recording Children’s Evidence: The Western Australian Experience” (2012) 1 Crim LR 3 at 11. See also Spencer “Children’s Evidence: The Barker Case and the Case for Pigot” (2010) 3 *Archbold News* 5.

<sup>156</sup> Henderson, Hanna, Davies “Pre-recording Children’s Evidence: The Western Australian Experience” (2012) 1 Crim LR 3 at 11.

<sup>157</sup> *Ibid*.

increased both guilty pleas and prosecution withdrawals and also assisted in trial preparation.<sup>158</sup> Neither counsel nor judges saw pre-recording as endangering the defendant's right to a fair trial.<sup>159</sup> Although there may be an element of double preparation, the advantage of having the prosecution's main witness give evidence in advance is that trial preparation can be more focused.<sup>160</sup> As to the factors raised by the New Zealand Court of Appeal relating to the resources of the courts, the use of pre-recorded hearings need not happen in every case.<sup>161</sup>

5.60 Critics also argue that pre-recording cross-examination makes it difficult to arrange for continuity of counsel and judge between pre-trial and the trial. In Western Australia however, this does not appear to be an issue amongst the judiciary or barristers and their standard jury directions acknowledge that trial counsel and judge may differ from those in the recording.<sup>162</sup> It has also been argued that pre-recording violates the defence's right of non-disclosure, forcing the defence to reveal their case theory, names of witnesses and lines of cross-examination before trial. However, it has been stated in the English context that this argument appears to now have little force given that defendants now have extensive obligations of disclosure.<sup>163</sup> While it is clear that full pre-recording may not be appropriate in every case, provided it was introduced on a presumptive rather than mandatory basis, a judge would have the discretion to reject it in those cases where it was not suitable.<sup>164</sup>

5.61 Finally, there is a general perception that using a video screen to present a person's evidence to the court alters the emotional impact of the testimony on the jury and that full pre-trial recording of evidence may in fact be detrimental to securing convictions for this reason. In this regard, anecdotal evidence described in the UK Stern Review<sup>165</sup> suggested that live testimony has a greater emotional impact and is perceived as more credible than CCTV and video recorded evidence-in-chief. Despite tentative findings that fact-finders may have a preference for live evidence, studies indicate that they do not appear to allow it to influence their decision-making, with mode of presentation having little impact on the overall proportion of guilty verdicts in several studies.<sup>166</sup> In fact, Western Australian practitioners using full pre-recording are of the view that pre-recording is advantageous to the defendant as it carries less emotional weight than live testimony.<sup>167</sup>

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<sup>158</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 151.

<sup>159</sup> *Ibid.*

<sup>160</sup> Sleight "Managing Trials for Sexual Offences – A Western Australian Perspective" (AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney 2011) at 13.

<sup>161</sup> Sleight "Managing Trials for Sexual Offences – A Western Australian Perspective" (AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney 2011) at 13.

<sup>162</sup> Henderson, Hanna, Davies "Pre-recording Children's Evidence: The Western Australian Experience" (2012) 1 Crim LR 3 at 12.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> Stern *The Stern Review: Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales* (Government Equalities Office and Home Office 2010) at 90.

<sup>166</sup> Tinsley and McDonald "Use of alternative ways of giving evidence by vulnerable witnesses: Current proposals, issues and challenges" (2011) 42 VUWLR 705 at 739. See also Henderson, Hanna, Davies "Pre-recording Children's Evidence: The Western Australian Experience" [2012] 1 Crim LR 3 at 13 and Davies "The Impact of Television on the Presentation and Reception of Children's Testimony" (1999) 22 Int'l J L & Psychiatry 241.

<sup>167</sup> Henderson, Hanna, Davies "Pre-recording Children's Evidence: The Western Australian Experience" (2012) 1 Crim LR 3 at 13.



**(c) Concluding comments and final recommendation**

5.62 The Commission recognises that section 16(1)(b) of the *Criminal Evidence Act 1992* represents a significant practical step towards making the testimony of witnesses who require support and accommodation to give evidence more easily heard within the criminal justice system. However, the Commission considers that the law as it stands creates difficulties for witnesses by splitting their testimony in two and requiring the witness to be available for cross-examination at trial after such a lengthy period of time has elapsed.<sup>168</sup> Having considered the arguments and the submissions received in response to this issue in the Consultation Paper, the Commission is of the view that it would be desirable to allow cross-examination of the complainant at the same time as the giving of evidence-in-chief. Such a provision would serve to maximise the beneficial effects of pre-trial recording of examination-in-chief by reducing the delay between the giving of examination-in-chief and cross-examination. It would spare the complainant the trauma of waiting for the trial to come to hearing and they could avail of therapy which may have been delayed pending the trial.<sup>169</sup> The Commission considers that providing for pre-trial cross-examination and re-examination if necessary, of a witness who requires support and accommodation to give evidence, with safeguards to protect the rights of the accused, would go some way towards addressing the difficulties and distress experienced by such witnesses during the trial process.

5.63 Thus, the Commission is of the view that the *Criminal Evidence Act 1992* should be amended to allow for pre-trial cross-examination and re-examination if necessary, of complainants and witnesses who are eligible under the 1992 Act for special measures in the criminal trial process. The recording of the cross-examination should be made in the absence of the accused but in circumstances where he can see and hear the witness being examined and communicate with his or counsel (if represented) and the witness' legal representative. The pre-recording should not be admitted as evidence if the safeguards have not been met. The provision allowing for this special measure should be accompanied by a Code of Practice outlining directions for the use of pre-recording.

5.64 *The Commission recommends that the Criminal Evidence Act 1992 should be amended to allow for pre-trial cross-examination and re-examination if necessary, of complainants and witnesses who are eligible under the 1992 Act for special measures in the criminal trial process. The recording of the cross-examination should be made in the absence of the accused but in circumstances where he can see and hear the witness being examined and communicate with his or her counsel (if represented) and the witness' legal representative. The pre-recording should not be admitted as evidence if the safeguards have not been met. The provision allowing for this special measure should be accompanied by a Code of Practice outlining directions for the use of pre-recording.*

**(6) Intermediaries**

5.65 In the Consultation Paper, the Commission considered the current use of intermediaries in Ireland under section 14 of the *Criminal Evidence Act 1992* and invited submissions on the efficacy of intermediaries as a special measure in criminal proceedings.<sup>170</sup> In Ireland, section 14 of the *Criminal Evidence Act 1992* allows the prosecution or an accused to apply to court for a direction that having regard to the age or mental condition of a witness who is under 18 years of age or has a "mental handicap" and is giving evidence through live television link, the interests of justice require that any questions to be put to the witness be put through an intermediary.<sup>171</sup> Questions put to a witness through an intermediary under section 14 "shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions

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<sup>168</sup> Delahunt "Video Evidence and s. 16(1)(b) of the Criminal Evidence Act 1992" (2011) 16(1) *The Bar Review* 2 at 5.

<sup>169</sup> *Ibid* at 3.

<sup>170</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 6.44 – 6.49.

<sup>171</sup> Section 5B of the *Criminal Justice Act 1993* as inserted by section 6 of the *Criminal Procedure Act 2010* makes provision for any questioning of a child or a person with a "mental disorder" in relation to his or her victim impact statement to be done via an intermediary.

being asked.” Section 14(3) states that an intermediary is appointed by the court and must be a person who, in the opinion of the court, is competent to act as an intermediary.

5.66 There is a dearth of information on the use of intermediaries in criminal trials in Ireland, making it difficult to assess the efficacy of the measure in assisting vulnerable witnesses during the criminal trial process. The 2012 UCC study identified the need for data on a range of areas in order to try to understand the situation of people with disabilities as victims of crime in Ireland.<sup>172</sup> This included information regarding how far the role of the intermediary as set out in section 14 of the 1992 Act is being implemented, who these intermediaries are and how effective this role appears to be. The study noted however, that under the current system, it is unclear who the intermediary should be and support currently operates in an *ad hoc* manner, depending on the networks available to the individual.<sup>173</sup>

**(a) Comparative analysis**

**(i) England and Wales**

5.67 The *ad hoc* nature of the intermediary system in Ireland may be contrasted with the procedure in England and Wales enshrined in the *Youth Justice and Criminal Evidence Act 1999*. The 1999 Act included the use of intermediaries as a special measure for cases involving vulnerable and intimidated witnesses. It is not a pre-requisite that the witness is giving evidence through a live television link, unlike in Ireland, under section 14(1)(b) of the *Criminal Evidence Act 1992*. According to section 29(2) of the 1999 Act, the function of an intermediary is to communicate (a) to the witness, any questions put to the witness; (b) to any person asking such questions, the answers given by the witness in reply to them; and (c) to explain such questions or answers so far as necessary to enable them to be understood by the witness or the questioner. This could involve relaying answers that would not otherwise be understood or interpreting non-verbal methods of communication.<sup>174</sup>

5.68 *The Registered Intermediary Procedural Guidance Manual*, issued by the UK Ministry of Justice, states that “[i]n practical terms, the central part of the intermediary’s role is to assist in communication in its widest sense; in other words, to assist the court, both prior to and during the giving of evidence by the witness by facilitating two-way communication in order to achieve best evidence.”<sup>175</sup> There are four phases in the intermediaries’ role: (1) assessing witnesses’ communication needs; (2) assisting at the police interview if requested; (3) preparing a report from the assessment and (4) assisting at trial.<sup>176</sup> Although the court may appoint an unregistered intermediary, in practice this is very uncommon. The court must approve an intermediary under section 29(1) of the 1999 Act. Pursuant to section 29(5) of the 1999 Act, a person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary.

5.69 The UK Witness Intermediary Scheme was first introduced as a pilot project in 2004<sup>177</sup> and national roll-out of the scheme was completed in 2008. The evaluation of the pilot project noted that

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<sup>172</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 134. In the United States, collection of statistics on people with disabilities as victims of crime is provided for in the *Crime Victims with Disabilities Awareness Act 1998* which makes it incumbent on the National Crime Victimization Survey to collect data “on crimes against people with disabilities and the characteristics of the victims of those crimes.”

<sup>173</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 9.

<sup>174</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 129.

<sup>175</sup> *The Registered Intermediary Procedural Guidance Manual* (Ministry of Justice 2012) at paragraph 1.12.

<sup>176</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 131.

<sup>177</sup> Between 2004 and 2005, pathfinder projects were carried out in six areas with the aim of establishing a model for national implementation. See Plotnikoff and Woolfson *The Go-Between: evaluation of intermediary*

feedback from witnesses and carers in trial cases was positive, with carers considering that intermediaries not only facilitated communication but also helped witnesses cope with the stress of giving evidence.<sup>178</sup> Appreciation of the role was found to be almost unanimous across the judiciary and criminal justice personnel.<sup>179</sup> A five point agenda was proposed for roll-out to avoid implementation pitfalls revealed during the pathfinder projects. It was proposed that:

- central guidance should be provided, together with a clear allocation of local responsibility for implementation;
- links between implementation of intermediaries and other initiatives should be highlighted;
- awareness raising needed to take place amongst the criminal justice community and “mind-set” obstacles to intermediary use tackled;
- eligible witnesses should be identified at the earliest opportunity; and
- improvements should be made to pre-trial planning and it should be ensured that ground rules for intermediary use are discussed before trial.<sup>180</sup>

5.70 As of February 2011, the Witness Intermediary Scheme and Registered Intermediaries operating within it have supported over 5,000 people during the justice process.<sup>181</sup> The scheme is supported by guidance documents for intermediaries and criminal justice practitioners issued by the Ministry of Justice<sup>182</sup> and the Office for Criminal Justice Reform.<sup>183</sup> *The Registered Intermediary Procedural Guidance Manual* outlines the intermediary’s role, provides guidance for intermediaries in drafting their reports and contains a Code of Practice and a Code of Ethics.<sup>184</sup>

5.71 In a 2010 study concerning child witnesses, it was observed that the intermediary system in the UK delivers significant benefits both for child witnesses and for the courts in terms of evidence quality, access to justice and stress reduction and that it does so without disrupting the rights of the defence or the smooth running of the trial.<sup>185</sup> The 2010 study also noted that the system attracts strong support from professionals. Significantly, there were no fears amongst practitioners or the judiciary that intermediaries impeded the defendant’s right to a fair trial.<sup>186</sup>

5.72 Intermediaries are generally appointed from the Intermediary Register. To become a Registered Intermediary, applicants must undertake training, comprising an interactive, six-module course, at graduate level; successfully complete an assessment and accreditation process, and demonstrate their understanding of the role of intermediary. To ensure professional standards, Registered Intermediaries must comply with a Code of Practice and a code of ethics, which is overseen by the Witness Intermediary Scheme Intermediaries Registration Board.<sup>187</sup> The Witness Intermediary

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*pathfinder projects* (2007) available at  
[http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries\\_study\\_report.pdf](http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf).

<sup>178</sup> Plotnikoff and Woolfson *The Go-Between: evaluation of intermediary pathfinder projects* (2007) at 60, available at [http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries\\_study\\_report.pdf](http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf).

<sup>179</sup> *Ibid* at ix.

<sup>180</sup> available at [http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries\\_study\\_report.pdf](http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf) at 73.

<sup>181</sup> Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2012) at 3.

<sup>182</sup> *Ibid*.

<sup>183</sup> Office for Criminal Justice Reform *Intermediary Procedural Guidance Manual* (2005).

<sup>184</sup> Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2012).

<sup>185</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 142.

<sup>186</sup> *Ibid* at 138.

<sup>187</sup> The codes are set out in *The Registered Intermediary Procedural Guidance Manual* (Ministry of Justice 2012) at 44-47.

Scheme Quality Assurance Board undertakes quality assurance, regulation and monitoring of the professional standards of Registered Intermediaries and should problems occur, there is a formal complaints and investigation procedure, with the option to remove a Registered Intermediary from the register if necessary.<sup>188</sup> Registered Intermediaries for vulnerable witnesses in court are normally applied for by the Crown Prosecution Service and are provided through the Witness Intermediary Scheme, currently administered on behalf of the Ministry of Justice by the National Policing Improvement Agency. The Witness Intermediary Scheme operates a national database of Registered Intermediaries and provides a “matching service” to find the most appropriate Registered Intermediary to support the particular needs of the individual witness.<sup>189</sup>

5.73 The English *Intermediary Procedural Guidance Manual* acknowledges that there may be instances where it is not possible to find a suitable intermediary from the Intermediary Register, for example, where no one on the Register has the specific skills required to communicate effectively with the particular witness.<sup>190</sup> In such cases, an unregistered person may be nominated as the intermediary. This person should normally be a professional in the field of facilitating communication with vulnerable people (for example, a speech and language therapist or a psychologist). Guidance is provided in England and Wales to untrained intermediaries, based on the training course given to registered intermediaries.<sup>191</sup> The Guidance Manual also acknowledges that there may be a very few special cases where the communication with a witness can only be facilitated by a close relative, carer or friend. The Guidance Manual states that, in such circumstances, a registered intermediary should have made an evaluation of the witness’ capacity to communicate with others and have concluded that only a close relative, carer or friend is able to facilitate communication.<sup>192</sup> The nominated person should demonstrate their ability to communicate accurately and effectively with the witness via a structured communication exchange set up and monitored by a professional intermediary. The nominated person must agree to take the intermediary declaration in section 29(5) of the 1999 Act and must be made aware of the legal consequences of perjury and contempt. They must also confirm that they understand that their first duty while acting as an intermediary is to the court and that their role will be to put questions directly to the witness and give their answers with minimum explanation of questions. Where there is a possibility of the nominated person having had any direct or indirect involvement in the incident, he or she cannot be used to facilitate the communication (for example, if there is a possibility that they may be called as a witness).<sup>193</sup>

5.74 Despite the provision for the appointment of a non-registered intermediary, in practice this is very uncommon. For example, during the pilot, only three unregistered intermediaries were appointed.<sup>194</sup> The unregistered intermediaries appointed were a mental health principal social worker with language skills, a teacher with Makaton<sup>195</sup> skills who knew the child in question and a principal clinical psychologist

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<sup>188</sup> Talbot *Fair Access to Justice? Support for vulnerable defendants in the criminal courts* (Prison Reform Trust 2012) at 13.

<sup>189</sup> *Ibid* at 13-14. Prior to 2009, the Office for Criminal Justice Reform was responsible for matching communications specialists to the particular needs of witness under the Witness Intermediary Scheme but this function is now part of the National Policing Improvement Agency’s Specialist Operations Centre. The recruitment and registration process which ensures that intermediaries are qualified and vetted continues to be managed by the Office of Criminal Justice Reform.

<sup>190</sup> *The Registered Intermediary Procedural Guidance Manual* (Ministry of Justice 2012) at paragraph 3.81.

<sup>191</sup> *Ibid* at paragraph 3.83.

<sup>192</sup> *Ibid* at paragraph 3.85.

<sup>193</sup> *Ibid*.

<sup>194</sup> Plotnikoff and Woolfson *The Go-Between: evaluation of intermediary pathfinder projects* (2007) at 34, available at [http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries\\_study\\_report.pdf](http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf).

<sup>195</sup> Makaton is a language programme using signs and symbols to help with communication. It is designed to support spoken language and the signs and symbols are used in conjunction with speech, and in spoken word order. Further information is available at [www.makaton.org](http://www.makaton.org).

who had previously assessed the witness. It has been noted that following the pilot, none or very few unregistered intermediaries were appointed.<sup>196</sup>

5.75 The Code of Practice set out in *The Registered Intermediary Procedural Guidance Manual* delineates the parameters of the intermediary's role.<sup>197</sup> It is notable that the English legislation goes further than the Irish provisions by allowing an intermediary to communicate to the court the witness' answers to questions. The *Intermediary Procedural Guidance Manual*, published in 2005 by the Office for Criminal Justice Reform, requires intermediaries, when relaying answers, to communicate accurately the witness' answers "as given", however irrelevant or illogical and to refrain from flagging up possible misunderstandings.<sup>198</sup> The 2005 Guidance also provides that it is for the court "to seek clarification from the intermediary if they so wish as to possible reasons for the response and if the question could be rephrased to permit a more logical or relevant response."<sup>199</sup> During the pilot, judges almost always accepted intermediaries' offers to rephrase questions.<sup>200</sup> Most intervened seldom and intervened for answers much less than questions, unless the answer was unintelligible.<sup>201</sup> Intermediaries rarely suggested that answers showed misunderstanding.<sup>202</sup>

5.76 In the United States, it is constitutionally impermissible for an intermediary to explain a question or an answer.<sup>203</sup> By contrast, the use of an intermediary in this limited capacity has been approved at common law by the English Court of Appeal. In *R v Duffy*,<sup>204</sup> only a social worker could understand a severely mentally handicapped adult's replies and was treated as being akin to a translator and therefore, could give admissible evidence as to his impression and interpretation of what he understood the man to have said in his videotaped police interview. Section 29(2) of the 1999 Act contemplates a wider role for an intermediary and he or she is authorised to "explain" the questions and answers "so far as necessary to enable them to be understood" by the witness or questioner. The explanatory function of intermediaries under the 1999 Act makes it vital that any intermediary be competent, independent and impartial.<sup>205</sup> These objectives are achieved through a system of checks.

5.77 Guidance in England and Wales also states that in each case where an intermediary is to be used, there should be a pre-trial meeting to establish ground rules, including clarifying the role of the intermediary.<sup>206</sup> A recent survey found that such meetings took place in only 47% of trials where an intermediary had been used. However, it has been observed that even if such meetings take place on the first day of trial, they are still likely to be of some use.<sup>207</sup>

## **(ii) Northern Ireland**

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<sup>196</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 130

<sup>197</sup> *The Registered Intermediary Procedural Guidance Manual* (Ministry of Justice 2012) at 44-45.

<sup>198</sup> Office for Criminal Justice Reform *Intermediary Procedural Guidance Manual* (2005) at paragraph 3.11.3.

<sup>199</sup> *Ibid* at paragraph 3.11.3.

<sup>200</sup> Plotnikoff and Woolfson *The Go-Between: evaluation of intermediary pathfinder projects* (2007) at 94, available at [http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries\\_study\\_report.pdf](http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf).

<sup>201</sup> *Ibid* at 54-55.

<sup>202</sup> *Ibid* at 55.

<sup>203</sup> *In the interest of RR, Jr* (1979) 6 ALR 4<sup>th</sup> 140 (NJ Sup Ct, 1979).

<sup>204</sup> *R v Duffy* [1999] QB 919.

<sup>205</sup> Hoyano "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" (2001) Crim LR 948 at 965.

<sup>206</sup> Advocacy Training Council of the Bar of England and Wales *Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court* (2011) at paragraph 18.4.

<sup>207</sup> *Ibid*.

5.78 The use of intermediaries is included as a special measure in Article 17 of the *Criminal Evidence (Northern Ireland) Order 1999*, the provisions of which are identical to those contained in section 29 of the *Youth Justice and Criminal Evidence Act 1999*. Article 17 of the 1999 Order has not, at the time of writing, been commenced. In 2012 the Northern Ireland Department of Justice stated that, following evaluation, a decision on future roll-out will be taken.<sup>208</sup> In April 2013, the Registered Intermediaries Scheme pilot began in Belfast Crown Court.

5.79 In its 2011 *Report on Vulnerable Witnesses in Civil Proceedings*, the Northern Ireland Law Commission included a draft Civil Evidence (Witnesses) Bill which empowers the Department of Justice to make, by regulations, provision as to the persons who may act as intermediaries and the conduct and standards expected of them.<sup>209</sup> Pending the implementation of Article 17 (examination of the witness through an intermediary), the courts can still grant the use of an intermediary under their inherent jurisdiction under Article 7(6) of the 1999 Order. Guidance issued by the Northern Ireland Department of Justice provides details of an unreported judgment in Northern Ireland which would be of assistance to legal representatives and judges considering the need for and use of an intermediary prior to commencement and implementation of the intermediary provision under Article 17.<sup>210</sup> The case involved an adult victim who suffered from cerebral palsy and who also had learning difficulties. The defendant was charged with a number of sexual offences which had been committed over a number of years. The prosecution successfully sought leave to adduce the victim's video interviews and her social worker's interpretation of her speech as the victim's evidence in chief and also that the social worker be permitted to act as interpreter during cross-examination. The prosecution submitted that, in the absence of the social worker's interpretation, the evidence would be unintelligible. It was further submitted that it would be in the interests of justice that the social worker's interpretation be adduced in evidence; otherwise it would not be possible for the victim to give any comprehensible evidence.

### **(iii) Scotland**

5.80 In Scotland, intermediaries are not specifically included in the *Vulnerable Witnesses (Scotland) Act 2004*. However, the legislation allows for Scottish Ministers to make secondary legislation for the creation of additional special measures.<sup>211</sup> In 2007, the Scottish Government consulted on the possible use of intermediaries which was published in 2008 with the result that no further action was taken on the issue due to the lack of consensus amongst those consulted.<sup>212</sup> As noted above, the Appropriate Adult Scheme in Scotland is being increasingly used in the justice system (although the scheme does not have a statutory footing) and is offered to witnesses, victims and accused persons who are described as "mentally disordered."<sup>213</sup> The role of the Appropriate Adult is to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties. They pick up on "clues" and indicators that a person has not fully understood what they are being told or what they are being asked. An Appropriate Adult is allowed to intercede for the purposes of checking understanding and conferring with the interviewee or police officers about their understanding.

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<sup>208</sup> Northern Ireland Executive "Ford to pilot new schemes for vulnerable victims, witnesses and defendants" 23 August 2012, available at <http://www.northernireland.gov.uk>.

<sup>209</sup> Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011) at 116, available at [www.dojni.gov.uk](http://www.dojni.gov.uk).

<sup>210</sup> Department of Justice *Achieving Best Evidence in Criminal Proceedings: guidance on interviewing victims and witnesses, the use of special measures and the provision of pre-trial therapy* Draft for Consultation (2010) at Appendix B.

<sup>211</sup> Section 271H of the *Criminal Procedure (Scotland) Act 1995* as inserted by section 1 of the *Vulnerable Witnesses (Scotland) Act 2004*.

<sup>212</sup> *Consulting on intermediaries as a special measure for vulnerable witnesses in Scotland* (Government of Scotland Publication 2007) and *Consulting on intermediaries as a special measure for vulnerable witnesses: the use of intermediaries for vulnerable witnesses in Scotland: report on the analysis of responses to the consultation* (Government of Scotland Publication 2008) available at [www.scotland.gov.uk](http://www.scotland.gov.uk).

<sup>213</sup> <http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult>.

They are selected for their experience in the field of mental health, learning disabilities, dementia and/or acquired brain injuries.

**(iv) New Zealand**

5.81 In New Zealand, the introduction of intermediaries was rejected as a result of divided views from the legal profession and concerns over the effectiveness of communicating a witness' answers to the court. There is, however, a provision for a limited kind of intermediary in the New Zealand *Evidence Act 1908* which applies to complainants in sexual offence cases who are children or "mentally handicapped."<sup>214</sup> Section 23E(4) of the 1908 Act provides that where a witness is to give evidence from out of court by closed-circuit television or from behind a partition by audio-link, the judge may direct that questions be put to the witness through a person approved by the judge. The provision does not permit the intermediary to rephrase the questions or interpret the witness' answer.<sup>215</sup> In its 1996 *Discussion Paper on the Evidence of Children and Other Vulnerable Witnesses*, the Law Commission of New Zealand noted that the need for intermediaries may not be confined to those situations where evidence is given in an alternative way<sup>216</sup> and argued that witnesses should be able to use intermediaries whenever their assistance is required and in particular, in any case where the rational ascertainment of facts would be assisted by use of an intermediary.<sup>217</sup>

5.82 Furthermore, the Law Commission of New Zealand recommended that intermediaries should be allowed to rephrase questions to assist witness comprehension.<sup>218</sup> The New Zealand Commission did not however recommend that intermediaries should interpret the witness' response to the court or have an explanatory function in this regard. Rather, it envisaged that an intermediary would ask questions in order to elicit a clear and unambiguous response from the witness. The New Zealand Commission emphasised that the use of intermediaries must be subject to procedural fairness and that it would be the judge's role to give guidance to the intermediary on how they are to perform their function in a particular case and to oversee the fairness and accuracy of rephrased questions.<sup>219</sup>

**(b) Discussion**

5.83 The advantages of intermediaries were identified in a 2010 New Zealand study as follows:

- Intermediaries reduce the stress of being interviewed or examined, both by preventing miscommunication and misunderstanding and by buffering any hostility or sarcasm in the examiner's tone;
- Intermediaries improve the quality of the evidence by (a) reducing miscommunications and misunderstandings between the witness, counsel or other interviewer and the court; (b) enabling the witness to communicate more fully; and (c) reducing stress, which can impair recall; and
- Intermediaries increase access to justice by facilitating the testimony of witnesses, especially to younger children and to witnesses with some impairment to their communication abilities, whose communication needs are beyond the ability of ordinary examiners to accommodate.<sup>220</sup>

5.84 The Commission considers that while the use of intermediaries is undoubtedly controversial, it can have a positive impact in making the criminal justice system more accessible for witnesses considered eligible under the 1992 Act. At the same time, the Commission also considers that care

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<sup>214</sup> Section 23E(4) of the *Evidence Act 1908*.

<sup>215</sup> New Zealand Law Commission *Discussion Paper on the Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996) at paragraph 170.

<sup>216</sup> *Ibid* at paragraph 171.

<sup>217</sup> *Ibid* at paragraph 172.

<sup>218</sup> *Ibid* at paragraph 173.

<sup>219</sup> *Ibid* at paragraph 175.

<sup>220</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 166.

should be taken to ensure that methods employed by intermediaries are effective. The use of intermediaries to enable witnesses to fully participate in the trial process must be balanced with the defendant's right to a fair trial under Article 6 of the ECHR.

5.85 Submissions indicated strong support for the use of intermediaries under section 14 of the 1992 Act. However, many submissions qualified their support by recognising the controversial nature of facilitated communication, particularly in light of the accused's right to a fair trial. The Commission is encouraged by the use of intermediaries in other countries, especially in England and Wales where the intermediary service has been well-received and it is felt that it delivers significant benefits for vulnerable witnesses, the courts and professionals.

**(c) Conclusions and final recommendations**

**(i) Responses put through an intermediary**

5.86 One submission received in response to the Consultation Paper expressed concern about the failure of section 14 of the *Criminal Evidence Act 1992* to allow for the complainant's responses to be put through an intermediary and it was suggested that section 14 should be amended to allow for this. Of interest in this regard is section 29(2) of the English *Youth Justice and Criminal Evidence Act 1999* which, as already mentioned, provides that an intermediary may communicate answers given by the witness in response to questions and to explain answers so far as necessary to enable them to be understood by the person asking the questions. Having considered the submissions which addressed this point and the approaches adopted in other countries, the Commission is of the view that there would be merit in amending section 14 of the 1992 Act to allow for the responses of a witness to be communicated to the court through an intermediary where it would not otherwise be understood or where non-verbal methods of communication are used which could only be interpreted by an intermediary. This would also allow for a question to be rephrased in order to permit a more logical or relevant response from the witness. However, the intermediary should not be permitted to point out a misunderstanding or provide an explanation for an answer given, unless asked to do so by the court for the purposes of clarification.

5.87 The Commission considers that such a provision would reduce miscommunications and misunderstandings between a vulnerable witness, counsel and the court. It would also contribute to reducing the stress of the witness, which can impair their recall and to enabling the witness to communicate more fully. To this end, the Commission is encouraged by the success of the intermediary scheme in England and Wales and by the fact that it is highly regarded amongst practitioners, the judiciary and vulnerable witnesses. The provision should be supported by checks which ensure that an intermediary appointed by the court is competent, independent and impartial. In this regard, section 14(3) of the 1992 Act provides that an intermediary "shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such." This provision could be extended by requiring that a person may not act as an intermediary in a particular case except after making a declaration that he or she will faithfully perform his function as intermediary.

5.88 *The Commission recommends that section 14 of the Criminal Evidence Act 1992 should be amended to allow for the responses of a witness to be communicated to the court through an intermediary where it would not otherwise be understood or where non-verbal methods of communication are used which could only be interpreted by an intermediary. The Commission recommends that a provision should be inserted into section 14(3) of the Criminal Evidence Act 1992 stipulating that a person may not act as an intermediary in a particular case except after making a declaration that he or she will faithfully perform his or her function as intermediary.*

**(ii) Use of untrained intermediaries**

5.89 It was also noted in a submission received by the Commission in response to the Consultation Paper that certain cases may arise where the individual interpretive needs of a person with intellectual disability can only be met by a limited number of people who may not be trained in court intermediating. It was submitted that such cases should be assessed on an individual basis. As discussed above, in England and Wales, an unregistered intermediary may be used in exceptional circumstances.<sup>221</sup> They

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<sup>221</sup> Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2012) at paragraph 1.12.



must be independent of the case being investigated (*i.e.* not witnesses or suspects) and although there is a preference for unregistered intermediaries to be professionals, family members, friends or associates may be permitted to act as an intermediary in limited circumstances. In such cases, the witness is assessed by a registered intermediary in order to confirm that the role can only be performed by the non-professional.<sup>222</sup>

5.90 The Commission accepts that in certain cases, trained intermediaries do not have the specific skills required to communicate with a vulnerable witness. With a view to ensuring that all witnesses who require assisted decision-making support and accommodation to give evidence are facilitated during the trial process and enabled to communicate their testimony, the Commission recommends that in certain exceptional circumstances, the use of a suitable untrained intermediary should be permitted.

**5.91** *The Commission recommends that, in certain exceptional circumstances, the use of a suitable untrained intermediary should be permitted.*

**(iii) Education and training**

5.92 The Commission is of the view that there is a need for proper training and support for intermediaries. Some of the submissions received by the Commission in response to the Consultation Paper emphasised the importance of ensuring that intermediaries are properly trained and that they understand and are understood by the complainant. In addition to the development of guidelines delineating the parameters of an intermediary's role, the Commission considers that emphasis should be placed on standardised training and accreditation of intermediaries. This would address any fears of inadvertent "coaching" and of the presence of an intermediary influencing witness' testimony. In England and Wales, the national training programme for prospective intermediaries is conducted over one week and outlines the criminal court system, interviewing procedures, report-writing, courtroom skills and the shift in professional responsibility from client welfare to the court. The emphasis is on practical learning, using role-plays of every aspect of an intermediary's role.<sup>223</sup> Upon successful completion of the course, the person is registered as an intermediary. The training and assessment arrangements ensure that the court and legal representative can be satisfied of an intermediary's professional competence and their independence in the process of acting as a communication conduit for the witness.<sup>224</sup> The Commission is encouraged by the training of Registered Intermediaries under the Witness Intermediary Scheme in England and Wales.

5.93 Provision should also be made for a preliminary out of court test stage to ensure that the intermediary understands and is understood by the witness. In England and Wales, the *Intermediary Procedural Guidance Manual* states that a meeting should be held between the witness and the proposed intermediary prior to the trial. The purpose of the meeting is to enable the witness and intermediary to (a) establish the communicative systems employed by the witness and any aids to communication; (b) establish a rapport with and understanding of each other; and (c) engage in an extended process of communication that helps to identify the breadth, fluency and ease of communication possible within the legal context in which future communication will take place.<sup>225</sup>

5.94 There is also a need for proper education and training of practitioners to enable them to (a) better utilise intermediaries; and (b) to appreciate the difficulties encountered by people who may require extra support and accommodation to give their evidence in court. In England and Wales, for example, the

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<sup>222</sup> *Achieving Best Evidence in Criminal Proceedings – Guidance on interviewing victims and witnesses and guidance on using special measures* (Ministry of Justice 2011) at paragraph 2.199.

<sup>223</sup> Hanna, Davies, Henderson, Crothers and Rotherham *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (The Law Foundation New Zealand 2010) at 137.

<sup>224</sup> Office for Criminal Justice Reform *Intermediary Procedural Guidance Manual* (2005) at paragraph 3.7.9.

<sup>225</sup> *Ibid* at paragraph 3.9.5.

Office for Criminal Justice Reform published *Procedural Guidelines for Practitioners on the Intermediary Provision (s. 29) of the Youth Justice and Criminal Evidence Act 1999*.<sup>226</sup>

**(iv) The development of guidelines**

5.95 The Commission considers that the role and function of intermediaries in the criminal justice system in Ireland requires clarification. It therefore recommends the development of guidelines which would clearly set out the parameters of an intermediary's role. In addition to aiding intermediaries, guidelines would also offer assistance to practitioners and the courts on the extent of an intermediary's role (e.g. the extent to which they can intervene in questioning, whether they should relay all questions or monitor and intervene only in problematic instances, and the extent to which they can intervene in answers and in question sequences). Guidelines should also stipulate criteria for the appointment of intermediaries.

5.96 *The Commission recommends the development of guidelines which set out the parameters of an intermediary's role.*

**(7) Support persons**

5.97 Research has demonstrated that the presence of a support person known to the witness may reduce the witness' anxiety and improve the accuracy of their recall.<sup>227</sup> Some countries make provision for a court witness supporter to provide emotional support and to help reduce the witness' anxiety and stress, contributing to their ability to give their best evidence. Support persons can also provide information to the witness regarding the progress of the case throughout the trial. A court witness supporter can be anyone known to the witness who is not a party to the proceedings and has no detailed knowledge of the evidence in the case. The role of support persons was summarised by the Law Reform Commission of Western Australia, in its 1990 *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses*, in the following way:<sup>228</sup>

“[s]upport' can, of course, cover a wide range of activities. At its minimum it would usually involve accompanying a child to court and sitting near him or her either in court (or in a monitor room) when he or she is giving evidence. In the United States, where some very young children have given evidence, the support person has been the child's mother who has held the child on her lap while the child was questioned. The role of the support person is to give the child some emotional security in a strange situation, thereby enhancing the child's ability to withstand the ordeal of giving evidence. This is valuable for both child and prosecution. It is not the part of a support person to coach or prompt the child in what he or she has to say, but the role should not preclude a gentle encouragement to 'tell the judge what happened' when a child seems to freeze, or giving a soothing pat to a distraught witness. Experience will obviously determine acceptable limits to such support and provide guidelines for support persons.”

5.98 In England and Wales, section 102 of the *Coroners and Justice Act 2009* makes provision for witnesses to be accompanied by a supporter whilst giving their evidence by live television link in criminal proceedings.<sup>229</sup> The role of the supporter during the court hearing is “principally to provide emotional support for the witness in order to reduce anxiety or stress, and therefore enable the witness to give their

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<sup>226</sup> Office for Criminal Justice Reform *Procedural Guidelines for Practitioners on the Intermediary Provision (s. 29) of the Youth Justice and Criminal Evidence Act 1999* (2005).

<sup>227</sup> Ministry of Justice *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses and guidance on using special measures* (2011) at paragraph 4.67.

<sup>228</sup> Law Reform Commission of Western Australia *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Project No 87 1990) at paragraph 4.83. Under section 106R of the *Evidence Act 1906 (WA)*, a person who by reason of mental impairment, is unlikely to be able to give evidence, or to give evidence satisfactorily, is entitled to “have near to him or her a person, approved by the court, who may provide him or her with support.”

<sup>229</sup> Section 102 of the *Coroners and Justice Act 2009* inserts subsections (1A) and (1B) into section 24 of the *Youth Justice and Criminal Evidence Act 1999*.

best evidence.”<sup>230</sup> The support person must be someone who only has basic information about the witness’ evidence and they must avoid discussing the witness’ testimony with them.<sup>231</sup> In addition, the supporter cannot be a party to the case and will have received appropriate training and where possible, will have a relationship of trust with the witness. The UK Ministry of Justice has developed national standards for the court witness supporter in the live link room.<sup>232</sup> This provision was replicated for criminal proceedings in Northern Ireland,<sup>233</sup> putting on a statutory footing an element of the service which was already being provided by Victim Support Northern Ireland and the National Society for the Prevention of Cruelty to Children.<sup>234</sup> In its *Consultation Paper on Vulnerable Witnesses in Civil Proceedings*, the Northern Ireland Law Commission noted that the “use of supporters appears to be a useful method of assisting witnesses in civil proceedings, though it should be noted that there may be a financial impact in making a recommendation of this nature if supporters were to be provided by agencies or organisations.”<sup>235</sup>

5.99 In Scotland, supporters have a more wide-ranging role and are not just limited to accompanying a witness in a live link room. “Supporters” have a legislative basis in Scotland for attending court with a witness in order to provide support in criminal proceedings.<sup>236</sup> The supporter is nominated by or on behalf of the vulnerable witness and may be present alongside the witness to support them while they are giving evidence. The Scottish legislation states that if the person nominated as a supporter is to give evidence at the trial, they may not act as a supporter at any time before giving evidence.<sup>237</sup> It also stipulates that the supporter shall not prompt or otherwise seek to influence the witness in the course of giving evidence.<sup>238</sup>

5.100 As noted by the Law Reform Commission of New Zealand, it would seem unlikely that the presence of support persons would either hinder the ascertainment of facts or impinge on the right of the accused to a fair trial.<sup>239</sup> The New Zealand Commission, in its *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses*, put forward that it would be useful to include a provision giving a presumptive entitlement to a support person for all complainants subject to the court’s discretion.<sup>240</sup> The Commission advised that the judge in each case would decide on what role the support person could take in particular circumstances, depending on, for example, the age of the witness, the nature of the proceedings or offence, and the relationship between the witness and the defendant in a criminal case.<sup>241</sup>

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<sup>230</sup> Ministry of Justice *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses and guidance on using special measures* (2011) at paragraph 4.67.

<sup>231</sup> *Ibid.*

<sup>232</sup> The national standards are set out in Appendix L of *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses and guidance on using special measures* (Ministry of Justice 2011).

<sup>233</sup> Section 10 of the *Justice Act (Northern Ireland) 2011*.

<sup>234</sup> Northern Ireland Law Commission *Consultation Paper on Vulnerable Witnesses in Civil Proceedings* (NILC 4 2010) at paragraph 3.57.

<sup>235</sup> *Ibid* at paragraph 6.45.

<sup>236</sup> Section 271L of the *Criminal Procedure (Scotland) Act 1995* as substituted by section 1 of the *Vulnerable Witnesses (Scotland) Act 2004*.

<sup>237</sup> Section 271L(2) of the *Criminal Procedure (Scotland) Act 1995* as substituted by section 1 of the *Vulnerable Witnesses (Scotland) Act 2004*.

<sup>238</sup> Section 271L(3) of the *Criminal Procedure (Scotland) Act 1995* as substituted by section 1 of the *Vulnerable Witnesses (Scotland) Act 2004*.

<sup>239</sup> New Zealand Law Commission *Discussion Paper on The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper 26 1996) at paragraph 161.

<sup>240</sup> *Ibid* at paragraph 163.

<sup>241</sup> *Ibid* at paragraph 164. See now section 79(2) of the *New Zealand Evidence Act 2006*.

Australian jurisdictions also provide for the use of support persons to provide emotional support to the complainant while giving evidence.<sup>242</sup>

5.101 The Commission is aware that support is provided in Ireland to prosecution witnesses and their families in court on a voluntary basis through Victim Support at Court.<sup>243</sup> The service provides trained volunteers who can facilitate a pre-trial visit to the courtroom for the witness and provide emotional support during the trial. The National Advocacy Service for People with Disabilities, which was formally launched in March 2011, provides independent, representative advocacy services for people with disabilities, including where they are involved in court proceedings. As already discussed in Chapter 1 of this Report, the Commission is aware that Personal Advocates have accompanied parents with intellectual disability to court where an application for a care order has been made. They have also on occasions provided support to victims of crime with disabilities.<sup>244</sup> The Commission is of the view that this service could have a role to play in providing independent advocacy support for people who require practicable assisted decision-making support and accommodation in the reporting of sexual abuse and court attendance. The service should be extended to provide support to complainants and witnesses who require support and accommodation during their participation in a criminal trial and during pre-trial interviews.

**5.102** *The Commission recommends that the National Advocacy Service for People with Disabilities should be extended to provide support to complainants and witnesses who require support and accommodation during pre-trial interviews and during their participation in a criminal trial.*

### **(8) Communication aids**

5.103 The Commission appreciates that facilitated communication through an intermediary is only one aspect of a spectrum of augmentative and alternative forms of communication that might be employed to assist a person to give evidence. Augmentative communication includes methods which support verbal speech (e.g. sign language when used to augment speech or gestures and body language, such as nodding and pointing) whilst alternative communication is the collective description of methods of communication which take the place of speech (the use of sign boards or verbal computers which will enable a witness to make use of an artificial voice where he or she has lost the power of speech).<sup>245</sup> Other measures which can support communication and contribute to the credibility of a relevant person as a witness include the use of sign language, communication aids, assistive technology and picture exchange systems.

5.104 Section 30 of the English *Youth Justice and Criminal Evidence Act 1999* states that a special measures direction may allow for the witness, while giving evidence (whether by testimony in court or otherwise), to be provided with such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness. The effect of this section is to permit the use of signs and symbol boards which can be used in conjunction with an intermediary.<sup>246</sup> Similarly, under section 18 of the *Criminal Evidence (Northern Ireland) Order 1999*, the court may authorise the use of communication aids to help witnesses overcome difficulties when being asked or answering questions. The measure is available to witnesses based on their eligibility under article 4 of the 1999 Order and is available to children, people who are living with a mental disorder or significant impairment of intelligence and social functioning, or those living with a physical disability or disorder. The Northern Ireland Law

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<sup>242</sup> See for example, section 294B of the *Criminal Procedure Act 1986* (NSW), section 37C(3)(c) of the *Evidence Act 1958* (Vic), section 21A(2)(d) of the *Evidence Act 1977* (Qld), section 13(2)(c) of the *Evidence Act 1929* (SA), section 21A(2)(c) of the *Evidence Act 1939* (NT) and section 106R(4)(a) of the *Evidence Act 1906* (WA).

<sup>243</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 85.

<sup>244</sup> *Ibid* at 109.

<sup>245</sup> Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011) at paragraph 3.54.

<sup>246</sup> *Achieving Best Evidence in Criminal Proceedings – Guidance on interviewing victims and witnesses and guidance on using special measures* (Ministry of Justice 2011) at 168.

Commission, in its 2010 *Consultation Paper on Vulnerable Witnesses in Civil Proceedings*, referred to a case in which a man was convicted of sexually abusing severely disabled residents in a care home upon the evidence of residents who communicated by blinking or by indicating symbols on a computer.<sup>247</sup> During the trial, one resident blinked her eyes in response to yes or no questions put to her by lawyers, while another resident used a pointer on a computer screen, operated by a joystick on her wheelchair, to identify the accused and to indicate what he had done to her by using symbols of body parts. In its subsequent *Report on Vulnerable Witnesses in Civil Proceedings*, the Northern Ireland Law Commission, recommended that aids be included as a special measure for witnesses in civil proceedings.<sup>248</sup>

5.105 The Commission is of the view that the role of an intermediary can, in certain circumstances, be enhanced by the use of appropriate communication aids. The Commission therefore recommends that provision should be made for communication aids to be used in conjunction with intermediaries when necessary to enable a complainant to communicate their testimony.

5.106 *The Commission recommends that provision should be made for communication aids to be used in conjunction with intermediaries, when necessary to enable a complainant to communicate their testimony.*

## **(9) Use of appropriate language and questioning style**

### **(a) Challenges**

5.107 The language used in a courtroom poses particular obstacles for people who require support and accommodation to give evidence. A study carried out in 2001 on a group of people with intellectual disability revealed that several parties could not comprehend terms such as “guilty” and “innocent”. The study concluded that “understanding of the complexity of the legal system requires a degree of cognitive sophistication beyond the capacity of most developmentally disabled individuals.”<sup>249</sup> In addition, people with intellectual disability may have difficulty with leading or lengthy questions, questions delivered rapidly or containing many concepts or double negatives.<sup>250</sup> They have often learned modes of behaviour leading to a need for approval, which can make them temper their responses merely to please the questioner.<sup>251</sup> It has been argued that people with intellectual disability can give accurate testimony, despite the fact that they appear to have difficulties in memorising and retrieving information, when appropriate styles of questioning are used to elicit information.<sup>252</sup> The questioning style adopted by barristers, particularly where the victim is under cross-examination, can often have a detrimental impact on the evidence provided by the witness if the practitioner is not aware of the accommodations necessary for effective communication with persons with intellectual disability.<sup>253</sup> In this regard, it has been suggested that

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<sup>247</sup> Northern Ireland Law Commission *Consultation Paper on Vulnerable Witnesses in Civil Proceedings* (NILC 4 2010) at paragraph 6.42.

<sup>248</sup> Northern Ireland Law Commission *Report on Vulnerable Witnesses in Civil Proceedings* (NILC 10 2011) at paragraph 3.56.

<sup>249</sup> Ericson and Perlman “Knowledge of Legal Terminology and Court Proceedings in Adults with Developmental Disabilities” (2001) 25(5) *Law and Human Behaviour* 529 at 541-542. In addition, in Smith “Confusing the terms ‘guilty’ and ‘not guilty’: implications for alleged offenders with mental retardation” (1993) 73 *Psychological Reports* 675-8 (cited in O’Callaghan and Murphy “Sexual relationships in adults with intellectual disabilities: understanding the law” (2007) 51(3) *Journal of Intellectual Disability Research* 197 at 204), it was noted in a study involving people with intellectual disability accused of committing criminal offences, that 16% did not understand the word “guilty” and 22% did not understand the words “not guilty.”

<sup>250</sup> Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) at paragraph 6.36.

<sup>251</sup> Advocacy Training Council of the Bar of England and Wales *Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court* (2011) at paragraph 20.7.

<sup>252</sup> Stobbs and Kebbell “Jurors’ perception of witnesses with intellectual disabilities and the influence of expert evidence” (2003) 16 *Journal of Applied Research in Intellectual Disabilities* 107 at 107.

<sup>253</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 80-81.

people with intellectual disability provide the most accurate response to open, free recall questions.<sup>254</sup> Appropriate communication and questioning methods are thus key to dealing effectively with witnesses with intellectual disability.<sup>255</sup> Studies have pointed to a failure on the part of legal professionals to understand the capabilities of people with intellectual disability<sup>256</sup> and uncertainty on the part of barristers and the judiciary regarding how to best communicate with people with intellectual disability.<sup>257</sup>

**(b) The court's discretion to control questioning**

5.108 The notion that a party should be free generally to present its case, particularly during cross-examination, as it chooses, has in the past meant that judges are reluctant to interfere with cross-examination.<sup>258</sup> In the Supreme Court of Canada, in *Osolin v R*, Cory J stated:

“There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness, cross-examination can provide the means to explore the frailties of the testimony.... Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence...”<sup>259</sup>

5.109 The right to cross-examine is not absolute however. The issue of controlling cross-examination is particularly acute in the case of complainants and witnesses who require support and accommodation to give evidence.

5.110 In England and Wales, the courts have recognised the need for advocates to adapt their approach when dealing with vulnerable witnesses.<sup>260</sup> In *R v Wills*,<sup>261</sup> the English Court of Appeal held that in cases where it is necessary and appropriate to have limitations on the way in which an advocate conducts cross-examination, there is a duty on the judge to ensure that those limitations are complied with in order to ensure that vulnerable witnesses are able to give the best evidence of which they are capable.<sup>262</sup> The court confirmed that it was appropriate for the judge to intervene to stop long questions and inappropriate comment by counsel. While the court considered that the cross-examination conducted by counsel for the co-defendant in the case failed to comply with the judge's limitation, it did not consider that it led to any unfairness in the way in which the trial was conducted from the point of view of the accused and any unfairness was properly dealt with by a direction given by the judge to the jury.<sup>263</sup> Although that case concerned a child witness, the principles discussed in the case are applicable to all vulnerable witnesses, including adults who require assisted decision-making support and accommodation to give evidence.

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<sup>254</sup> Stobbs and Kebbell “Jurors’ perception of witnesses with intellectual disabilities and the influence of expert evidence” (2003) 16 *Journal of Applied Research in Intellectual Disabilities* 107 at 108.

<sup>255</sup> Advocacy Training Council of the Bar of England and Wales *Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court* (2011) at paragraph 20.1.

<sup>256</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 73.

<sup>257</sup> *Ibid* at 86.

<sup>258</sup> Sleight “Managing trials for sexual offences – A Western Australian Perspective” (AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney 2011) at 16.

<sup>259</sup> *Osolin v R* (1993) 86 CCC (3d) 481 at 516-517.

<sup>260</sup> See *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr App R 2 and *R v Barker* [2010] EWCA Crim 4; [2011] Crim L R 233.

<sup>261</sup> *R v Wills* [2011] EWCA Crim 1938.

<sup>262</sup> *Ibid* at paragraph 36.

<sup>263</sup> *Ibid* at paragraph 35.

5.111 In a study of cases taken to court in England and Wales in which people with intellectual disability acted as witnesses, the important role of the judge in intervening to ensure clarity in questioning was observed.<sup>264</sup> The study also noted however, that although many judges want to intervene, they lack the necessary knowledge of people who require support and accommodation to give evidence to do so. This highlights the need for training of judges, similar to that recommended in relation to An Garda Síochána, above.<sup>265</sup>

5.112 The 2011 report of the Advocacy Training Council of the Bar of England and Wales, *Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court*<sup>266</sup> addressed the urgent need to address the problems associated with the inconsistency and weakness of some advocates in handling and questioning vulnerable witnesses. The report contains recommendations in relation to cross-examination and refers to the use of a trial practice note of boundaries for the use of advocates and the trial judge.<sup>267</sup> The note may include: an agreed description of the nature of the witness' vulnerability, an outline of particular concerns which should inform questioning, how long the witness should expect to be questioned in one session and what breaks will be taken, and an agreed outline for the formulation of appropriate questions (for example, the use of short, single-subject questions and pauses between questions). The recommendations contained in the 2011 report have been endorsed by the English Court of Appeal.<sup>268</sup> Guidelines on cross-examining witnesses with intellectual disability were also introduced in Western Australia.<sup>269</sup>

5.113 Other jurisdictions have also adopted measures which aim to alleviate the abrasiveness of the adversarial court process for witnesses with intellectual disability.<sup>270</sup> In some jurisdictions, legislation permits a judge to intervene if they consider the questioning of a witness to be inappropriate. For example, under section 26 of the New South Wales *Evidence Act 1995*, the court can make orders in relation to how witnesses are to be questioned; the use of documents in the process of witness questioning; the order in which parties may question a witness; and the behaviour of any person in connection with the questioning of a witness. In addition, section 41 of the 1995 Act obliges the court to intervene in and disallow questioning that is misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive after taking into account any relevant characteristic of the witness, including mental, intellectual or physical disability.<sup>271</sup> This "improper questioning" power in particular, recognises that language employed in cross-examination is sometimes beyond the comprehension of vulnerable witnesses. Section 29(2) of the 1995 Act allows the court to order that a witness give their evidence by narrating their account, without a lawyer's questions, interruptions or directions. Similar provisions appear in sections 26, 29 and 41 of the Victorian *Evidence Act 2008* (Vic).

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<sup>264</sup> Kebell, Hatton, Johnson and O'Kelly "People with learning disabilities as witnesses in court: What questions should lawyers ask?" (2001) 29(3) *British Journal of Learning Disabilities* 98 at 100.

<sup>265</sup> *Ibid* at 101.

<sup>266</sup> Advocacy Training Council of the Bar of England and Wales *Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court* (2011).

<sup>267</sup> Advocacy Training Council of the Bar of England and Wales *Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court* (2011) at paragraph 15 of Part 5.

<sup>268</sup> *R v Wills* [2011] EWCA Crim 1938 at paragraph 22.

<sup>269</sup> Sleight "Managing trials for sexual offences – A Western Australian Perspective" (AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney 2011) at 20-22.

<sup>270</sup> Nair "Giving Voice in Court: Cushioning Adversarialism for Witnesses with Intellectual Disabilities" (2009) 21(3) *Current Issues in Criminal Justice* 481 at 481. In the Consultation Paper, the Commission recognised, albeit regarding a defendant, the need for courts to ensure, so far as is practicable, that the trial is conducted in easily understood, clear language that the defendant can understand and that cross-examination is conducted by questions that are equally easily understood and short (Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.92).

<sup>271</sup> Section 41(2)(b) of the *Evidence Act 1995* (NSW). See also section 26 of the *Evidence Act 1906* (WA).

5.114 The Victorian Law Reform Commission recommended that the *Evidence Act 1958 (Vic)* be amended to impose a duty on the court to ensure, as far as possible in the case of questions asked of people with a cognitive impairment, that neither the context of a question nor the manner in which it is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and that the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.<sup>272</sup> The Victorian Law Reform Commission also noted a submission which stated that the criminal justice system can only operate fairly if judges have an understanding of and sensitivity to the needs of people with a cognitive impairment.<sup>273</sup> It therefore recommended that training programs for the judiciary, prosecutors and defence lawyers should include a component on the disadvantages experienced by people with intellectual disability in their participation in the criminal justice process, and effective communication with such people.<sup>274</sup>

5.115 The Commission recognises that the use of legal jargon and traditional style of questioning during cross-examination can operate to further alienate people who require support and accommodation to give evidence during the criminal trial process. While the Commission also acknowledges the perceived conflict between enabling a witness to give his or her best evidence and the pursuit of a fair and effective defence, it is of the view that obtaining the most truthful and accurate account of events concerned in the trial will also be of importance to the defence and appropriate and effective testing of the complainant's evidence is essential in that regard.<sup>275</sup> In addition, while intermediaries bring a new type of expertise to the criminal justice process, their introduction cannot totally compensate where the communication abilities of criminal justice professionals are poor.<sup>276</sup>

### **(c) Training**

5.116 Article 13(2) of the UNCRPD requires states that ratify it to promote appropriate training for those working in the administration of justice in order to ensure effective access to justice for persons with disabilities.

5.117 The 2012 UCC study noted that while some agencies such as victim support agencies, have undertaken disability awareness training, other agencies and professionals such as the judiciary and the Courts Service appear to have undertaken little, if any.<sup>277</sup> Nair has commented that without appropriate training, it is questionable whether judges can appreciate the complex difficulties facing witnesses with intellectual disabilities.<sup>278</sup> It appears however that some efforts are being made to raise awareness within the criminal justice system of adults who require extra support and accommodation to give evidence. In 2011, the Committee for Judicial Studies in Ireland published guidelines for judges on how to treat people with disabilities, amongst a range of other groups.<sup>279</sup> The Commission is of the view that similar guidance should be available for barristers and recommends that barristers receive specific training on dealing with people who require support and accommodation to give evidence in court and how to best accommodate their individual communication needs. As Delahunt observed:

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<sup>272</sup> Victorian Law Reform Commission *Sexual Offences: Final Report* (2004), recommendation 158.

<sup>273</sup> *Ibid* at paragraph 6.38.

<sup>274</sup> Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) at paragraph 6.39 and recommendations 159 and 160.

<sup>275</sup> Advocacy Training Council of the Bar of England and Wales *Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court* (2011) at paragraph 20.4.

<sup>276</sup> Plotnikoff and Woolfson "Making Best Use of the Intermediary Special Measure at Trial" (2008) 2 Crim LR 91 at 103.

<sup>277</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 5.

<sup>278</sup> Nair "Giving Voice in Court: Cushioning Adversarialism for Witnesses with Intellectual Disabilities" (2009) 21(3) *Current Issues in Criminal Justice* 481 at 481.

<sup>279</sup> Committee for Judicial Studies *Equal Treatment of Persons in Court: Guidance for the Judiciary* (2011).



“[g]ardaí who conduct the section 16(1)(b) interviews are now more specifically trained than senior legal practitioners in the techniques of interviewing children and persons with an intellectual disability. Specific advocacy training for legal practitioners in this area is recognised as an ongoing need in respect of the advocacy training provided by the Honourable Society of Kings Inns and the Law Society.”<sup>280</sup>

5.118 The Commission also recommends the introduction of guidelines for cross-examining witnesses with a range of different capacities. Such training and guidance would go some way towards addressing negative assumptions of legal practitioners regarding the capacity of people who require support and accommodation to be reliable witnesses.

5.119 *The Commission recommends that specific training should be provided to barristers on dealing with people who require support and accommodation to give evidence in court and how to best accommodate their individual communication needs. The Commission also recommends the introduction of guidelines for cross-examining witnesses with a range of different capacities.*

#### **(10) Guidelines for those working in the criminal justice system**

5.120 In the Consultation Paper, the Commission provisionally recommended the development of guidelines for those working in the criminal justice process in identifying current obstacles and examining methods by which the participation of adults who require support and accommodation in court proceedings could be enhanced.<sup>281</sup> It was envisaged that this could be done in consultation with the National Disability Authority and the proposed Office of Public Guardian, to be established under the forthcoming mental capacity legislation.<sup>282</sup> Submissions received by the Commission in response to the Consultation Paper were supportive of this provisional recommendation. The Commission is aware that the Rape Crisis Network Ireland published a *Legal Information Pack for Practitioners Advising Survivors of Sexual Violence* in May 2012.<sup>283</sup> This document contains specialised information for lawyers such as an overview of sexual violence issues as they impact on survivors, the various supports which are available and the principal legal issues which a survivor may encounter during their contact with the criminal justice system.

5.121 The Commission confirms its provisional recommendation with regard to the development of guidelines for those working in the criminal justice system. The Commission considers that in addition to the National Disability Authority and the proposed Office of Public Guardian, the development of such guidelines would benefit from the involvement of specialist advocacy groups, such as Inclusion Ireland and Rape Crisis Network Ireland and statutory agencies, such as An Garda Síochána, the Courts Service and the Office of the Director of Public Prosecutions. Guidelines should include a framework of structured training and disability awareness raising for individuals working in the criminal justice system. They should address issues such as the early identification of persons who require support and accommodation, the varying degrees of capacity, the difficulties which such persons may encounter during their participation in the criminal trial process and the availability of measures which could ensure effective access to justice for the person, including the use of intermediaries and support persons. Such guidance would help to develop a greater awareness by criminal justice practitioners of how to overcome communication difficulties that witnesses who require support and accommodation commonly experience. Guidelines should also include emphasis on the importance of effective communication between different agencies with whom a victim comes into contact in the criminal justice system and engagement between

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<sup>280</sup> Delahunt “Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992” (2011) 16(1) *The Bar Review* 2 at 5.

<sup>281</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.40. A similar recommendation was made by the Victorian Law Reform Commission (Victorian Law Reform Commission *Sexual Offences: Final Report* (2004) at paragraph 6.39).

<sup>282</sup> Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraph 6.40.

<sup>283</sup> Rape Crisis Network Ireland *Legal Information Pack for Practitioners Advising Survivors of Sexual Violence* (2012) available at [www.rcni.ie](http://www.rcni.ie).

members of An Garda Síochána and other agencies such as the Courts Service, victim support organisations, and health and social care agencies who may be working with the individual.<sup>284</sup>

5.122 *The Commission recommends the development of guidelines for those working in the criminal justice system in identifying witnesses who may require support and accommodation to give evidence, identification of current obstacles and examining methods by which their participation in court proceedings could be enhanced. The Commission recommends that such guidelines should be developed in consultation with the proposed Office of Public Guardian, the National Disability Authority, the Rape Crisis Network Ireland (and other specialist advocacy groups), An Garda Síochána, the Courts Service and the Office of the Director of Public Prosecutions.*

## **D Special measures for defendants**

### **(1) Introduction**

5.123 In this section, the Commission examines the position of defendants who may require special assistance to ensure their full and equal participation in the criminal trial process. In Ireland, defendants who may require special assistance in the trial process do not have the same statutory entitlement to the same range of supports as other witnesses. The Commission considers that this could potentially be in breach of Article 6 of the ECHR.

### **(2) Challenges facing defendants who require support and accommodation**

5.124 In 2012, the Prison Reform Trust in the UK published a Report on the experiences of offenders with learning disabilities and difficulties in the criminal justice system. It noted that high numbers of defendants have particular support needs which, if left unmet, can affect their ability to participate effectively in court proceedings and compromise their right to a fair trial, as protected by Article 6 of the ECHR.<sup>285</sup> Around a fifth of adult prisoners said they did not understand what was happening in court or what was happening to them and some did not understand why they were in court or what they had done wrong.<sup>286</sup> In a 2009 publication of the UK Prison Reform Trust, it was suggested on foot of research findings that defendants with intellectual disability, like witnesses, may face difficulties during their participation in the criminal justice process, such as:

- being less likely to understand information about the caution and their legal rights;
- being more likely to make decisions which would not protect their rights as suspects and defendants; and
- being more likely to be acquiescent and suggestible.<sup>287</sup>

5.125 The minimum rights of the accused in a criminal trial as set out in Article 6 of the ECHR are arguably violated where a defendant's ability to understand and be involved in the trial is significantly inhibited and where the necessary supports to assist them in participating in the trial process are not provided. In this regard, the UK's Joint Committee on Human Rights concluded that:

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<sup>284</sup> Edwards, Harold and Kilcommins *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) at 61.

<sup>285</sup> Talbot *Fair Access to Justice? Support for vulnerable defendants in the criminal courts* (Prison Reform Trust 2012). The Report stated that 7% of adult prisoners have an IQ of less than 70 and a further 25% have an IQ of between 70-79. In addition, it is generally acknowledged that between 5 and 10% of the adult offender population has a learning disability. The extensive research undertaken by the UK Prison Reform Trust also indicated that around two-thirds experienced difficulties in verbal comprehension skills, including difficulties understanding certain words and in expressing themselves.

<sup>286</sup> Talbot *Fair Access to Justice? Support for vulnerable defendants in the criminal courts* (Prison Reform Trust 2012) at 11. See also Talbot "No One Knows. Prisoners' Voices. Experience of the criminal justice system by prisoners with learning disabilities and difficulties" (Prison Reform Trust 2008).

<sup>287</sup> Jacobson and Talbot *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Prison Reform Trust 2009) at 5.

“[w]e are concerned that the problems highlighted by... [the] evidence could have potentially very serious implications for the rights of people with learning disabilities to a fair hearing, as protected by the common law and by Article 6 ECHR. Some of this evidence also suggests that there are serious failings in the criminal justice system, which give rise to the discriminatory treatment of people with learning disabilities.”<sup>288</sup>

### **(3) Comparative analysis**

#### **(a) England and Wales**

5.126 Section 16 of the English *Youth Justice and Criminal Evidence Act 1999* excludes defendants from the provision of special measures. The availability of special measures to vulnerable defendants in England and Wales is currently based on the court’s inherent jurisdiction under section 19(6) of the English *Youth Justice and Criminal Evidence Act 1999*. Section 19(6) of the 1999 Act allows the court to exercise its inherent jurisdiction to make an order or give leave of any description in relation to any witness. Since the decision of the European Court of Human Rights in *SC v United Kingdom*,<sup>289</sup> there have been calls to extend the provisions on special measures to vulnerable defendants.<sup>290</sup>

5.127 Currently, there is no statutory framework in England and Wales for allowing the use of an intermediary for a defendant. However, section 33BA of the *Youth Justice and Criminal Evidence Act 1999*, as inserted by section 104 of the *Coroners and Justice Act 2009*, will when implemented, allow the court to make a direction that provides that any examination of the accused be conducted through an interpreter or an intermediary. The provisions apply to (a) defendants under the age of 18 years whose ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by their level of intellectual ability or social functioning and (b) defendants over the age of 18 who are unable to participate effectively in the proceedings as a witness giving oral evidence in court because they suffer from a mental disorder within the meaning of the *Mental Health Act 1983*, or otherwise have a significant impairment of intelligence or social functioning. In both cases, the making of the direction must be necessary in order to ensure that the accused receives a fair trial.

5.128 Pending implementation of this measure, the courts use their inherent jurisdiction under section 19(6) of the 1999 Act<sup>291</sup> to appoint intermediaries for vulnerable defendants. The judgment in *R (on the application of C) v Sevenoaks Youth Court* provides authority for the court to appoint an intermediary to support a defendant to follow the proceedings and to give evidence, if without such assistance he would not be able to have a fair trial. It was held that notwithstanding the absence of any express statutory power, the court has a duty under its inherent powers and under the *Criminal Procedure Rules 2005* to take such steps as are necessary to ensure that the accused has a fair trial, not just during the proceedings, but also during preparation for the trial.<sup>292</sup> The *Registered Intermediary Procedural Guidance Manual* states that the judiciary should consider the judgment in the *Sevenoaks* case to ensure that the defendant gives their best evidence and receives a fair trial, helping them deal with the circumstances of each particular defendant accordingly.<sup>293</sup>

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<sup>288</sup> *A Life Like Any Other? Human Rights of Adults with a Learning Disability* (House of Lords/House of Commons Joint Parliamentary Committee on Human Rights 2008) at paragraph 212.

<sup>289</sup> *SC v United Kingdom* [2005] 1 FCR 347.

<sup>290</sup> For further discussion, see Law Reform Commission *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at paragraphs 6.82 – 6.92.

<sup>291</sup> Section 19(6) of the English *Youth Justice and Criminal Evidence Act 1999* allows the court to exercise its inherent jurisdiction to make an order or give leave of any description in relation to any witness.

<sup>292</sup> *R (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); [2010] 1 All ER 735 at paragraph 17. Under section 3.10(e) of the *Criminal Procedure Rules 2005*, the court was required to consider arrangements which facilitate the participation of the defendant.

<sup>292</sup> *R (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3008 (Admin); [2010] 1 All ER 735.

<sup>293</sup> Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2012) at paragraph 1.17.

5.129 At present, in England and Wales, there are no statutory criteria in force which define “vulnerable defendants” in respect of the use of an intermediary. Each case is decided on its own facts. The defence must seek someone who is best able to help, either from their professional qualifications and experience or from their knowledge of the defendant and their communication abilities and needs. The service which matches communications specialists to the particular needs of witnesses, now facilitated by the National Policing Improvement Agency, is not available for defendants since they will be operating outside of the Witness Intermediary Scheme.<sup>294</sup> Thus, while intermediaries appointed to support vulnerable witnesses are registered and subject to a stringent selection, training and accreditation process, and quality assurance, regulation and monitoring procedures, intermediaries for defendants are neither registered nor regulated.<sup>295</sup> It is the responsibility of the defendant’s legal advisors or the court, rather than of the Witness Intermediary Scheme, the Ministry of Justice or the National Policing Improvement Agency, to make arrangements for the use of a non-registered intermediary for the defendant.<sup>296</sup> In its 2012 Report, the Penal Reform Trust recommended that all intermediaries should be registered and subject to the same stringent recruitment, training, quality assurance, professional standards and monitoring procedures. It also recommended that there should be one register of intermediaries for all vulnerable people – witnesses, victims and defendants – in the criminal justice system.<sup>297</sup>

5.130 Defendants generally cannot give evidence in England and Wales by way of live link and the courts do not have an inherent power to order the use of this particular means of giving evidence. However, pursuant to sections 33A-C of the 1999 Act, as inserted by section 47 of the *Police and Justice Act 2006*, the court may order the use of a live link in respect of a limited class of vulnerable defendants. The provisions apply to the same categories of defendants as those set out in section 33BA of the 1999 Act.<sup>298</sup> It is a condition that use of a live link would enable the accused to participate more effectively in the proceedings as a witness, whether by improving the quality of their evidence or otherwise<sup>299</sup> and the court must be satisfied that it is in the interests of justice for the accused to give evidence through a live link.<sup>300</sup>

**(b) Northern Ireland**

5.131 In Northern Ireland, provision is made for the use of intermediaries in relation to certain defendants in article 21BA of the *Criminal Evidence (Northern Ireland) Order 1999*, as inserted by section 12 of the *Justice Act (Northern Ireland) 2011*. As is the case with the equivalent provision in the English *Youth Justice and Criminal Evidence Act 1999*, section 12 of the 2011 Act has not yet commenced. The intended roll-out of the use of intermediaries in criminal proceedings in Northern Ireland extends to

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<sup>294</sup> Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2012) at paragraph 1.18.

<sup>295</sup> The person who assists the defendant is known as a “non-registered intermediary.” A non-registered intermediary is an individual – professionally trained or otherwise – who (i) assists a vulnerable defendant as an intermediary in the giving of evidence or throughout his trial; or (ii) assists a prosecution or defence witness but is not recruited, selected and accredited by the Ministry of Justice as a Registered Intermediary operating within the Witness Intermediary Scheme (Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2012) at paragraph 1.19, fn 6).

<sup>296</sup> Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2012) at paragraph 1.19.

<sup>297</sup> Talbot *Fair Access to Justice? Support for vulnerable defendants in the criminal courts* (Prison Reform Trust 2012) at 19.

<sup>298</sup> Section 33BA of the *Youth Justice and Criminal Evidence Act 1999* was inserted by section 104 of the *Coroners and Justice Act 2009*.

<sup>299</sup> Section 33A(4) and (5) of the *Youth Justice and Criminal Evidence Act 1999* as inserted by section 47 of the *Police and Justice Act 2006*.

<sup>300</sup> Section 33A(2)(b) of the *Youth Justice and Criminal Evidence Act 1999* as inserted by section 47 of the *Police and Justice Act 2006*.

vulnerable defendants.<sup>301</sup> Article 21A of the *Criminal Evidence (Northern Ireland) Order 1999*, as inserted by article 82 of the *Criminal Justice (Northern Ireland) Order 2008*, provides for the use of a live link in respect of certain categories of defendants.

**(c) Scotland**

5.132 Scottish legislation provides a robust affirmation of the accused's right to a fair trial. Under section 271F<sup>302</sup> of the *Criminal Procedure (Scotland) Act 1995*, the accused is also entitled to make an application for special measures which include giving evidence through the use of a live television link, the use of a screen, the presence of a supporter and the giving of evidence in chief in the form of a prior statement.

**(d) New Zealand**

5.133 As discussed above, video-recorded cross-examination or re-examination is not included as a special measure in New Zealand, but it is not prohibited by the provisions dealing with the use of alternative ways of giving evidence in the *New Zealand Evidence Act 2006*.<sup>303</sup> Section 103 of the 2006 Act empowers the judge to direct that any witness, including a defendant in criminal proceedings, may give evidence in an alternative way.

**(4) Concluding comments and final recommendations**

5.134 The evidence indicates that many defendants may require special assistance to ensure their full and equal participation in the criminal trial process. In Ireland, such defendants do not have a statutory entitlement to the same range of supports as other witnesses. In light of the above discussion, the Commission concludes that the exclusion of defendants from the application of special measures could potentially constitute a breach of Article 6 of the ECHR. In the Consultation Paper, the Commission invited submissions as to whether pre-trial recording of the cross-examination of a defendant with an intellectual disability should be introduced and whether this would be taken at the same time as evidence-in-chief. Having considered the submissions received in response to the Consultation Paper which addressed this issue, the Commission recommends that special measures that are currently available to witnesses who require support and accommodation to give evidence should be extended to defendants who require assistance in giving evidence during a criminal trial. In addition, the Commission recommends that any amendment of the *Criminal Evidence Act 1992* to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act for special measures in the criminal trial process should also cover defendants who require assistance in giving evidence.

5.135 *The Commission recommends that special measures that are currently available to witnesses who require support and accommodation to give evidence should be extended to defendants who require assistance in giving evidence during a criminal trial. In addition, the Commission recommends that any amendment of the Criminal Evidence Act 1992 to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act for special measures in the criminal trial process should also cover defendants who require assistance in giving evidence.*

5.136 The Commission is also of the view that guidelines for those involved in the criminal justice system should cover methods for the identification of defendants who require support and accommodation to give evidence, identification of current obstacles and examination of methods by which the participation of such defendants in court proceedings could be enhanced.

5.137 *The Commission also recommends that guidelines for those involved in the criminal justice system should cover methods for the identification of defendants who require support and accommodation to give evidence, identification of current obstacles and examination of methods by which the participation of such defendants in court proceedings could be enhanced.*

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<sup>301</sup> Northern Ireland Executive "Ford to pilot new schemes for vulnerable victims, witnesses and defendants" 23 August 2012, available at <http://www.northernireland.gov.uk>.

<sup>302</sup> Section 271F was inserted by section 1 of the *Vulnerable Witnesses (Scotland) Act 2004*.

<sup>303</sup> Tinsley and McDonald "Use of alternative ways of giving evidence by vulnerable witnesses: Current proposals, issues and challenges" (2011) 42 VUWLR 705 at 707.



## CHAPTER 6 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report are:

6.01 The Commission recommends that the term “relevant person,” which should be defined as: “(a) a person whose capacity to consent to a sexual act is called into question or (b) a person who lacks capacity to consent to a sexual act” should be used in any legislation resulting from this Report to refer to those affected by any reform or replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993*, which is the subject-matter of this Report. [Introduction to Report, paragraph 11]

6.02 The Commission recommends that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should provide that while a relevant person’s lack of capacity to consent may arise because of (a) a disability, (b) ill health or (c) any other reason, the fact of disability or of ill health or the presence of any other reason does not, in itself, mean that the relevant person lacks capacity to consent and that each should be treated quite separately. The Commission also recommends that the Code of Practice to be published by the Office of Public Guardian, which is to be established under the *Assisted Decision-Making (Capacity) Bill 2013*, should provide that a person’s state of health or ill-health should not be seen as directly connected with a person’s decision-making capacity and should include detailed guidance on the effect, where relevant, of ill-health on decision-making capacity. [Introduction to Report, paragraph 17]

6.03 The Commission recommends that section 5 of the *Criminal Law (Sexual Offences) Act 1993* should be repealed because it does not reflect the changes in national policy towards a rights-based and functional analysis of capacity to consent. The Commission also recommends that section 5 of the 1993 Act should be replaced by legislative provisions that recognise that persons who lack capacity to consent are at a greater risk of sexual abuse or exploitation than the general population and that this risk is not limited to sexual intercourse, to which section 5 of the 1993 is confined, but more commonly involves other forms of sexual assaults and sexual abuse. The Commission also recommends that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should provide that, to avoid any doubt on the matter, no offence occurs where (a) two relevant persons engage in or attempt to engage in a sexual act and (b) there is no exploitation or abuse (whether physical, sexual or emotional) of either relevant person; and that in such a case they need not have the same decision-making capacity as each other. [Paragraph 1.20]

6.04 The Commission recommends that national standards concerning safeguards from sexual exploitation or abuse for relevant persons be put in place. Such national standards should be developed in consultation with HIQA, the HSE, the proposed Office of Public Guardian, the Department of Education and Skills, An Garda Síochána, professionals such as doctors, nurses and carers, and groups who work with and advocate for the adults concerned, such as the National Disability Authority. The Commission also recommends that the adults to whom the national standards would apply should be consulted in the drawing up of such national standards. The national standards should include protocols on co-operation between different agencies, including the Health Service Executive, HIQA, the proposed Office of Public Guardian and An Garda Síochána, to provide protection to the adults concerned. In addition to protective measures, emphasis should be placed on supporting the positive exercise of a person’s legal right to sexual expression. The national standards should also provide clarity as to who will be responsible for leadership and implementation of the standards and as to accountability. [Paragraph 1.52]

6.05 The Commission recommends that the national standards recommended at paragraph 1.52 of this Report should also cover the delivery of high quality sex and relationships education for relevant persons. This should include: (1) the development of a comprehensive nationwide policy and action plan regarding the delivery of sex and relationships education and (2) clarity as to responsibility for the

provision of educative support. The Commission also recommends that national standards should address the need for education and training for carers, staff and parents, in addition to the establishment of a communications and information campaign to raise awareness throughout the wider community of the sexual rights of persons with intellectual disability. [Paragraph 1.62]

6.06 The Commission recommends that specific provisions on capacity to consent to sexual activity should be incorporated into the criminal law that are consistent with the equality principles in the UN Convention on the Rights of Persons With Disabilities and the European Convention on Human Rights but which also provides substantive and procedural protections against exploitation and abuse. The Commission recommends that these provisions should state that it is an offence to engage in sexual activity with a person who lacks capacity to consent to that sexual activity or whose capacity is in question. [Paragraph 2.68]

6.07 The Commission recommends that a person's capacity to consent to sexual activity should be determined by reference to a functional test of capacity. [Paragraph 2.70]

**6.08** The Commission recommends that the functional test of capacity to consent to sexual acts should require that the relevant person can choose to agree to the sexual act involved (including where he or she can so choose arising from the provision to him or her of suitable decision-making assistance) because he or she has sufficient understanding of the nature and reasonably foreseeable consequences of the sexual act involved. [Paragraph 3.31]

**6.09** The Commission recommends that the functional test of capacity to consent to sexual acts should not include a specific requirement that the person is able to retain the information related to the understanding of the nature and reasonably foreseeable consequences of the sexual act involved. [Paragraph 3.41]

6.10 The Commission recommends that the functional test of capacity to consent to sexual acts should include a requirement that the person is able to weigh up relevant information in deciding whether to engage in the sexual act involved. [Paragraph 3.51]

6.11 The Commission recommends that the functional test of capacity to consent to sexual acts should include a requirement that the person is able to communicate his or her decision (whether by talking, using sign language or any other means). [Paragraph 3.60]

6.12 The Commission recommends that the specific offences which should replace the limited offences in section 5 of the *Criminal Law (Sexual Offences) Act 1993* should mirror the four generally applicable sexual offences in the *Criminal Law (Rape) Act 1981 and 1990*. The Commission also recommends that the offences should take account of specific elements that involve exploitation or abuse, such as inducements, threats or tricks. The Commission also recommends that the offences should also deal separately with persons who occupy positions of trust or authority. The Commission also recommends that these proposed offences should be modelled on those in sections 30 to 44 of the English *Sexual Offences Act 2003* and Articles 43 to 57 of the *Sexual Offences (Northern Ireland) Order 2008*. [Paragraph 4.17]

6.13 The Commission recommends that "a person in a position of trust or authority" should be defined as "parents, stepparents, guardians, grandparents, uncles, aunts, children, nephews and nieces of; any person who is in loco parentis to; or persons who directly care for and support, the victim." The Commission recommends that this should include persons who were in a position of trust or authority in respect of the complainant but were not in such a position at the time of the alleged offence. [Paragraph 4.25]

6.14 The Commission recommends that, in the context of an offence where the defendant was in a position of trust or authority, it shall be presumed that the defendant knew that the relevant person did not have capacity to consent unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know that the relevant person did not have the capacity to consent. The Commission also recommends that where the defendant is not in a position of trust or authority it should remain, as currently provided in section 5(3) of the *Criminal Law (Sexual Offence) Act 1993*, that it is a defence for the defendant to show that at the time of the alleged



commission of the offence he or she did not know and had no reason to suspect that the relevant person did not have the capacity to consent. [Paragraph 4.33]

6.15 The Commission recommends that the fact that the sexual offence in question occurred within a marriage or a civil partnership which pre-dated the relationship of care should not in itself be a defence. [Paragraph 4.36]

6.16 The Commission recommends that the penalties on conviction for the offences recommended in this Report that are to replace section 5 of the *Criminal Law (Sexual Offences) Act 1993* should correspond to the penalties for the four comparable sexual offences which they are intended to mirror. The Commission also recommends that it should continue to be the case that the consent of the Director of Public Prosecutions is required for any prosecution of the offences recommended in this Report. [Paragraph 4.48]

6.17 The Commission recommends the provision of disability awareness training to members of An Garda Síochána by the National Disability Authority. The training should include guidance regarding identification of persons who may require support and accommodation to report abuse and the availability of support measures during the reporting and investigative stages of the criminal justice system and during the criminal trial process. The Commission also recommends that provision should be made for the presence of a support person during police interviews to assist people who require support and accommodation to report abuse. [Paragraph 5.24]

6.18 The Commission recommends that the national standards recommended by the Commission at paragraph 1.52 of this Report should also include the development of an inter-agency procedure between An Garda Síochána and other criminal justice agencies and health, social care and disability services to respond to reports of, and to investigate, abuse or exploitation against adults who require support and accommodation and to ensure early identification of a witness' needs and the provision of appropriate special measures. [Paragraph 5.26]

6.19 The Commission recommends that the national standards recommended by the Commission at paragraph 1.52 of this Report should also cover the delivery of information and education to persons who require practicable assisted decision-making support and accommodation to access the criminal justice system. Education programmes should include information about how to report abuse, how the criminal justice system works, how to access it, what happens at different stages of the criminal justice procedure, the rights of victims of sexual abuse and how to access support. [Paragraph 5.28]

6.20 The Commission recommends that the *Criminal Evidence Act 1992* should be amended to allow for pre-trial cross-examination and re-examination if necessary, of complainants and witnesses who are eligible under the 1992 Act for special measures in the criminal trial process. The recording of the cross-examination should be made in the absence of the accused but in circumstances where he can see and hear the witness being examined and communicate with his counsel (if represented) and the witness' legal representative. The pre-recording should not be admitted as evidence if the safeguards have not been met. The provision allowing for this special measure should be accompanied by a Code of Practice outlining directions for the use of pre-recording. [Paragraph 5.64]

6.21 The Commission recommends that section 14 of the *Criminal Evidence Act 1992* should be amended to allow for the responses of a witness to be communicated to the court through an intermediary where it would not otherwise be understood or where non-verbal methods of communication are used which could only be interpreted by an intermediary. The Commission recommends that a provision should be inserted into section 14(3) of the *Criminal Evidence Act 1992* stipulating that a person may not act as an intermediary in a particular case except after making a declaration that he or she will faithfully perform his or her function as intermediary. [Paragraph 5.88]

6.22 The Commission recommends that in certain exceptional circumstances, the use of a suitable untrained intermediary should be permitted. [Paragraph 5.91]

6.23 The Commission recommends the development of guidelines which set out the parameters of an intermediary's role. [Paragraph 5.96]

6.24 The Commission recommends that the National Advocacy Service for People with Disabilities should be extended to provide support to complainants and witnesses who require support and

accommodation during pre-trial interviews and during their participation in a criminal trial. [Paragraph 5.102]

6.25 The Commission recommends that provision should be made for communication aids to be used in conjunction with intermediaries when necessary to enable a complainant to communicate their testimony. [Paragraph 5.106]

6.26 The Commission recommends that specific training should be provided to barristers on dealing with people who require support and accommodation to give evidence in court and how to best accommodate their individual communication needs. The Commission also recommends the introduction of guidelines for cross-examining witnesses with a range of different capacities. [Paragraph 5.119]

6.27 The Commission recommends the development of guidelines for those working in the criminal justice system in identifying witnesses who may require support and accommodation to give evidence and current obstacles and examining methods by which their participation in court proceedings could be enhanced. The Commission recommends that such guidelines should be developed in consultation with the proposed Office of Public Guardian, the National Disability Authority, the Rape Crisis Network Ireland (and other specialist advocacy groups), An Garda Síochána, the Courts Service and the Office of the Director of Public Prosecutions. [Paragraph 5.122]

6.28 The Commission recommends that special measures that are currently available to witnesses who require support and accommodation to give evidence should be extended to defendants who require assistance in giving evidence during a criminal trial. In addition, the Commission recommends that any amendment of the *Criminal Evidence Act 1992* to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act for special measures in the criminal trial process should also cover defendants who require assistance in giving evidence. [Paragraph 5.135]

6.29 The Commission also recommends that guidelines for those involved in the criminal justice system should cover methods for the identification of defendants who require support and accommodation to give evidence, identification of current obstacles and examination of methods by which the participation of such defendants in court proceedings could be enhanced. [Paragraph 5.137]

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<sup>1</sup> As noted in the Introduction to this Report, the Department of Justice and Equality is currently engaged in a general review of the law on sexual offences and this Report and draft Bill are intended to form part of that general review. The draft Bill is confined to implementing the recommendations in this Report, and the Commission is conscious that it is a matter for the Department and, ultimately, the Oireachtas as to whether the proposals in this Bill are enacted separately or as part of a consolidated and codified Act.

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ACTS REFERRED TO

Criminal Evidence Act 1992 (No.12)

Criminal Law (Sexual Offences) Act 1993 (No.20)

Criminal Procedure Act 1967 (No.12)

**BILL**

*entitled*

An Act to amend the law in relation to sexual offences concerning capacity to consent, to amend the Criminal Evidence Act 1992, to repeal section 5 of the Criminal Law (Sexual Offences) Act 1993 and to provide for related matters.

**Be it enacted by the Oireachtas as follows:**

**Short title and commencement**

**1.** — (1) This Act may be cited as the Criminal Law (Sexual Offences and Capacity to Consent) Act 2013.

(2) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

***Explanatory Note***

Section 1 contains standard provisions on the Short Title of the Bill and commencement arrangements.

**Interpretation**

**2.** — In this Act —

“the Minister” means the Minister for Justice and Equality;

“relevant person” means

- (a) a person whose capacity to consent to a sexual act is called into question, or
- (b) a person who lacks capacity to consent to a sexual act;

“sexual act” means—

- (a) an assault of a relevant person that is accompanied by circumstances of indecency on the part of the defendant;
- (b) a sexual assault of a relevant person that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to a relevant person;

(c) penetration (however slight)—

- (i) of a relevant person’s anus or vagina with a part of the defendant’s body or by any object held or manipulated by the defendant,
- (ii) of a relevant person’s mouth with the defendant’s penis,
- (iii) of the defendant’s anus or vagina with a part of a relevant person’s body, or
- (iv) of the defendant’s mouth with a relevant person’s penis;

or

(d) sexual intercourse.

### ***Explanatory Note***

Section 2 contains definitions for the purposes of the Bill. The definition of “relevant person” implements the recommendation in paragraph 11 of the Introduction to this Report concerning the scope of the Bill and is derived from, but not identical to, the definition of “relevant person” in section 2(1) of the *Assisted Decision-Making (Capacity) Bill 2013* as initiated. The 2013 Bill forms an important element of Ireland’s stated commitment to ratify the 2006 UN Convention on the Rights of Persons With Disabilities; and the Commission intends this Report and draft Bill to be consistent with that commitment. The definition of “sexual act” implements the recommendations in paragraphs 1.20 and 4.17 that any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should not be limited in scope and should apply to all sexual acts. This includes (a) an assault that is accompanied by circumstances of indecency on the part of the defendant (this is equivalent to sexual assault under section 2 of the *Criminal Law (Rape) (Amendment) Act 1990*, which replaced the common law offence of indecent assault); (b) a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person (this is equivalent to aggravated sexual assault under section 3 of the *Criminal Law (Rape) (Amendment) Act 1990*); (c) penetration other than sexual intercourse (this is in general equivalent to “section 4 rape” under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*); and (d) sexual intercourse (this is equivalent to rape under section 2 of the *Criminal Law (Rape) Act 1981*, assuming as with the others that there is no consent).

### **Capacity to consent and choosing to agree**

**3.** — (1) A relevant person has capacity to consent for the purposes of this Act where he or she can choose to agree to the sexual act involved (including where he or she can so choose arising from the provision to him or her of suitable decision-making assistance) because he or she—

- (a) has sufficient understanding of the nature and reasonably foreseeable consequences of the sexual act involved,
- (b) is able to use or weigh up relevant information in deciding whether to engage in the sexual act, and
- (c) is able to communicate his or her decision (whether by talking, using sign language or any other means).

(2) (a) A relevant person does not have capacity to consent for the purposes of this Act where he or she is unable (whether or not he or she has been provided with suitable decision-making assistance) to choose to agree to the sexual act involved because he or does not have sufficient understanding within the

meaning of *subsection (1)(a)*, is not able to use or weigh information within the meaning of *subsection (1)(b)* and is not able to communicate within the meaning of *subsection (1)(c)*.

(b) A relevant person's lack of capacity to consent for the purposes of this Act may arise because of—

(i) a disability,

(ii) ill health or

(iii) any other reason,

but the fact of disability or of ill health or the presence of any other reason does not, in itself, mean that the relevant person lacks capacity to consent.

### ***Explanatory Note***

Section 3 implements the recommendations in paragraphs 2.70, 3.31, 3.41, 3.51 and 3.60 that capacity to consent to a sexual act means that the relevant person can choose to agree to the sexual act involved, based on a functional test of capacity. The functional test is consistent with the approach in the *Assisted Decision-Making (Capacity) Bill 2013* (see section 2, above) and can be contrasted with the “status” approach currently set out in section 5 of the *Criminal Law (Sexual Offences) Act 1993*. The status approach deems a group or class of persons (such as persons who are “mentally impaired”) not to have capacity, whereas the functional approach focuses on whether a particular person has capacity to make a specific decision in a specific setting. Section 3(1) provides that the functional test to be applied in the context of sexual acts involves three elements, namely, that the relevant person: (a) has sufficient understanding of the nature and reasonably foreseeable consequences of the sexual act involved, (b) is able to use or weigh up relevant information in deciding whether to engage in the sexual act, and (c) is able to communicate his or her decision (whether by talking, using sign language or any other means). Section 3(1) also provides that these three elements may be present because the relevant person has been provided with suitable decision-making assistance; as discussed in the Report, the provision of such assistance is envisaged by the 2006 UN Convention on the Rights of Persons With Disabilities. Section 3(2) implements the recommendation in paragraph 17 of the Introduction that a person's decision-making capacity to consent to sexual activity may arise from (a) a disability, (b) ill health or (c) from any other reason, but that none of these should, in itself, mean that the person lacks capacity to consent. This is also consistent with the functional test and also avoids conflation of, for example, decision-making capacity and ill health. The inclusion of “any other reason” is to ensure that a court may take account of any other matter or specific circumstance that could affect decision-making capacity, whether this arises from a developmental issue (including autism), a neurological disorder, dementia or an acquired brain injury.

### **Sexual act that does not involve exploitation or abuse**

**4.** — (1) For the avoidance of doubt, no offence under this Act occurs where—

(a) two relevant persons engage in or attempt to engage in a sexual act, and

(b) there is no exploitation or abuse (whether physical, sexual or emotional) of either relevant person.

(2) For the purposes of this section, the two relevant persons need not have the same decision-making capacity as each other.

### ***Explanatory Note***

Section 4 implements the recommendation in paragraph 1.20 that any replacement of section 5 of the



*Criminal Law (Sexual Offences) Act 1993* should provide that no offence occurs where (a) two relevant persons engage in or attempt to engage in a sexual act and (b) there is no exploitation or abuse of either relevant person – whether physical, sexual or emotional in form. The Report notes that such a provision should refer to the potentially wide scope of exploitation or abuse that may arise, and that both the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* and the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* expressly refer to these three forms of exploitation or abuse. Section 4 also implements the recommendation in paragraph 1.20 that the two relevant persons need not have the same decision-making capacity as each other.

### **Sexual act with a relevant person**

**5.**—(1) A person commits an offence where he or she intentionally or knowingly engages in or attempts to engage in a sexual act with a relevant person who does not have the capacity to consent.

(2) A person commits an offence where he or she intentionally or knowingly, with the agreement of a relevant person who does not have the capacity to consent, engages in a sexual act with that person where that agreement has been obtained by means of an inducement offered or given, a threat made or a deception practised by the person who engages in the sexual act.

### ***Explanatory Note***

Section 5 implements the recommendations in paragraphs 2.68 and 4.17 that the offences replacing section 5 of the *Criminal Law (Sexual Offences) Act 1993* should mirror the four generally applicable sexual offences in the *Criminal Law (Rape) Acts 1981 and 1990* and that they should also provide substantive and procedural protections against exploitation and abuse. Section 5(1) largely mirrors the offence in section 30 of the English *Sexual Offences Act 2003* and Article 43 of the *Sexual Offences (Northern Ireland) Order 2008*. Section 5(2) largely mirrors the offence in section 34 of the English *Sexual Offences Act 2003* and Article 47 of the *Sexual Offences (Northern Ireland) Order 2008*.

### **Sexual acts that involve a person who does not have capacity to consent**

**6.**—(1) A person commits an offence where he or she intentionally or knowingly causes or incites a relevant person, who does not have the capacity to consent, to engage in a sexual act.

(2) A person commits an offence where he or she intentionally or knowingly engages in an a sexual act for the purpose of his or her sexual gratification and where—

- (a) this is done in the presence of or within the sight of a relevant person who does not have the capacity to consent and
- (b) the person engaging in the sexual act knows or believes that the relevant person who does not have the capacity to consent is aware, or intends that the relevant person who does not have the capacity to consent should be aware, that he or she is engaging in the sexual act.

(3) A person commits an offence where he or she intentionally or knowingly, for the purpose of obtaining sexual gratification, causes a relevant person who lacks capacity to consent to—

- (a) watch a third person engaging in a sexual act, or
- (b) to look at an image of any person engaging in a sexual act.

(4) A person commits an offence where he or she intentionally or knowingly, by means of an inducement offered or given to a relevant person who does not have the capacity to consent, a threat made

to such a relevant person or a deception practised by him or her on such a relevant person for this purpose, causes that relevant person to engage in, or to agree to engage in, a sexual act.

(5) A person commits an offence where he or she intentionally or knowingly, by means of an inducement offered or given to a relevant person who does not have the capacity to consent, a threat made to such a relevant person or a deception practised on such a relevant person for this purpose (such inducement, threat or deception being carried out by the person who engages in the sexual act) engages in a sexual act for the purpose of his or her sexual gratification and where—

- (a) this is done in the presence of or within the sight of a relevant person who does not have the capacity to consent and
- (b) the person engaging in the sexual act knows or believes that the relevant person who does not have the capacity to consent is aware, or intends that the relevant person who does not have the capacity to consent should be aware, that he or she is engaging in the sexual act.

(6) A person commits an offence where he or she intentionally or knowingly, for the purpose of obtaining sexual gratification, causes a relevant person who lacks capacity to consent to—

- (a) watch a third person engaging in a sexual act, or
- (b) to look at an image of any person engaging in a sexual act,

and where the relevant person who lacks capacity to consent agrees to watch or look because of an inducement offered or given, a threat made or a deception practised by the person who engages in the sexual act and for the purpose of obtaining that agreement.

### ***Explanatory Note***

Section 6 further implements the recommendations in paragraphs 2.68 and 4.17 that the offences replacing section 5 of the *Criminal Law (Sexual Offences) Act 1993* should mirror the four generally applicable sexual offences in the *Criminal Law (Rape) Acts 1981 and 1990* and that they should also provide substantive and procedural protections against exploitation and abuse. Section 6 largely mirrors the offences in sections 31 to 33 and sections 35 to 37 of the *English Sexual Offences Act 2003* and in Articles 44 to 46 and Articles 48 to 50 of the *Sexual Offences (Northern Ireland) Order 2008*.

### **Persons in position of trust or authority**

**7.—**(1) A person in a position of trust or authority commits an offence where he or she intentionally or knowingly engages in or attempts to engage in a sexual act with a person who does not have the capacity to consent to the sexual act.

(2) A person in a position of trust or authority commits an offence where he or she intentionally or knowingly causes or incites a person, who does not have the capacity to consent, to engage in a sexual act.

(3) A person in a position of trust or authority commits an offence where he or she intentionally or knowingly engages in an a sexual act for the purpose of his or her sexual gratification and where—

- (a) this is done in the presence of or within the sight of a person who does not have the capacity to consent and
- (b) the person engaging in the sexual act knows or believes that the person who does not have the capacity to consent is aware, or intends that the person who does not have the capacity to consent should be aware, that he or she is engaging in the sexual act.

(4) A person in a position of trust or authority commits an offence where he or she intentionally or knowingly, for the purpose of obtaining sexual gratification, causes a person who lacks capacity to consent to—

(a) watch a third person engaging in a sexual act, or

(b) to look at an image of any person engaging in a sexual act.

(5) (a) In this section, “person in a position of trust or authority” means a parent, stepparent, guardian, grandparent, uncle, aunt, child aged 17 or over, adult nephew aged 17 or over, adult niece aged 17 or over, or any other person in loco parentis to or person who directly cares for and supports the person who does not have capacity to consent.

(b) A person shall be regarded as a person in a position of trust or authority where the person is in such a position in respect of the person who does not have capacity to consent at the time of an alleged offence or was in such a position in the past.

### ***Explanatory Note***

Section 7 implements the recommendation in paragraph 4.17 that there should be specific offences of engaging in sexual activity, while in a position of trust or authority, in respect of a person who either lacks capacity to consent or has capacity but is nonetheless vulnerable to abuse and exploitation. Section 7(5)(a) implements the recommendation in paragraph 4.25 that “a person in a position of trust or authority” should be defined as “parents, stepparents, guardians, grandparents, uncles, aunts, children, nephews and nieces of; any person who is in loco parentis to; or persons who directly care for and support, the victim.” Section 7(5)(b) implements the recommendation in paragraph 4.25 that the definition should include persons who were in a position of trust or authority in respect of the complainant but were not in such a position at the time of the alleged offence. Section 7 largely mirrors the offences in sections 38 to 41 of the English *Sexual Offences Act 2003* and in Articles 51 to 54 of the *Sexual Offences (Northern Ireland) Order 2008*.

### **Defences**

8.— (1) (a) Subject to *paragraph (b)*, in any proceedings under this Act it shall be a defence for the defendant to show that at the time of the alleged commission of the offence he or she did not know and had no reason to suspect that the relevant person did not have the capacity to consent.

(b) In proceedings under *section 7(1)*, *section 7(2)*, *section 7(3)* or *section 7(4)*, it shall be presumed that the defendant knew that the relevant person did not have capacity to consent unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know that the relevant person did not have the capacity to consent.

(2) In any proceedings under this Act, the fact that at the time of the alleged offence the defendant was married to or was in a civil partnership with the relevant person (or to whom the defendant believed at the time with reasonable cause he or she was married or in a civil partnership) shall not, in itself, be a defence.

### ***Explanatory Note***

Section 8 (1) implements the recommendation in paragraph 4.33 that, in the context of an offence where the defendant was in a position of trust or authority, it shall be presumed that the defendant knew that the relevant person did not have capacity to consent unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know that the relevant person did not have the capacity to consent; and that in other cases it should remain, as currently provided in section 5(3) of the *Criminal Law (Sexual Offence) Act 1993*, that it is a defence for the defendant to show that at the time of the alleged commission of the offence he or she did not know and had no reason to

suspect that the relevant person did not have the capacity to consent. Section 8(2) implements the recommendation in paragraph 4.36 that the fact that the sexual offence in question occurred within a marriage or a civil partnership which pre-dated the relationship of care should not in itself be a defence.

### **Penalties**

**9.**—(1) A person guilty of an offence under *section 5(1), section 5(2), section 6(1), section 6(2), section 6(3), section 6(4), section 6(5), section 6(6), section 7(1), section 7(2), section 7(3) or section 7(4)* shall, where the offence involves a sexual act coming within *paragraphs (b), (c) or (d)* of the definition of sexual act in *section 2*, be liable on conviction on indictment to imprisonment for life.

(2) A person guilty of an offence under *section 5(1) section 5(2), section 6(1), section 6(2), section 6(3), section 6(4), section 6(5), section 6(6), section 7(1), section 7(2), section 7(3) or section 7(4)* shall, where the offence involves a sexual act coming within *paragraph (a)* of the definition of sexual act in *section 2*, be liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a Class A fine or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

### ***Explanatory Note***

Section 9 implements the recommendation in paragraph 4.48 that the penalties for the offences under the provisions that replace section 5 of the *Criminal Law (Sexual Offences) Act 1993* should correspond to the penalties for the comparable sexual offences which they mirror. Thus, section 9(1) provides that where the sexual act involves corresponds to the offences of aggravated sexual assault, “section 4 rape” or rape, the defendant faces a maximum sentence of life imprisonment on conviction on indictment. It also means that such an offence cannot be tried summarily in the District Court but must always involve trial on indictment, that is, jury trial. Section 9(2) provides that where the sexual act involved corresponds to the offence of sexual assault (previously called indecent assault), the defendant can be tried either summarily in the District Court or on indictment. Whether the defendant is tried in the District Court or on indictment will exclusively be a matter for the Director of Public Prosecutions to decide: see section 10, below. As with the offence of sexual assault, section 9(2) provides that, on summary conviction the defendant faces a maximum term of imprisonment of 12 months or a Class A fine (currently, under the *Fines Act 2010*, a maximum fine of €5,000) or to both; on conviction on indictment the defendant faces a maximum sentence of 14 years imprisonment.

### **Consent of Director of Public Prosecutions**

**10.**— Proceedings against a person charged with an offence under this Act shall not be taken except by or with the consent of the Director of Public Prosecutions.

### ***Explanatory Note***

Section 10 implements the recommendation in paragraph 4.48 that proceedings against a person charged with an offence under the provisions that replace section 5 of the *Criminal Law (Sexual Offences) Act 1993* should continue to require the consent of the Director of Public Prosecutions. Section 10 therefore repeats the requirement to that effect currently in section 5(4) of the 1993 Act.

### **Amendment of Criminal Evidence Act 1992**

**11.**—(1) Section 13(1) of the Criminal Evidence Act 1992 is amended by replacing “In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act, 1967) for an offence to which this Part applies a person other than the accused may give evidence, whether from within or

outside the State,” with “In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act 1967) for an offence to which this Part applies a person, including the accused, may give evidence and may be cross-examined and re-examined, whether from within or outside the State.”.

(2) Section 14 of the Criminal Evidence Act 1992 is amended by replacing subsection (3) with the following—

“(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such (or in exceptional circumstances who is, in its opinion, otherwise suitable to act as such).

(4) The testimony of any witness to which this Part applies may be communicated to the court through an intermediary where it would not otherwise be understood or where non-verbal methods of communication are used which could only be interpreted by an intermediary.

(5) Communication aids may be used in conjunction with an intermediary where this is necessary to enable a witness to communicate his or her testimony

(6) A person may not act as an intermediary unless he or she has made a declaration to the court that he or she will faithfully perform the function of intermediary.”

### ***Explanatory Note***

Section 11(1) implements the recommendation in paragraphs 5.64 and 5.135 that section 13 of the *Criminal Evidence Act 1992* be amended to provide for pre-trial cross-examination and re-examination of witnesses – and defendants – who are eligible under the 1992 Act for special measures in the criminal trial process. Section 11(2) implements the recommendations in paragraphs 5.88, 5.91, 5.107 and 5.135 that section 14 of the *Criminal Evidence Act 1992*, which concerns the role and functions of an intermediary, be amended. These amendments are: (a) that in certain exceptional circumstances, the use of a suitable (not necessarily trained) intermediary should be permitted; (b) that the responses of a witness may be communicated to the court through an intermediary where it would not otherwise be understood or where non-verbal methods of communication are used which could only be interpreted by an intermediary; (c) that provision should be made for communication aids to be used in conjunction with intermediaries when necessary to enable a witness to communicate his or her testimony; and (d) that a person may not act as an intermediary unless he or she has made a declaration that he or she will faithfully perform the function of intermediary.

### **Repeal**

**12.** — Section 5 of the Criminal Law (Sexual Offences) Act 1993 is repealed.

### ***Explanatory Note***

Section 12 implements the recommendation in paragraph 1.20 that section 5 of the *Criminal Law (Sexual Offences) Act 1993* should be repealed.