



INCLUSION IRELAND

National Association for People with an Intellectual Disability

**Briefing note
relating to Part 3 of
the Criminal Law
(Sexual Offences)
Bill 2015 – Seanad
Éireann**

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Briefing note relating to Part 3 of the Criminal Law (Sexual Offences) Bill 2015 – Seanad Éireann

While the passing of this Bill represents a move forward from the archaic prohibition of sexual intercourse with a mentally impaired person in the Criminal Law (Sexual Offences) Act 1993, Inclusion Ireland remains disappointed that this Bill continues to create a separate category of person – the “protected person”.

The Minister for Justice has retained the separate offence of sexual act with a ‘protected person’ in Section 21 and has introduced the offence of abuse of a ‘relevant person by a person in authority’ in Section 22.

1. Protected Person

Section 21 sets out that a person lacks capacity if “by reason of a mental or intellectual disability or a mental illness is “incapable of understanding the nature, or consequences, of that act evaluating relevant information communicating his or her consent then they should be deemed a **“protected person”**”.

This is in stark contrast to the **Assisted Decision-Making (Capacity) Act 2015** which took a ‘disability neutral’ approach to assessing capacity and does not require that a person have a diagnosis or disability to have their capacity assessed. This disability-neutral approach ensures that it is a functional approach to decision-making rather than a status-based approach to decision-making.

Inclusion Ireland, alongside other advocacy organisations as well as organisations of persons with disabilities, has repeatedly called for a ‘disability-neutral’ approach to law reform but to no avail.

It has been asserted by the Minister for Justice that the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) requires that special measures be put in place to protect persons with disabilities.

The label of ‘Protected Person’ is not a feature of the UNCRPD and the use of that term is not justified by the Convention’s provisions. While ‘protect’ appears many times in the Convention, it is primarily in the context of protection of rights.

The UNCRPD requires States to “take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms” and while protection is mentioned it is ‘on an equal basis with others.’

Furthermore the Committee on the Rights of Persons with Disabilities has said: "Sexual rights are fundamentally entrenched in the human rights to, dignity, physical and mental integrity, private life, health and equality, in addition to the right to non-discrimination and with the physical and mental integrity on an equal basis with others¹."

Regarding the use of the term 'protected person', Inclusion Ireland conferred with a lawyer who has experience in criminal trials with persons with intellectual disabilities and we were told that:

- If you are opening a case for the Director of Public Prosecutions (DPP) and you are using the terminology 'protected persons', then you are pre-judging something.
- This terminology requires the jury to make a judgment about the person before they have heard any evidence.
- Assessment of capacity in criminal trials should be case dependent and victim dependent.
- When using the current legislation, which uses terminology such as 'mentally handicapped', this lawyer declines to use that terminology in court. Instead, they use the phrase 'intellectually disabled' which is the phraseology used by experts in the field. So they ignore statute terminology that is offensive.

2. Relevant Person

Inclusion Ireland welcomes the recognition in law that relationships of authority can create a situation for an abuse of power which leads to sexual abuse. But again, the offence is not disability neutral. The Act defines a relevant person as one who has a mental or intellectual disability, or a mental illness, which is of such a nature or degree as to severely restrict the ability of the person to guard him or herself against serious exploitation.

Serious exploitation is not defined in the Bill.

Inclusion Ireland is disappointed that a disability-specific approach has been taken. Any person can be vulnerable to exploitation and the definitions put forward by deputies Clare Daly, Mick Wallace, Catherine Connolly created an Offence of abuse of position of dependence and trust

¹ CRPD/C/14/R.1

which was 'disability neutral' and did not single out persons with disabilities for special treatment.

Inclusion Ireland has advocated for the repeal of Section 5 of the 1993 Criminal Law Sexual Offences Act.

The 1993 Act was inadequate from a protective perspective as clearly demonstrated by case law as well having an unclear application in law leading to people with intellectual disabilities reporting a restriction of their rights as adults to have intimate relationships including sexual intercourse. This Bill proposes the continuation of a 'status' based approach to the criminal law will continue this undue influence into the lives of people with disabilities.

Through our work, Inclusion Ireland has experienced the 'chilling effect' of the legislation with educators and advocates afraid to provide support to individuals with disabilities or provide education for fear of encouragement of law-breaking. This Bill was an opportunity to remove the restrictions on the rights of persons with disabilities and repeal an Act that does nothing to protect persons; instead it is replicating many aspects of that Act.

For further information contact

Sarah Lennon, Campaigns & Policy Lead, sarah@inclusionireland.ie

Cormac Cahill, Communications Officer, cormac@inclusionireland.ie

Or 01 855 98 91