Sexual Offences and Capacity to Consent
Consultation Paper
Law Reform Commission
2012

Response on behalf of the following directorates and programmes of the HSE:

HSE Crisis Pregnancy Programme
HSE Children and Families Services
  HSE Health Promotion Unit
  HSE Mental Health Services
HSE National Advocacy Unit
HSE National Disability Unit

January 2012

Health Service Executive
Introduction

The purpose of this document is to set out the HSE’s response to the Law Reform Commission’s (LRC) consultation paper on ‘Sexual offences and the capacity to consent’. The consultation paper forms part of the LRC’s Third Programme of Law Reform 2008-2014 which proposes a general review of the law on sexual offences with a view to its consolidation. The consultation paper specifically focuses on the current legislation on sexual offences in the specific context of persons with intellectual disability or limited capacity which is contained in section 5 of the Criminal Law (Sexual Offences) Act 1993. Section 5 of the 1993 Act reflects the legitimate aim of protecting from sexual exploitation or abuse persons who are at risk or are otherwise vulnerable to such exploitation or abuse because of their intellectual disability or limited capacity. However Section 5 of the 1993 Act fails to provide sufficient clarity that it recognises the rights of persons with an intellectual disability or limited capacity to have a fully-expressed consensual sexual life. The LRC’s general approach in the consultation paper is that the law should recognise both the right of persons with intellectual disability to express their sexuality and also that they may be at risk or otherwise vulnerable to sexual exploitation or abuse.

Preliminary comments:

The HSE welcomes the move from a protectionist perspective to a rights based approach in relation to the matter of intellectual disability and sexual consent as outlined in the LRC consultation paper. It commends the recommendations which support the rights of people with disabilities to live fulfilled lives, including sexual lives, by self determination, whilst giving adequate attention to the issue of the appropriate protection from potential and actual abuse.

The HSE further welcomes the following:

- The use of functional capacity to assessing capacity to consent to sexual activity.
- The repeal and replacement of section 5 of 1993 act.
- The provision of harsher consequences for offenders in a position of trust.
- The extension of categories of act to cover all forms of sexual acts including non-penetrative sexual acts and those which exploit a person’s vulnerability.
- That marriage or civil partnership should not in themselves be a defense to a charge under the act.
- The use of the term ‘Adults at risk’.

Expansion of provision to “Adults at risk” rather than “ People with Intellectual Disability”

The HSE welcomes the reference to ‘Adults at risk’ within the document and would request that consideration be given to extending all of the provisional recommendations from ‘people with intellectual disability’ to ‘Adults at risk’ owing to the similarities of issues between people with intellectual disabilities and adults at risk including people with an acquired brain injury, people with diminished mental capacity, substance mis-users, among others.

Relationship and Sexuality Education for “Adults at risk”

The HSE welcomes the strong references to education as an essential support to the exercise of consent to sexual relationships and to aid determinations as to the person’s capacity to give such consent. Whilst the emphasis in the document is on education as a protective factor, the LRC notes that, ‘for the most part, current policies on sexuality are focussed on protection
rather than empowering clients with information on sexuality and relationships’ and that ‘this perpetuates their lack of knowledge in this area’. The HSE would concur with this assessment and would wish to promote a more holistic and positive approach to the sexual health of people with Intellectual Disability. The HSE holds that legislation on capacity to consent to sexual relations should be developed alongside the provision of contextually appropriate sex education, as mentioned in 2005 LRC document (LRC, 2006. Report on Vulnerable Adults and the Law). Capacity to consent requires an awareness of the act of sex and the risks involved regarding sexually transmitted infections (STI's) and pregnancy, information on contraception, emotions, and relationships and it would facilitate individuals with Intellectual Disability with an opportunity to express capacity to consent. The HSE notes, with interest the UK court (2011, High Court decision, D Borough Council v AB) concluded that sex education was a necessary precursor to assisting a man with Intellectual Disability in making a decision with regard to consenting to sexual intimacy, based on their Mental Capacity Act of 2005 which holds that a person should not be treated as unable to make a decision unless all practicable steps are made to assist that person in making a decision.

**Relationship and sexuality education for families and care givers**
The HSE suggests that relationship and sexuality education (RSE) for adults at risk will have limited impact if it is not accompanied by a parallel process of educating caregivers and exploring potentially damaging prejudices held in relation to the sexual expression of adults at risk. As many adults at risk have some level of dependency on others (families and professionals) and can be more affected by their opinion and permission, it is essential that the education of caregivers and the wider community is addressed to create a supportive culture in which adults at risk can exercise their rights under the new law in making appropriate choices about their sexual expression and activities.

**Education of the wider community**
The HSE would request that consideration is given to adding a recommendation referring to a communications and information campaign to raise awareness throughout wider society of the proposed changes to legislation and the potential impact this will have on the rights of ‘Adults at risk’ including people with intellectual disability. If the recommendations included a reference to the drawing up of a code of practice to cover various aspects not covered in the actual legislation, the process of setting up the group to carry out this function, gathering submissions from stakeholders and launching the code would provide a useful educative vehicle.

**Concluding comment regarding education**
Whilst the HSE welcome the LRC’s strong endorsement of the role of education and the suggestion of the development of a national sex education programme, it is disappointed that this is not carried forward into the recommendations as this would ensure that it is not lost in the many and varied responsibilities which will be assumed by the Office of the Public Guardian. The Department of Health has also indicated its interest in developing a national sexual health policy. In view of this, the HSE suggests that consideration is given to the broadening of recommendation 7.03 regarding developing national standards and guidelines to respond to issues that will arise from the change in legislation and to specifically name sex education for adults at risk, their families and care givers and of the wider community, as a key priority; potentially to be addressed as part of a national sexual health policy. The drawing up of the code of practice will have to be allocated to a specified agency and some
consideration will have to be given to ensuring such a code has statutory authority in order to effect meaningful change.

**Prospective parents with disabilities, existing parents with disabilities, capacity to parent and the need for support services**

The report refers to the challenges faced by women with an intellectual disability experiencing pregnancy and parenthood including sexual health information, accessing sexual health services, inadequate information and negative attitudes toward pregnancy and parenthood among service providers and the wider community. The consultation paper goes on to address the absence of specialist support and other services for disabled adults with parenting responsibilities. The report advocates providing timely and appropriate supports to assist disabled adults to fulfil their parenting role and responsibilities. We know that in the general population, up to 30% of all pregnancies are experienced as crisis pregnancies by the mothers and fathers concerned. It is important to acknowledge that men and women with intellectual disability may experience crisis pregnancies in a similar way that non-disabled adults do. It is critically important that adults at risk have equal access a broad range of sexual health and pregnancy related services including cases where the pregnancy may be unplanned and represents a personal crisis to the woman and/or man concerned. It is important to acknowledge this fact, as HSE funded services working in the area of crisis pregnancy counselling, have been keen to ensure (in addition to work the HSE Crisis Pregnancy Programme is conducting with GPs at primary care level) they adopt a best practice approach to delivering holistic and specialist services to individuals with intellectual disability. Women and men ‘at risk’ have the right to define their pregnancy (partner’s pregnancy) in whatever way they feel, as planned and wanted or in other ways. Services and rights and entitlements available to the general population should be equally available to people ‘at risk’.
HSE Response to the provisional recommendations

7.01 The Commission provisionally recommends that the same functional approach to capacity be taken in respect of assessing capacity to marry in the civil law and capacity to consent to sexual relations in the criminal law. The Commission also provisionally recommends that capacity to marry should generally include capacity to consent to sexual relations. The Commission also provisionally recommends that, consistently with the functional approach, capacity to consent to sexual relations should be regarded as act-specific rather than person-specific. [paragraph 2.44]

The HSE welcomes this recommendation with one query:

- Will the following ‘assessing capacity to marry in the civil law and capacity to consent to sexual relations in the criminal law’ also include assessing capacity for civil partnership and same sex relationships?

7.02 The Commission provisionally recommends, that consistently with the general presumption of capacity in the forthcoming mental capacity legislation, which would include a presumption of capacity to parent, there should be a positive obligation to make an assessment of the needs of parents with disabilities under the Disability Act 2005. The Commission also provisionally recommends that, in providing assistance to parents with disabilities, an inter-agency protocol is needed between the child protection services and family support services which would provide that, before any application for a care order is made under the Child Care Act 1991, an assessment is made of parenting skills and the necessary supports and training that would assist parents with disabilities to care for their children. [paragraph 3.76]

The HSE welcome this recommendation with the following reservations and observations:

- While the HSE fully supports the recommendation of ensuring that there is a positive obligation to make an assessment of the needs of parents with Disabilities, it has concerns as to its specific reference to the Disability Act 2005 thus limiting this recommendation to those who meet the definition of disability as set out in the Act. Could consideration be extended to ensuring there is a positive obligation to make an assessment of ‘adults (in this instance parents) at risk’ so as to capture the range of issues impacting on a person’s capacity to parent, which includes their disability?

- It would be desirable to embed a further recommendation within paragraph 3.76 requiring the development of a code of practice to enable its implementation? Is it possible for the Law Reform Commission to be specific about where the responsibility lies for this requirement?

- What role will the Office of the Public Guardian have in implementing this recommendation?
The HSE supports the recommendation that an inter-agency protocol is needed between the child protection services and family support services which would provide that, before any application for a care order is made under the Child Care Act 1991, an assessment is made of parenting skills and the necessary supports and training that would assist parents with disabilities to care for their children. This should obviously be with primary regard for the welfare of the child and should allow for appropriate compliance with any outcome of the upcoming referendum on the rights of the child. Will this aspect of the recommendation be more specific and include the need for a code of practice and further guidance? Can the LRC be specific regarding who will lead such a process? If such specificity is not possible, can the LRC recommend that a section be inserted into the Act which calls for such a code of practice to be developed by an agency to be decided by the appropriate Minister and covering a given range of subject areas? Such a process must also take into consideration frameworks and thresholds of emergency care orders, interim care orders and supervision orders.

7.03 The Commission provisionally recommends that national standards be developed concerning safeguards from sexual abuse for “at risk” adults, including protocols on cooperation between different agencies, including the Health Service Executive, the Health Information and Quality Authority, the proposed Office of the Public Guardian and the Garda Síochána. The Commission also provisionally recommends that, in developing such standards, a multi-agency approach be adopted similar to that adopted for the implementation of the National Guidelines for the Sexual Assault Treatment Units (SATUs). [paragraph 4.89]

The HSE welcomes the recommendation with the following suggestion:

- The HSE would suggest consideration be given to amending this recommendation to start from position of supporting the positive exercise of a person’s legal right to appropriate sexual expression and activity with due regard to the potential risks (rather than focus on the risks alone). We suggest an additional recommendation regarding appropriate provision of sex education for people with Intellectual Disability and for training for families and for personnel involved in their care and support. This might also be included in the code of practice mentioned above.

7.04 The Commission provisionally recommends that the 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-
(a) to understand the information relevant to engaging in the sexual act, including the consequences;
(b) to retain that information;
(c) to use or weigh up that information as part of the process of deciding to engage in the sexual act; or
(d) to communicate his or her decision (whether by talking, using sign language or any other means). [paragraph 5.119]

The HSE welcomes this recommendation with the following suggestions and queries:

- There is a requirement for an additional recommendation stating that paragraph 5.119 be supported by the development of a code of practice (as above) or set of standards that clearly specify the following:
  - Standards applying to the functional test;
  - Who carries out the functional test;
  - Specifying the appeal mechanism of the functional test;
  - Provision of information and education to the people concerned and those around them;

- Can the Commission be explicit about whose responsibility it is to develop such a code? What role will the Office of the Public Guardian have in the implementation of this recommendation?

7.05 The Commission provisionally recommends that, since section 5 of the Criminal Law (Sexual Offences) Act 1993 is not consistent with a functional test of capacity, it should be repealed and replaced. [paragraph 5.120]

The HSE welcomes this recommendation.

7.06 The Commission provisionally recommends that there should be a strict liability offence for sexual acts committed by a person who is in a position of trust or authority with another person who has an intellectual disability. A position of trust or authority should be defined in similar terms to section 1 of the Criminal Law (Sexual Offences) Act 2006 which defines a “person in authority” as a parent, stepparent, guardian, grandparent, uncle or aunt of the victim; any person who is in loco parentis to the victim; or any person who is, even temporarily, responsible for the education, supervision or welfare of the victim. [paragraph 5.121]

The HSE welcomes this recommendation with the following queries:

- Why is this recommendation confined only to persons with an intellectual disability? Should it not be extended to ‘adults at risk’?
- How will this fit with other legislative aspects including the bill being developed regarding children first which will include obligation to report?

7.07 The Commission also provisionally recommends that 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. [paragraph 5.122]

The HSE welcomes this recommendation.

7.08 The Commission provisionally recommends that a defence of reasonable mistake should apply, which would mirror that applied to sexual offences against children but
that the defence should not be available to persons in positions of trust or authority. [paragraph 5.123]

The HSE welcomes this recommendation with the following query:
- Will this recommendation apply to ‘Adults at risk’?

7.09 The Commission provisionally recommends that the fact that the sexual offences in question occurred within a marriage or a civil partnership should not, in itself, be a defence. [paragraph 5.124]

The HSE welcomes this recommendation.

7.10 The Commission invites submissions as to whether any replacement of section 5 of the Criminal Law (Sexual Offences) Act 1993 should provide a specific offence of obtaining sex with a person with intellectual disability by threats or deception. [paragraph 5.125]

The HSE welcomes this recommendation with the following queries:
- Why is this recommendation confined only to persons with an intellectual disability? Should it not be extended to ‘adults at risk’?

7.11 The Commission provisionally recommends that the maximum penalty on conviction on indictment for the sexual offences involving a person with an intellectual disability should be 10 years imprisonment. The Commission also provisionally recommends that the consent of the Director of Public Prosecutions be required for any prosecution of such offences, as is currently the case under section 5 of the Criminal Law (Sexual Offences) Act 1993, bearing in mind that where a prosecution is brought the ultimate assessment of capacity will be matter for the jury in a trial on indictment. [paragraph 5.126]

The HSE has the following query:
- Why is this recommendation confined only to persons with an intellectual disability? Should it not be extended to ‘adults at risk’?

7.13 The Commission provisionally recommends the development of guidelines for those working in the criminal justice process in identifying current obstacles and examining methods by which the participation of eligible adults in court proceedings could be enhanced in consultation with the proposed Office of Public Guardian, to be established under the proposed mental capacity legislation, and the National Disability Authority. [paragraph 6.40]

The HSE welcomes this recommendation.

7.15 The Commission invites submissions as to whether pre-trial recording of the cross-examination of a defendant with an intellectual disability should be introduced, and whether this would be taken at the same time as evidence in-chief. [paragraph 6.97]
The HSE has the following query:

- Why is this recommendation confined only to persons with an intellectual disability? Should it not be extended to ‘adults at risk’?