



Sexual Offences against Vulnerable Persons

Introduction

Inclusion Ireland is the National Association for people with Intellectual Disabilities. For over 50 years, we have campaigned to promote the rights of people with intellectual disability. Inclusion Ireland welcomes the opportunity to make a contribution regarding the reform of Section 5 of the 1993 Criminal Law (Sexual Offences) Act. Inclusion Ireland has campaigned for many years for legislative change.

As long ago as 2003, Inclusion Ireland (formerly *namhi*) stated its position in the consultation document “Who Decides and How”. In that document, Inclusion Ireland argued that the law was too onerous and insensitive. The position held at that time was that an “ability to guard against serious exploitation” was a sufficient test and that ability should be individually assessed on a case by case basis. Inclusion Ireland was also concerned that the law could criminalise a relationship between two people with an intellectual disability and advocated that the law should not criminalise this type of relationship.

Inclusion Ireland was disappointed that the Assisted Decision-Making (Capacity) Bill expressly excluded sexual relationships from its remit, so this proposal is welcomed by us.

Legislative safeguarding must not have a disproportionate effect on the rights of people to have intimate relationships of their choosing. Section 5 of the Criminal Law (Sexual Offences) Act 1993 (The Act) is ambiguous and not adequately defined in its parameters. There is no definition of ‘independent life’, nor of ‘serious exploitation’ included in the Act. Inclusion Ireland has firsthand experience of the law being interpreted as a blanket ban on all people with intellectual disability having sexual relationships. People who work with people with intellectual disabilities have spoken of being afraid to provide relationship and sexual education for fear of facilitating criminal behaviour. The lack of accurate and appropriate training does not arm people with increased knowledge, confidence and self esteem with positive attitudes towards their sexuality thus placing people with disabilities at risk.



Where there are perceived intimate relationships taking place, particularly in a residential care environment, people working in the service have contacted us with concerns about whether they have a responsibility to prevent such relationships. This so-called ‘chilling effect’, leads to a disadvantage among young people with impairment, as compared to their non-disabled peers.

People with intellectual disabilities face many difficulties in terms of social integration and in particular intimate or sexual relationships. A report by the National Federation of Voluntary Bodies¹ discovered that while the majority of the teenagers involved in their research “expected to live away from home in the future and to marry”, none had discussed having a current or former boyfriend or girlfriend.

Attitudes play a significant part in driving change in this area and the National Disability Authority reports² that almost half (49%) of people surveyed believed that people with intellectual disability did not have the same right as everyone else to a sexual relationship. Concerns as to the capacity to consent was cited as a significant factor in this attitude. With people with intellectual disabilities facing such significant social and attitudinal barriers, it is clear that legislation compounding these attitudes is unhelpful at best and represents a significant barrier to people with intellectual disabilities enjoying their right to relationships.

The Current Law

Protection V Non-Protection

The difficulties with the Act are well established and it is sufficient to say that the legislation that is currently in place protects both too little and too much. The scope of the Act has proved to not be sufficiently protective where there is an alleged act short of attempted or completed intercourse or buggery, while at the same time a de facto consensual relationship between two individuals could be criminalised, if one person, or both, fall within the broad and vague category of ‘mentally impaired’. It is conceivable that, under the definition of mental impairment in the Act that two people with intellectual disability, who are in reality enjoying a consensual sexual relationship, could be committing a criminal offence against each other.

¹ Quality of life for young people in Ireland with an intellectual disability May 2003

² A National Survey of Public Attitudes to Disability in Ireland October 2011



It is also true that the law does not have a protective effect in the case of sexual contact that falls short of sexual intercourse or buggery. In two cases, widely reported in the Irish press, the effect of this limitation was evidenced. In DPP V XY a man was acquitted of the oral rape of a woman with an intellectual disability. In that case the man had been charged with an offence under section 4 of the Criminal Law (Rape) (Amendment) Act 1990. This law does not have any regard to any mental impairment of a complainant. In his judgment Mr Justice Barry White stated *“It 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,”*

A second case, again widely reported on in the media involved a young woman from County Kerry. Again as the act fell short of completed intercourse there was no charge under the 1993 Act and as the alleged victim was deemed to be an unreliable witness, the charges were dismissed.

The Proposed Law reform

The proposal lists four objectives,

- protection of vulnerable adults,
- to respect the rights of vulnerable adults,
- to repeal the relevant section of the 1993 Act
- to be compatible with the UN Convention (UNCRPD)

Un Convention and Non-Discrimination

As per the introduction, this proposal seeks to respect the right to a ‘loving sexual relationship’. A person who does not have a disability is not required to demonstrate a loving relationship prior to having their right to sexual relationships respected. The standard, in general, for a person to have a sexual interaction with another person is that consent is present and that the individual had the capacity to consent. In this proposal, it is mentioned that the UN Convention on the Rights of Persons with Disabilities (UNCRPD) obliges States Parties to eliminate discrimination in realizing their human rights. To require people with intellectual disability to be in ‘loving’ sexual relationships is to hold them to a different and discriminatory standard.



“Vulnerable Adult” and Status Approach

The definition of vulnerable adult as someone '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' is troublesome.

The Assisted Decision-Making (Capacity) Bill 2013 (ADMB) has set out a template for reforming law in the area of capacity, consent and decision making. It was regrettable that sexual relationships were expressly omitted from this legislation, although the need to reform the criminal law was obvious. The ADMB does not define vulnerable adult, nor does it take effect where an adult has a diagnosis or disability. Instead a functional approach to decision making is taken on an issue specific basis. This represents a modern approach in keeping with global trends and along the lines of the UNCRPD.

Functional Approach

A functional approach to capacity to consent was recommended by the Law Reform Commission³ and comprises of four elements

- An ability to understand relevant information
- An ability to retain the information
- An ability to use the information towards a decision
- An ability to communicate

An individual's capacity to consent at any given time is subject to many influences. A person's cognitive ability is one of these, as is duress, intoxication or the relationship between the parties.

Capacity is by its nature a fluid concept that applies to all persons and legislation should recognise that a person's capacity is not concrete nor is it tied to a person's disability or otherwise. In providing a category of persons that could be defined as 'vulnerable' adults and outlining the factors that make an adult vulnerable, there is retention of a medical model approach to disability and the retention of a status approach to decision making. A status approach on the basis of disability is no longer seen as the appropriate approach with a functional approach widely adopted and the UNCRPD mandating supportive measures by States.

³ Sexual Offences and Capacity to Consent LRC 109-2013



Prosecution of 'Vulnerable Persons'

This proposal also states that 'no proceedings for a sexual offence shall be brought against a vulnerable person except by, or with the consent of, the Director of Public Prosecutions'. The reasoning for this is unclear, but it seems to suggest that a 'vulnerable adult' is less likely to commit an offence, or that a prosecution of an offence may not be in the public interest. As the majority of rapes and sexual assaults occur in a social situation with a person known to the victim⁴ it would seem that a person with a disability who is in receipt of a disability service may be as at risk of a sexual assault from another person who is considered vulnerable, as anyone else. Head 5.b would seem to be sufficient in stating that 'no proceedings shall be brought.. except by..the [DPP]'

A person of trust and authority

Head 4 covers the prohibition of sexual contact between a vulnerable person and a person of trust and authority. It is proposed to make it an offence for a person who has a professional relationship and is in a position of trust and authority over a vulnerable person to engage in a serious sexual act with that vulnerable person, regardless of consent. Inclusion Ireland welcomes this proposal but would be concerned that it does not go far enough with its reach. The requirement that the relationship be a paid one does not take the significant volunteering presence in disability services into consideration, nor does it account for a relationship that is, for example, in loco parentis, or where an relationship with a close family member may be abusive. A relationship where there is a disproportion of power is not limited to professional relationships.

With this said, it is important that a termination of a professional relationship does not necessarily end the power imbalance between the parties, nor the influence that could result. The consideration of a cooling-off period would be beneficial here in terms of ensuring that the mere ending of a professional relationship validates what would be an illegal sexual relationship.

The behaviours in question in this section refers to 'serious sexual acts' with the exclusion of 'minor sexual acts'. This is ambiguous and a clearer boundary must be established in law between acts of affection and acts that are of a sexual nature. If there are parameters of minor and serious sexual contact then this must be clearly defined.

⁴ Source: Dublin Rape Crisis Centre



Conclusion

Any attempt to balance the rights of a defendant with the rights of a citizen to enjoy privacy while also offering protection to a person who may need that protection is an onerous task. It is clear that this legislation has been designed to provide a clear and fair framework for any defendant to defend him or herself and that this is at the heart of the legislation. It would be more in keeping with the general approach of the Assisted Decision Making (Capacity) Bill and international human rights standards to have a general approach to decision making rather than isolate defined individuals as 'vulnerable'.

The UNCRPD states⁵ "*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*". Inclusion Ireland is concerned that this legislation does not sufficiently meet this standard. An examination of a person's ability to make a decision in the context of their disability rather than an objective examination on the basis of their capacity to consent does not represent a non-discriminatory approach.

Inclusion Ireland welcomes this proposal towards reforming the law in this area, as although the present situation does not represent a significant risk of criminal punishment it does provide a real barrier to people with intellectual disability enjoying sexual relationships and a disincentive to those seeking to provide education in the area.

Recommendations

- The concept of 'Vulnerable Adult' should be revisited with a broader 'Person with Impaired Capacity' considered
- A definition of vulnerability based on an individual's disability or mental illness is discriminatory and should be removed.
- A statement of the presumption of capacity to consent for all persons would be beneficial in terms of policy
- 'Loving sexual relationship' should be removed. If a statement is required 'Sexual relationship of their choosing' could be considered.
- The statement that 'no proceedings for a sexual offence shall be brought against a vulnerable person except by, or with the consent of the Director of Public Prosecutions' should be removed for the reasons outlined above.

⁵ UN Convention on the rights of Persons with Disabilities Article 23



- The position of trust and authority should not be limited to paid professionals but include any relationship with an imbalance of power, including volunteers, persons in loco parentis or family members.
- The mere termination of a professional relationship is not a sufficient protection where the relevant person is using trust or authority to encourage engagement in a sexual relationship. A cooling –off period should be considered.
- A definition of minor and serious sexual contact should be included

