



## INCLUSION IRELAND

National Association for People with an Intellectual Disability

Unit C2, The Steelworks, Foley Street, Dublin 1, Ireland.

Tel: +353 1 855 9891 Fax: +353 1 855 9904 info@inclusionireland.ie www.inclusionireland.ie

**promoting rights, independence, dignity and equality**

### **Submission from Inclusion Ireland on the Law Reform Commission's Consultation Paper on Sexual Offences and Capacity to Consent 2011**

- Inclusion Ireland welcomes the LRC consultation paper on Sexual Offences and Capacity to Consent. Inclusion Ireland met with the Commission prior to the preparation of this paper. Inclusion Ireland welcomes the good working relationship with the Commission over the years on reviewing the law and making proposals for reform concerning the law and people with an intellectual disability. This relationship goes back to 1990 and the LRC *Report on Sexual Offences against the Mentally Handicapped* and more recently the LRC *Report on Vulnerable Adults and the Law 2006*.
- Inclusion Ireland wishes to acknowledge the contribution of Commissioner Patricia Rickard-Clarke and her dedicated work in this area, as well as Darelle O'Keeffe who was the legal researcher on this consultation paper.
- The Law Reform Commission argued in its Report on Sexual Offences against the Mentally Handicapped 1990 that "*it should not be a criminal offence for a mentally impaired person to engage in sexual activity with another mentally impaired person*". This proposal was not included in the 1993 legislation on sexual offences, nor was it discussed in the Dáil.
- Inclusion Ireland supports the Law Reform Commission's proposals in this consultation paper 2011 to change the law on sexual relations between people who are both mentally impaired.
- The time is now long overdue for change in this area. Inclusion Ireland set out its position in its booklet *Who Decides and How*, which was published in 2003 and stated:

*“The criminal law aims to protect people with intellectual disability from sexual exploitation but it can be argued that it goes too far and prevents people from having appropriate and satisfying relationships. In many cases, it reduces or removes peoples’ ability to make personal decisions and as a result, reduces their ability to live independent autonomous lives and removes their rights to sexual fulfilment”*

- Since 2003 there has been a growing recognition in international law and European and Irish law that people with disabilities have rights. This requires that laws and practices should provide for full and equal enjoyment of human rights to persons with disabilities on the same basis as any other person.
- The present criminal law makes it an offence to have sexual relationships with people who are mentally impaired. While this aims to protect people with intellectual disabilities, it is unduly restrictive. The definition of mentally impaired should not include “being incapable of living an independent life”. The criterion of being incapable of guarding against serious exploitation is a better one and requires an individual assessment. If criminal charges are to be brought under any new legal provision to replace section 5 of the 1993 Act, then a Tribunal set up to deal with legal capacity should be asked to make a ruling on the person’s ability to guard against serious exploitation.
- The Law Reform Commission’s proposals for intervention orders in its Report on Vulnerable Adults and the Law could be extended to allow the Office of the Public Guardian to investigate, and if necessary intervene, in cases where family members and carers have serious concerns that there is an exploitative sexual relationship, but criminal proceedings are not warranted.
- Inclusion Ireland considers that the general recommendations on capacity outlined in the Commission’s 2006 Report on Vulnerable Adults, named above, should also apply to the capacity to marry.
- Inclusion Ireland agrees in general with the LRC that the test for assessing capacity to consent to sexual relations should reflect the functional test of capacity in the proposed mental capacity legislation. However, there is danger that the bar may be set higher for people with an intellectual disability than it is for others.
- Attention has now turned to ways of empowering people in relation to their sexuality while at the same time providing protection to those who are extremely vulnerable and may not have the capacity to consent to sexual relations. This is a dilemma, as the LRC

has pointed out. While we now accept that an expression of sexuality is considered part of everyday life for people, including people with disabilities, there is growing evidence of high rates of sexual abuse involving people with intellectual disabilities.

- The LRC states that there is a move from large institutions to community living for persons with an intellectual disability. However it should be noted that there are still nearly 4,000 people with an intellectual disability living in congregated settings, i.e. ten or more people (*Time to Move on from Congregated Settings*, HSE 2011). These people are at a high risk of abuse, be it financial, physical or sexual abuse. In Inclusion Ireland's experience, they are also fearful of reporting abuse. People with an intellectual disability living in residential care do not have the protection of independent inspection against national standards. Yet national standards have been drawn up by HIQA - the Health Information and Quality Authority – in 2009, and accepted by the Department of Health.
- Inclusion Ireland welcomes the LRC's strong emphasis on the importance of education on personal and sexual relationships. The current position with the law puts providers in a difficult position where they focus more on sex education in terms of protection rather than educating and enabling people to have meaningful relationships.
- Training and information for families and parents, as well as people with an intellectual disability, must also be considered.
- The issue of parents with an intellectual disability who have children who are the subject of child care proceedings, is mentioned in the LRC paper. This is an issue Inclusion Ireland is very aware of, and it currently provides an advocacy service for parents. The lack of parenting and other family support services by the HSE and voluntary disability service providers is a major concern to Inclusion Ireland. Inclusion Ireland, therefore, welcomes the recommendation that in providing assistance to these parents an inter agency protocol is needed between HSE, child protection services and family support services. Inclusion Ireland would add that the HSE Disability Services be included in this protocol.
- Inclusion Ireland is concerned that there is no statutory recognised parent assessment guidelines for people with an intellectual disability in such child care proceedings. Assessment tools currently being used do take account of people with limited capacity.
- Inclusion Ireland agrees with the recommendation that the current section 5 of the Criminal Law Sexual Offences Act be repealed and replaced.

- Inclusion Ireland supports the recommendation there should be a strict liability offence for sexual offences committed by a person who is in a position of trust or authority.
- Inclusion Ireland supports the recommendation that any replacement of section 5 of the Criminal Law Sexual Offences Act should cover all forms of sexual offences which are non-penetrative, and sexual acts which exploit a person's vulnerability.
- Inclusion Ireland stresses the importance of independent advocacy to support people with intellectual disabilities, and agrees with the Commission's proposals about the development of guidelines and training for those working in the criminal justice process.
- The National Advocacy Service for People with Disabilities was formally launched in 2011 and has taken on a number of cases of parents with an intellectual disability whose children are the subject of child care orders. There is a concern that that the extensive work load involved in such cases and the increasing number of cases will mean that such an advocacy service may not be available to all who need it. Pressure on this service will be further increased if its work is to be extended to support people in the criminal justice system. The role of an advocate in child care proceedings is to ensure that the person understands the proceedings and that their views can be ascertained so that they are in a position to instruct their legal team.
- It should also be noted that the National Advocacy Service is not underpinned by statute as originally provided for in the Citizens Information Act 2007.
- The role of an intermediary in criminal proceedings is to liaise with the court on how best the witness can communicate his or her testimony. Inclusion Ireland supports the role of intermediaries for people with intellectual disabilities if they are to access justice.
- Consideration should be given to having a specialised system of support for people with intellectual disabilities in contact with the courts either in child care proceedings or criminal proceedings. Such a system would help develop competence of intermediaries and awareness amongst the legal profession, police and the judiciary. Either the Free Legal Aid Service or the National Advocacy Service could host this system.

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