

**Section 5 Criminal Law (Sexual Offences) Act 1993  
Discussion Paper  
Submission on behalf of the Irish Human Rights  
and Equality Commission (Designate)**

**September 2014**

## Introduction

1. The Irish Human Rights and Equality Commission designate (“IHREC”) is being established pursuant to the Irish Human Rights and Equality Commission Act 2014, bringing about the merger of the Equality Authority and the Irish Human Rights Commission (IHRC). Its functions include reviewing the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and making recommendations to Government thereon. The IHREC welcomes the Government’s intention to repeal section 5 of the Criminal Law (Sexual Offences) Act 1993 (“**the 1993 Act**”) set out in its *Discussion Paper on Sexual Offences with Vulnerable Adults* as it relates to persons with disabilities.

2. The purpose of the legislative reform in a new Criminal Law (Sexual Offences) Bill (not to hand) is stated to provide, on the one hand, for increased protection for “vulnerable persons” against all forms of sexual exploitation and, on the other hand, to respect the rights of persons with an intellectual disability to enter into loving sexual relationships. This is to be achieved through reforming section 5 of the 1993 Act and through adherence to the rights set out in the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”).<sup>1</sup> The IHREC may wish to provide observations on the amending legislation when published in due course. For the purposes of this submission, it proposes to consider the Heads of Bill text as set out in the Appendix to the discussion paper (i.e. Heads X.1 – X.6).

## Sexual Offences and “Vulnerable” Adults

3. Section 5(1) of the 1993 Act renders it an indictable offence for a person to have or attempt to have sexual intercourse or, “an act of buggery” with a person “*who is mentally impaired*”. Under section 5(3), a defence shall lie where the accused can “*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*”.

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<sup>1</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I. Last accessed from <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> on 8 September 2014.

4. Under section 5(5) the definition of “*mentally impaired*” is “...*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.*”

5. There is clearly a tension between protecting vulnerable persons with an intellectual disability from sexual offences, on the one hand, and in respecting their rights to enter into loving sexual relationships, on the other. Ideally, this will take place in a manner which will involve removing the paternalistic protection of the law evident in legislation such as the 1993 Act, the current Wards of Court system and aspects of the Assisted Decision-Making (Capacity) Bill 2013 (“the 2013 Bill”) which are set out below.

### **Applicable Principles of International Human Rights Law**

#### *Conformity with the Provisions of the CRPD*

6. The discussion paper references the general principles in Articles 3 and 4 of the CRPD which include obligations on State Parties to refrain from engaging in any act or, practice that is inconsistent with the CRPD and to ensure that public authorities and institutions act in conformity with its provisions (Article 4(1)(d)) and the obligation to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise (Article 4(1)(e)).

#### *Legal Capacity on an Equal Basis*

7. Article 12 of the CRPD provides for equal recognition before the law and sets out the presumption of legal capacity of persons with a disability on an equal basis with others:

“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 take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”

The Committee on the Rights of Persons with Disabilities' General Comment No. 1 (2014) states:

Article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage) and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.<sup>2</sup>

8. Article 12 is supported by Article 5 of the CRPD which provides for the rights to equality and non-discrimination:

"1. 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.

2. 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.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. 4.

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<sup>2</sup> UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment No. 1: Article 12: Equal recognition before the law, 19 May 2014, CRPD/C/GC/1, at para. 8. Last accessed from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> on 8 September 2014.

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”.

#### *Protection of Persons with Disabilities*

9. The discussion paper also references Article 16 CRPD which requires that States 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”* (Article 16(1)). At paragraph 2, Article 16 also requires the State to 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”*. Subparagraph 3 of this Article requires a prevention strategy which envisages the State ensuring that *“all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.”*

10. Where persons are victims of any form of exploitation, violence or abuse, States Parties are obliged under sub-paragraph 4, Article 16 to take *“all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities ... 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.”*

11. The UN Committee on Economic, Social and Cultural Rights has also made special mention of the rights of women with disabilities to protection and support:

*“Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, “persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood”. The needs*

and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and women with disabilities worldwide.”<sup>3</sup>

*Obligation on the State to Take Positive Measures to Protect*

12. Article 16(5) of the CRPD provides that “*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.*”

13. Article 16 of the CRPD sets out a requirement to prevent through a) criminal law measures (the obligation to identify, investigate and, where appropriate, prosecute) and b) through the provision of information and education supports (on how to avoid, recognise and report on same) instances of exploitation, violence and abuse. Mere legislation will not suffice, as set out above, Article 16(3) and (4) provide in particular, for supports to persons with disabilities, their families and caregivers, the tools to prevent abuse and the right to receive recovery, rehabilitation and social reintegration services, which can include protection services, where abuse occurs.

14. Article 16 replicates the jurisprudence of the European Court of Human Rights which in *X & Y v the Netherlands*<sup>4</sup>, found that the State was obliged to take positive measures to

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<sup>3</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5: Persons with Disabilities, 9 December 1994, E/1995/22, at para.31. Last accessed from [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4760&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4760&Lang=en) on 8 September 2014.

<sup>4</sup> *X & Y v the Netherlands*, 8 EHRR 235 (1985). This case concerned a 16 year old girl with a mental disability identified as Y, who was accommodated in a privately-run home for disabled children. One night Y was raped by the son-in-law of the director of the home. Y’s father, X, notified the police and later the public prosecutor’s office decided not to initiate a prosecution against the perpetrator. X appealed this decision to a court which upheld the prosecutor’s decision on the basis that, under Dutch law, persons over 16 had to make the complaints themselves in such cases, although the law also considered that Y was incapable of bringing a complaint because of her mental disability. X, Y’s father, petitioned Strasbourg on her behalf. The Court considered that Article 8 was indeed applicable to the case and considered that “private life” was a concept “*which covers the physical and moral integrity of the person, including his or her sexual life*”. The Court considered that the protection afforded by the civil law in the case was insufficient, as “fundamental values and essential aspects of private life” were at stake. It also considered that there was a gap in the Criminal Code which prevented a prosecution and did not provide Y with practical and effective protection. In other words, the Court found that the State had failed to take the necessary positive measures to secure the protected right. Consequently it found that she was a victim of a violation of Article 8 of the Convention. This case is important as it cites ‘the physical and moral integrity of the person’ as being a key component of the right to private life.

remedy a wrong perpetrated on an intellectually disabled girl who was raped where the law presumed her to lack capacity and to be unable to bring a criminal complaint. Thus strict all-or-nothing “status” responses to disability will result in a violation of human rights where the victim cannot have her right to private life vindicated primarily through criminal law means.

#### *Rights of Persons with Disabilities to Form Loving Sexual Relationships*

15. In relation to sexual expression and reproductive rights and the ability to form loving sexual relationships, a number of CRPD rights apply. Article 22 protects against “*arbitrary or unlawful interference*” with privacy at article 22(1) and protects “*the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others*” at 22(2). Article 23, on the right to respect for marriage, family parenthood and the relationships, states:

“1. States Parties shall 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, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.”

Article 25(a) on the provision of health care, states that States Parties shall:

“Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes...”

16. All provide for the right to private life of the individual to what the European Court of Human Rights has described as *"a person's physical and psychological integrity ... the development, without outside interference, of the personality of each individual in his relations with other human beings..."*<sup>5</sup>

### **Issue of Consent**

17. The key issue addressed in the discussion paper is that of consent and the ability to consent to sexual relations. The 2013 Bill attempts to address the issue of determining one's capacity which, if introduced, will provide the main statement of the law on consent for persons with intellectual disabilities. As currently formulated, the 2013 Bill provides in section 3(1) that for the purposes of the legislation, *"including for the purposes of creating a decision-making assistance agreement, co-decision-making agreement or enduring power of attorney"*, thereunder, *"a person's capacity shall be assessed on the basis of his or her ability to understand the nature and consequences of a decision to be made by him or her in the context of the available choices at the time the decision is made"*.

18. Under section 3(2) of the 2013 Bill, a person is deemed to lack the capacity to make a decision if he or, she is unable *"(a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his or her decision (whether by talking, writing, using sign language, assisted technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party"*.

19. Consideration will need to be afforded as to how the analysis of decision-making capacity under the Bill 2013 will interact with the definition of a *"vulnerable person"* under the current Heads of Bill. In the IHREC's view, both definitions are problematic and there should be clear differentiation between legal capacity and mental capacity.

20. In its 2014 Observations on the Assisted Decision-Making (Capacity) Bill 2013 ("the 2014 Observations"), the IHRC expressed concern at the formulation of how a person is to

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<sup>5</sup> *Botta v Italy* 26 EHRR 241 (1998) at para 32.

be assisted in decision-making, stating that there should be a presumption that an individual always has legal capacity but a recognition that mental capacity may fluctuate depending on one's disability.

21. The 2014 Observations found that the 2013 Bill failed to distinguish between two distinct concepts; legal capacity and mental capacity in a manner that is compatible with Article 12 of the CRPD. The IHRC identified a number of aspects of the Bill where substitute decision making is provided for, calling for more stringent safeguards to ensure that such arrangements are subject to oversight and minimise the level of interference with the person's rights, particularly for persons who are at present within the Wards of Court system. The IHRC questioned the emphasis on the Courts as a means of making determinations of capacity and putting decision making arrangements in place, and urged consideration of less onerous procedures to establish the supports a person needs to make decisions and exercise their legal capacity.<sup>6</sup>

22. While the functional approach to decision-making is welcome, the proposed mechanics through a co-decision maker or, enduring power of attorney are complicated and led the IHRC to consider that these aspects of the Bill perpetuated the archaic and discriminatory approaches to mental capacity and were not reflective of an approach based on supporting a person's capacity, as required under international human rights law, most notably the CRPD. The IHRC recalled how, in its 2006 Report on Vulnerable Adults and the Law, the Law Reform Commission (LRC) describes the functional approach as involving an *"issue-specific and time-specific assessment of a person's decision making ability"*. Such an approach would be in stark contrast to the current system whereby a finding of incapacity, under the Wards of Court system, is applied to every decision and legal transaction a person may make.

23. Paragraph 5 of the discussion paper acknowledges that it is rare for consent to sexual relations to be addressed explicitly by a couple. Bearing this in mind, it is difficult to equate the presumptions in law that a person with a disability which render her/ him *"incapable of living an independent life or of guarding against serious exploitation"* as being

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<sup>6</sup> Irish Human Rights Commission, Observations on the Assisted Decision-Making (Capacity) Bill 2013, March 2014, last accessed from [http://www.ihrc.ie/download/pdf/ihrc\\_observations\\_on\\_assisted\\_decision\\_making\\_capacity\\_bill\\_2013.pdf](http://www.ihrc.ie/download/pdf/ihrc_observations_on_assisted_decision_making_capacity_bill_2013.pdf) on 21 August 2014.

*“mentally impaired”* and hence incapable of consenting, as evident in the 1993 Act and in some aspects of the proposed Heads of Bill, with the CRPD presumption of legal capacity on an equal basis with others.

24. What would be preferable is to provide that the starting point (as per CRPD) is a presumption that all persons have legal capacity and that a person with legal capacity will be presumed to be able to consent to a sexual act with any other person unless it is demonstrated that the person lacked mental capacity at a particular time. In parallel it would be useful for the Director of Public Prosecutions (“the DPP”) to promulgate specific guidelines concerning the circumstances in which she will take a prosecution. It is welcome that persons with intellectual disabilities, i.e. *“vulnerable persons”* as defined cannot be prosecuted under Head X.5 except with the consent of the DPP. However, this safeguard applies for all indictable prosecutions and hence would appear to apply to all offences under the legislation in any case.

25. What would benefit the legislation here is the promulgation of guidelines by the DPP indicating the criteria to be taken into account when deciding whether to prosecute a person with intellectual disabilities. Insofar as it is open to the DPP to prosecute any person, including persons with disabilities where the “victim” is defined as a “vulnerable person”, the scope for sexual and/ or loving relationships between persons with intellectual disabilities would otherwise be restricted through fear of prosecution. This would likely represent a violation of the CRPD and go against the tenor of the proposed legislation by adopting a paternalistic approach to intellectual disability whereby status rather than function becomes the defining approach. Such an approach, it is suggested, runs counter to Articles 12, 5, 22, 23 and 25 of the CPRD. In addition, it is clear that a range of intellectual ability will exist for persons with an intellectual disability, ranging from mild to severe to profound. These are all factors which could be included in guidelines from the DPP.

26. To provide for a defence requiring there be evidence of consent in each situation where a person with intellectual disabilities is involved in sexual relations would, it is suggested, introduce a chilling effect on the ability and/ or willingness of the person and their partners to engage in sexual relations which is an integral part of private and family life, as set out in the CRPD and international standards generally.

27. One cannot engage in lawful acts unless one knows what are unlawful acts. If the information one receives is that certain acts are or could be unlawful, one could gain the impression that all such acts are unlawful. The requirements under Article 16 CRPD for information and supports could include guidelines by the DPP supported by accessible information on how the law will be applied.

### **Proposed Offences under the Heads of Bill**

28. There are at least three types of offences introduced under Head X.3. The first is an offence carrying a sentence of life imprisonment if a person engages in one of four “sexual act[s]” (as defined in Head X.1 and X.3(d)) with a “vulnerable person” (as defined) unless the person took reasonable steps to ascertain that the “vulnerable person” had the understanding to consent and did consent to the “sexual act”. Under Head X.3(g) it is for a court to consider reasonable mistake: *“whether a reasonable person would have concluded that the latter was not a vulnerable person”*. The standard of proof to be applied to *“reasonable mistake”* is that applicable to civil proceedings (i.e. on the balance of probabilities).

29. The four “sexual act[s]” carrying life imprisonment terms are defined as sexual intercourse, “buggery”, rape or aggravated sexual assault. This would appear to replicate current criminal provisions, if it is accepted that absence of consent renders sexual intercourse as rape.

30. The second type of offence is inferred under Head X.3(e)) when read with Head X.1, and carries a term of imprisonment not exceeding 14 years. This type of offence concerns a *“an act which if done [with a “vulnerable person” (as defined)] without consent would constitute a sexual assault”* or *“inviting, inducing, counselling or inciting for sexual purposes a vulnerable person to engage in a sexual act”*. A similar defence pertains (unless the person took reasonable steps to ascertain that the “vulnerable person” had the understanding to consent and did consent to the “sexual act”).

31. The third type of offence is under Head X.4 which provides for a new offence where a person in a position of trust and authority engages in a “sexual act” with a “vulnerable

person". This is a strict liability offence for which there is no defence on consent grounds, while a rebuttable presumption exists that the perpetrator knew the person was a "vulnerable person" unless reasonable mistake can be demonstrated (to a balance of probabilities standard). As noted in the discussion document, the key element appears to be the duty of care the person in a position of trust and authority owes to the person with an intellectual disability.

## Definitions

32. A general difficulty with definition arises. The definition of "vulnerable person" focusing as it does on a "disorder of the mind" is not one which finds favour under human rights norms. Head X.1 states:

"“vulnerable person” means a person who-

(i) is suffering from a disorder of the mind, or

(ii) has a disability

Which is of such nature or degree as it

(a) may cause the person to lack the necessary understanding to consent to sexual acts [in certain circumstances] or

(b) may severely restrict the capacity of the person to guard himself or herself against serious exploitation by another person."

33. The upcoming report of the Department of Health's Expert Group on the Mental Health Act 2001 should be consulted in this regard.<sup>7</sup> The IHREC suggests that (1) 'disorder of the mind' be removed as a criterion from Head X.1 as the language is not consonant with the CRPD; (2) that a reference to time-specific consent be introduced to Head X.1(ii)(a) to make clear that a paternalistic status approach to disability is not to be applied and; (3) that consideration be also given to deleting Head X.1(ii)(b). This Head again assumes a paternalistic status approach to one's disability, emphasising as it does not a time and circumstance - specific disability that leads to sexual exploitation but a disability that *may*

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<sup>7</sup> Other definitions in legislation may be found in the National Vetting Bureau (Children and Vulnerable Persons) Act 2012; the Criminal Justice (Withholding of Information of Offences against Children and Vulnerable Persons) Act 2012 ; and s3 Mental Health Act 2001. See discussions in Law Reform Commission, 'Sexual Offences and Capacity to Consent' (LRC 109-2013), November 2013, at para 3-11. Last accessed from [http://www.lawreform.ie/\\_fileupload/Reports/r109.pdf](http://www.lawreform.ie/_fileupload/Reports/r109.pdf) on 22 August 2014.

severely restrict the capacity of the person to guard against such exploitation. By suggesting a wide definition of "vulnerable person" it is unclear how a person with fluctuating mental capacity can ever not be a "vulnerable person" even where they exercise full legal and mental capacity to enter into consensual sexual relations. By setting out in legislation restrictions on such a person having consensual relations during periods of mental capacity, the legislation would likely run afoul of the CRPD.

34. Similarly the reference to "buggery" as an offence is offensive to same sex persons. While the definition of rape under the 1990 Act could be improved on, it includes, under section 4(1)(a) the offence of *"penetration (however slight) of the anus or mouth by the penis"*.

35. The definition of "sexual act" under Head X.1(e) and (f) are not without difficulty, including in relation to (f) the situation whereby both the perpetrator and victim of a sexual act could theoretically be prosecuted for the same act if they both meet the definition of "vulnerable persons".

36. As set out in the IHRC 2014 Observations and the Equality Authority's Review of the Assisted Decision-Making (Capacity) Bill 2013<sup>8</sup>, the meanings to be ascribed to "consent" and legal capacity remain opaque.

37. More generally not to hand is sight of the other provisions of the Heads of Bill as they relate to children or other "vulnerable persons". It is difficult to on the whole respond to the Heads of Bill as presented without knowledge of the wider legislative intent.

### **Summary of IHREC's Recommendations**

- Provide for a presumption of legal capacity, as per Article 12 of CRPD, to include a presumption that all persons with a disability have legal capacity on an equal basis with others. The presumption of legal capacity will include the ability to consent to a sexual act with any other person, as an integral part of private and family life.
- Provide greater clarity to the meanings of "consent" and (legal) "capacity".
- Revise the definition of "vulnerable person".

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<sup>8</sup> Equality Authority, Review of the Assisted Decision-Making (Capacity) Bill 2013.

- Remove references to “buggery”.
- Clarify reference to “sexual act” whereby, both the perpetrator and victim of a sexual act could theoretically be prosecuted for the same act if they both meet the definition of “vulnerable persons”.
- Consider, in conjunction with the Assisted Decision-Making (Capacity) legislation, the supports a person may need to make decisions and exercise their legal capacity.