Inclusion Ireland Conference 2011
Law and People with intellectual Disability

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

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Overview

• Background
• *Criminal Law (Sexual Offences) Act 1993* – *Section 5*
• Capacity to consent – common law/statute law
• Capacity to Consent to Sexual Relations
• Convergence of the Civil and Criminal Law
• Offences
• Defences
Background

• Reform of the law on sexual offences
• LRC *Report on Sexual Offences against the Mentally Handicapped* 1990
• *Criminal Law Sexual Offences Act* 1993
  – Maintains a paternalistic or protective approach
  – Fails to provide clarity on rights of person with Intellectual Disability to have a fully-expressed consensual sexual life
• Commission’s approach
  – Empowerment and protection
Section 5 of the 1993 Act

- 3 Offences
- Definition of ‘mentally impaired’
- Penalties – 10 years, attempt 3/5 years, gross indecency 2 years
- 2 Defences – marriage, did not know/had no reason to believe
- Proceeding require consent of DPP
1993 Act

• Created a new offence for people who are ‘mentally impaired’ outside a marriage context
• No provision for consent as a defence in situations where both capable of giving real consent to sexual intercourse
• Fear of prosecution may prevent development of relationships where consent and no element of exploitation
• Predicating the capacity to consent on ability to live independently is not an accurate assumption
• Does not deal with sexual abuse or exploitation generally
• No reference to Mental Treatment Act 1945
Capacity to consent: Common/ Statute Law– criminal law context

- *R v Camplin* (1845) intercourse had taken place without consent even though no force, fear or fraud.
- *R v Fletcher* (1886) incapable of giving consent due to ‘a defect in reasoning’
  - Established a subjective functional test of capacity to consent to sexual relations.
- Sec 4 of the 1935 Act and Sec 5 of the 1993 Act – status based assessment of capacity to consent to sexual relationships and a general retreat from common law functional test in place since 19C.
Capacity – functional test

• LRC CP on Capacity 2005
  – Recommended Sec 5 be amended ‘in order to ensure that relationships between adults with limited decision-making ability would be lawful where there is real informed consent’

• Submissions emphasised the vulnerability of adults with limited decision-making ability to exploitation and abuse. Support for specific offence where imbalance in power
Capacity to consent: Common/ Statute Law – civil law context

• No one generally applicable definition of capacity at common law or statute
• Presumption of capacity

• Capacity to marry
  – formalities set out in statute
  – Issue of capacity to marry a matter for common law – free consent of both parties
Capacity to Consent to Sexual Relationships

• Issue of consent distinguishes between when a sexual activity becomes a criminal act or a protected right of the individual

• Capacity to enter into a sexual relationship is a matter ruled by the criminal law
  – Touching in a sexual manner without consent
  – Penetrative sexual relations without consent
Consent

• *Role of the criminal law is to supervise the line between legitimate right of all adult persons to engage in sexual relationships and the need to protect vulnerable adults from exploitation and abuse*

• Consent – no definition
  – common law test
  – *R v Morgan* [1970] VR 337

• No consent – *Criminal Law (Rape) Amendment Act 1990*
Convergence between civil law and criminal law determinations as to capacity

England:

*Sexual Offences Act 2003*
*Mental Capacity Act 2005*

- *X City Council v MB, NB and MAB*[2006]EWHC
- Policy reasons why civil and criminal law should be the same
Capacity – functional test

• LRC 2006 Report Vulnerable Adults and the Law: Capacity

• Civil law aspects of capacity, which would be consistent to relevant international human rights standards, including the rights based analysis found in the 2006 UN Convention on the Rights of Persons with Disabilities

• Functional approach 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 and to communicate that decision, with assistance as needed
Test for assessing capacity to consent to sexual relations

• Should reflect the functional test of capacity to be taken in the proposed mental capacity legislation, that is, the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made

• Consistently with this, therefore, a person lacks capacity to consent to sexual relations, if he or she is unable:
  – to understand the information relevant to engaging in the sexual act, including the consequences
  – to retain that information
  – to use or weigh up that information as part of the process of deciding to engage in the sexual act, or
  – to communicate his or her decision (whether by talking, using sign language or any other means)
Criminal Law (Sexual Offences) Act 1993

• Section 5 of the *Criminal Law (Sexual Offences) Act 1993* should be repealed and replaced.

• Any replacement of section 5 of the *Criminal Law (Sexual Offences) Act 1993* should cover all forms of sexual acts including sexual offences which are non-penetrative and sexual acts which exploit a person’s vulnerability.

• The fact that the sexual offences in question occurred within a marriage or a civil partnership should not, in itself, be a defence.
Other issues

- Protective Offences
- Strict Liability Offences
- Defences
- Criminal Justice Process
  - A sexual offence concerning adults can only be established where a lack of consent by the victim can be proved beyond reasonable doubt
- Reproductive Freedom
Law Reform Commission
Annual Conference

Monday 7 November 2011
at Law Society
Blackhall Place Dublin 7

Sexual Offence and Capacity to Consent

Launch of CP on Monday 24 October 2011 at
35 Shelbourne Road Ballsbridge Dublin 4

www.lawreform.ie