

## **Discussion Paper on Sexual Offences against Vulnerable Persons**

### **Introduction**

1. The purpose of this paper is to invite views from interested parties on the proposals set out at Appendix 1. to replace section 5 of the Criminal Law (Sexual Offences) Act 1993 - "Protection of mentally impaired persons".
2. The purpose of the proposal is
  - (i) to provide increased protection for vulnerable persons against sexual exploitation and not just limit protection to acts involving sexual intercourse or buggery;
  - (ii) to respect the rights of the intellectually disabled to enter into loving sexual relationships;
  - (iii) to repeal section 5 of the Criminal Law (Sexual Offences) Act 1993, and
  - (iii) to be compatible with the 2006 UN Convention on the Rights of Persons with Disabilities.
3. The 2006 UN Convention on the Rights of Persons with Disabilities sets out general principles and obligations in articles 3 and 4, including taking measures to eliminate discrimination against persons with disabilities, facilitating their full participation in society and the realization of all their human rights. Article 16 of the Convention imposes a specific obligation to put effective legislation in place to ensure that instances of exploitation, violence and abuse against persons with disabilities can be identified, investigated and prosecuted. The UN Committee on the Rights of Persons with Disabilities has made specific reference to the need to provide protection against sexual violence against intellectually disabled women. The issue was the subject of a special report at the committee's 9th session and is frequently addressed in general comments for State reports.

4. In the case of the prosecution of most criminal offences, consent is not normally an issue. The act itself normally has such adverse effects on the victim that the question of consent simply does not arise. In contrast, sexual offences can involve acts that people regularly engage in on a consensual basis. Therefore, frequently a key element in the prosecution of such offences is the question of consent. An example of what is required to prove lack of consent is set out in the definition of rape in the Criminal Law (Rape) Act 1981, as amended which provides that rape is where a man

(i) has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and

(ii) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it.

It is important to note that there is a double proof required for consent: (i) that the woman did not consent and (ii) that the alleged perpetrator knew that she did not consent or was reckless as to consent.

5. The question of consent in sexual offence cases is complicated. In real life, it can be rare for the consent issue to be addressed explicitly by a couple. For persons with intellectual disabilities or mental health issues, whose social and verbal skills and understanding of situations may be different to the general population, the issue of proving lack of consent can be even more complicated. Furthermore, a vulnerable person may have sufficient capacity to give consent to one sexual act but not to another. Similarly, a vulnerable person may, in certain circumstances and with assistance, be able to give consent to sexual intercourse but, in other circumstances and without support, may not have the capacity to consent. These type of complications make it very difficult to prove in court, beyond all reasonable doubt, that an accused did not believe that the vulnerable adult consented to the act or was reckless as to whether he or she consented.

6. Section 5 of the Criminal Law (Sexual Offences) Act 1993 was introduced following a recommendation in the 1990 Law Reform Commission Report on Sexual Offences Against the Mentally Handicapped. The section makes it an offence to have sexual intercourse or commit buggery with "a person incapable of living an independent life or of guarding against serious exploitation", regardless of whether the person consents or not. The only exception is when the act occurs between two people married to one another. The offence facilitates prosecution in that there is no need to prove lack of consent, and it relies on the discretion of the Director of Public Prosecutions not to prosecute non exploitative incidents. However, it does not make allowance for the fact that a person incapable of living an independent life may be capable of giving consent to a sexual act and means such persons cannot enter into consensual sexual relationships outside marriage without placing their partner in danger of prosecution. It has also been reported that sex education is denied to vulnerable persons for fear that it might be portrayed as facilitating criminal offences. In addition, the section does not address any form of sexual abuse other than sexual intercourse or buggery.

7. In November 2013, the Law Reform Commission published their Report on Sexual Offences and Capacity to Consent. This proposes to repeal section 5 and replace it by new provisions that would apply to a wider range of sexually abusive behaviour. The report takes a rights based approach with a focus on the capacity of the person to consent. However, there are concerns that the proposed approach does not sufficiently address the practical problems of successfully prosecuting a person who sexually exploits a vulnerable person, and that, in practice, little special protection would be afforded to the vulnerable if the law was amended in line with the Law Reform Commission proposal.

8. In May 2014 Senator Zappone published a Private Member's Bill - Criminal Law (Sexual Offences) (Amendment) Bill 2014. This was debated in the Seanad on 10 June 2014. The Bill proposed to:

- repeal section 5 of the Criminal Law (Sexual Offences) Act 1993;
- create a new offence making it an offence for a person "being in a position of dependence and trust" (*defined in the Bill*) to take advantage of his or her position to commit sexual intercourse/sexual offence with a defence that there would be no offence if the "victim consented to the sexual act" and that such consent was granted freely and in the absence of duress or coercion;
- set out factors that would determine whether consent was granted or not.

9. Having considered the Law Reform Commission Report, the Private Member's Bill and the 2006 UN Convention on the Rights of Persons with Disabilities, the Department prepared proposals for inclusion in the Criminal Law (Sexual Offences) Bill (already approved for drafting by the Government in December 2013). The Minister is conscious of the complexity and sensitivity of the issue and the difficulty in respecting the rights of vulnerable people while at the same time ensuring there are offences that offer real protection and which can be prosecuted successfully in the courts. She now seeks initial observations on these proposals.

10. The approach being proposed by the Department is to apply the same basic sexual offences and the same law as regards consent but with a procedural change as to the onus of proof. The prosecution will have to prove, beyond all reasonable doubt, that the sexual act took place and that the victim did not consent but if it is proven that the victim was vulnerable, the onus of proof regarding the defendant's belief as to consent will shift to the defendant. The defendant will be required to prove that he (or she) took reasonable steps to ascertain that the vulnerable person had the understanding to consent and to form a reasonable belief that the vulnerable person did consent to the sexual act. The justification for such an approach is that it is reasonable to afford special protection to such persons and that any person dealing with a vulnerable person should be under a duty to specifically address the question of understanding and consent before engaging in a sexual act with such a person. The

basic offence remains the same. The only difference is that the procedure to prove such an offence is slightly different.

11. In addition to the procedural change envisaged, an additional and separate offence is proposed that would make it an offence for certain categories of persons to engage in sexual acts against a vulnerable person, regardless of consent. This would be limited to persons who have a professional relationship with a vulnerable person where it would be an abuse of that relationship and incompatible with the position of trust and influence they hold, to engage in sexual acts with that vulnerable person. If they wish to enter into a loving sexual relationship with a vulnerable client it has to be done outside the professional relationship ( i.e. they can terminate their professional relationship).

12. Written observations are invited to be submitted by 5.30 p.m. on Friday, 5 September, 2014. Responses can be sent by post or email to:

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## **APPENDIX 1**

### **Head X - Sexual Offences with Vulnerable Adults**

#### **X.1 Interpretation**

For the purpose of this head

"able to consent" - for the avoidance of doubt the use of the words "able to consent" shall not restrict the meaning of "consent" in this provision.

*Note*

*1. To facilitate the understanding of this provision, reference is made to "able to consent and did so consent". The existing law is that a person cannot give consent if he or she lacks the capacity to consent (e.g the person is unconscious). This avoidance of doubt provision is being included just to make it clear that the use of the term "able to consent" is not intended to restrict the meaning of consent in any way for the purpose of these offences.*

*2. Consideration was given to defining aspects of consent for the purpose of this proposal and in particular the level of understanding required to have the ability to consent. However after reflection it was decided not to address this issue for the following reasons:*

- (a) the purpose of these offences is to prevent the sexual exploitation of vulnerable persons, not to determine the circumstances where a person can engage in lawful sexual acts with a vulnerable person;*
- (b) the focus of the offence is on the mens rea of the defendant, not on the capacity or otherwise of the complainant;*
- (c) putting down a formal definition of the capacity required to give consent and requiring defendants to take reasonable steps to ascertain that the vulnerable person has that capacity might be regarded by a jury as too onerous a burden on a defendant;*
- (d) The question of defining consent in statute in the context of sexual offences is complex and attempts in other jurisdictions have not always been successful. Any definition of capacity in this provision would have to be consistent with the existing law and the Assisted Decision Making (Capacity) Bill*

*On balance therefore, it is considered that it would not be in the interest of vulnerable adults to include any new statutory definition for the purpose of these offences*

"person in a position of trust and authority" means a person who as part of their employment or as part of a contract for service supervises or provides treatment to a vulnerable person and that supervision or treatment directly relates to that person's vulnerabilities.

*Note: This is intended to identify those who as part of their job or through paid contracts interact with vulnerable persons and have a position of trust and authority in respect of that person because of that vulnerability. It is intended to cover for example a health professional treating a mentally ill patient in an institution. Sexual acts with that person would be incompatible with that relationship. It is only intended to cover current paid interaction.*

"sexual act" includes

- (a) sexual intercourse
- (b) buggery
- (c) an act which if done as part of a sexual assault would constitute an offence under section 4 of the Criminal Law Rape (Amendment) Act 1990 (Rape under Section 4)
- (d) an act which if done as part of a sexual assault would constitute an offence under section 3 of the Criminal Law Rape (Amendment) Act 1990 (Aggravated Sexual Assault)
- (e) an act which if done without consent would constitute a sexual assault
- (f) inviting, inducing, counselling or inciting for sexual purposes a vulnerable person to engage in a sexual act.

*Note: This includes all the acts defined as a "sexual act" in section 2 of the LRC draft Bill but adds buggery and a new offence (f) - (Invitation to Sexual Touching) a form of passive sexual assault to be created in the new Sexual Offences Bill. The LRC also recommend creating new offences as set out in the UK legislation, including*

- inducing a person with a mental disorder to engage in sexual activity (section 35 of UK 2003 Act)
- engaging in sexual activity in the presence of such a person (section 36 of UK 2003 Act)
- causing such a person to watch a sexual act by a third person (section 37 of UK 2003 Act).

*The new Sexual Offences Bill is already creating similar type offences. The offence of invitation to sexual touching is referred to above. The Sexual Offences Bill will also create new offences of soliciting or paying for the purposes of sexually exploiting a child; organisation of child prostitution or the production of child pornography; and participation of a child in a pornographic performance. These are intended to apply to vulnerable adults as well. On initial assessment, these offences, which are not consent based, should be adequate.*

"vulnerable person" means a person

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.

*Note: This is similar to the definition of "vulnerable person" in the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 but retains a reference to exploitation but does not limit it to physical and sexual exploitation as there may also be emotional abuse. [It is not restricted to persons other than children, which may lead to overlap where you have a child with an intellectual disability but this should not lead to a conflict. A defendant could be charged with rape, sex with a child and/or sex with a vulnerable person for the same act but all having different proofs. The intention is to make the definition of vulnerable person reasonably wide as the offence is not "engaging in a sexual act with a vulnerable person" but "engaging in a sexual act with a vulnerable person without consent" so the issue of consent still has to be addressed. For this reason the word "may" is included to make it clear that there is no automatic inference that a vulnerable person cannot consent. An option may be to also include "(c) may cause the person to be incapable of independent living" as a further criterion.*

## **Head X.2 Purpose of Provision**

The purpose of this provision is to

- (i) respect the rights of vulnerable persons to enter into consensual sexual relationships and
- (ii) provide protection for vulnerable persons against sexual exploitation.

*Note: Given the sensitivity and complexity of this issue, and to avoid misunderstandings, it is considered that these measures would benefit from the inclusion of a provision which states their general purpose.*

## **Head X.3 Sexual Act with a Vulnerable Person**

- (a) A person (other than a vulnerable person) who engages in a sexual act with a person whom he or she knows to be a vulnerable person, or is reckless to that fact, shall be guilty of an offence unless the defendant has taken reasonable steps
  - (i) to ascertain that the vulnerable person had the understanding to consent and
  - (ii) to form the reasonable belief that the vulnerable person did so consent to the sexual act.
- (b) In proceedings under this subhead, it shall be presumed that the defendant is not a vulnerable person unless the contrary is proven. The standard of proof for this purpose shall be that applicable to civil proceedings.
- (c) For the purpose of paragraph (a), where it has been proved that the defendant has engaged in a sexual act with a person who is vulnerable and that the complainant did not consent or was not able to consent, it shall be presumed that the defendant knew that the vulnerable person did not consent or was not able to consent or was reckless as to the fact, unless it is proved (in accordance with the standard of proof applicable to civil proceedings) that the defendant took reasonable steps

- (i) to ascertain that the vulnerable person had the understanding to consent and
- (ii) to form the reasonable belief that the vulnerable person did so consent to the sexual act.

(d) A person guilty of an offence under this subsection shall be liable to life imprisonment if the sexual act involves

- (i) sexual intercourse
- (ii) buggery
- (iii) an act which if done as part of a sexual assault would constitute an offence under section 4 of the Criminal Law Rape (Amendment) Act 1990 (Rape under Section 4) or
- (iv) an act which if done as part of a sexual assault would constitute an offence under section 3 of the Criminal Law Rape (Amendment) Act 1990 (Aggravated Sexual Assault).

(e) A person guilty of an offence under this subsection where the sexual act is an act other than one listed in paragraph (d) shall be liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(f) It shall be a defence to proceedings for an offence under this subsection for the defendant to prove that he or she was reasonably mistaken, at the time of the alleged commission of the offence, that the person against whom the offence is alleged to have been committed was not a vulnerable person.

(g) Where in proceedings for an offence under this subsection, it falls to the court to consider whether the defendant was reasonably mistaken, at the time of the alleged commission of the offence, that the person against whom the offence is alleged to have been committed was not a vulnerable person, the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the latter was not a vulnerable person.

(h) The standard of proof required to prove that the defendant was reasonably mistaken that the person against whom the offence is alleged to have been committed was not a vulnerable person shall be that applicable to civil proceedings.

*Note: This provision is intended to recognise the right of a vulnerable person to engage in sexual relations where they have the capacity to consent, while at the same time providing practical protection to vulnerable persons. It does so by putting the onus on the defendant to establish that he or she took active measures to establish that the vulnerable person had the capacity to consent and the belief that the vulnerable person did consent to the sexual act in question. It creates a new offence of a sexual act with a vulnerable person with the same proofs as existing offences but with a reversal of the onus of proof as regards the belief of the defendant. It is intended that more serious sexual acts should attract a penalty of up to life imprisonment (as they would if committed against a non-consenting adult of full capacity). Less serious acts will attract a penalty of up to 14 years imprisonment.*

*The offence only targets abuse by a person with full understanding/capacity against a vulnerable person and deliberately does not address the question of potentially exploitative sexual acts committed by one vulnerable person against another or against a person of full understanding. If the perpetrator has mental health issues, then the real issue will be does the perpetrator have the necessary mens rea to commit an*

*offence. It would be potentially unfair to expect a person with difficulties about understanding to be able to take reasonable steps to ascertain that the victim had the understanding to consent. The standard sexual offences and the normal onus and burden of proof will be applicable to a sexual act by one vulnerable person against another.*

*The Law Reform Commission in their head 4 introduce an interesting concept which suggests that a defence to a non consensual act would be that "there is no exploitation or abuse". It is prefaced "for the avoidance of doubt" as if it is not creating new law. However, it is not at all clear that this is the case. There would be serious concerns that making lack of consent contingent on exploitation or abuse would confuse the issue and undermine the basic principle of consent. Presumably, the LRC want to address a situation where two vulnerable persons who do not have the capacity to consent engage in a sexual act and there is no intimidation or violence. The LRC presumably also want to ensure that neither party is guilty of an offence. If that is the case it is difficult to see how it could be proved beyond all reasonable doubt that either party would have the necessary mens rea to commit an offence in such circumstances. A further fear may be that the vulnerable person might be found unfit to plead or not guilty by reason of insanity. In this regard it should be noted that (i) the Director of Public Prosecutions has discretion not to prosecute such cases and (ii) even if prosecuted, a finding of unfit to plead or not guilty by reason of insanity does not lead to automatic detention. There is no existing provision dealing specifically with sexual acts between vulnerable persons and it is not proposed to introduce new law on the matter at this stage. In line with the general law on consent and the recommendation of the LRC, marriage is not taken to equate to automatic consent to all sexual acts.*

#### **Head X.4 Sexual Acts Involving a Vulnerable Person and a person in a position of trust and authority**

(a) A person in a position of trust and authority with respect to a vulnerable person who engages in a sexual act of the nature set out in paragraph (b) with that vulnerable person shall be guilty of an offence.

(b) The sexual acts to which this subsection applies shall be

(i) sexual intercourse

(ii) buggery

(iii) an act which if done as part of a sexual assault would constitute an offence under section 4 of the Criminal Law Rape (Amendment) Act 1990 (Rape under Section 4) or

(iv) an act which if done as part of a sexual assault would constitute an offence under section 3 of the Criminal Law Rape (Amendment) Act 1990 (Aggravated Sexual Assault).

(c) It shall not be a defence to an offence under this subsection to establish that the person in a position of trust and authority believed that the vulnerable person consented to the sexual act in question.

(d) For the purpose of paragraph (a), it shall be presumed, subject to paragraph (e), that the person in a position of trust and authority knew that the person was a vulnerable person.

(e) It shall be a defence to proceedings for an offence under this subsection for the defendant to prove that he or she was reasonably mistaken, at the time of the alleged

commission of the offence, that the person against whom the offence is alleged to have been committed was not a vulnerable person.

(f) The standard of proof required to prove that the defendant was reasonably mistaken that the person against whom the offence is alleged to have been committed was not a vulnerable person shall be that applicable to civil proceedings.

(g) A person guilty of an offence under this subsection shall be liable, on conviction on indictment, to imprisonment for a term not exceeding 5 years.

*Note: The purpose of this head is to address the question of abuse of vulnerable adults by persons in authority. Section 254 of the Mental Treatment Act 1945 provided for an increased penalty where a person convicted of an offence under section 4 of the Criminal Law Amendment Act 1935 ("Defilement of idiots") was a person who had charge of the victim or worked in a mental institution. This approach of an increased penalty was also proposed in the Department's original proposal to update section 5 of the 1993 Act. The significance of this approach is that it recognises that the abuse of position is an aggravating factor warranting a more serious sanction. However, the limitations of this approach are that (a) it does not make prosecutions any easier and (b) the deterrent/protective effect is limited, particularly if the substantive offence already attracts a heavy sentence.*

*Head 7 of the LRC report proposed the creation of specific offences involving a person in a position of trust or authority engaging in a sexual act with a person who does not have the capacity to consent. Such persons include family members, guardians and carers. However the offences in head 7 (or the penalties provided) do not seem to add significantly to the offences envisaged at LRC Heads 5 and 6, other than being symbolic and imposing an extra proof on the prosecution.*

*The Private Members Criminal Law (Sexual Offences) (Amendment) Bill 2014 proposes an offence of abuse of position of dependence and trust. However the definition of such persons is very wide ranging and would include family and partners. A key offending behaviour is "takes advantage of his or her position" which may not be sufficiently clear nor appropriate to ground a criminal sanction. Also it is unclear how consent can be a defence to an offence without lack of consent being an integral part of the offence itself and therefore part of the proofs required for prosecution.*

*The approach taken in this Head is 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. (Minor sexual acts are excluded as they could include normal displays of affection.) This would already be unethical and making it an offence would give vulnerable persons the protection of the criminal law against exploitation. It is a much easier offence to prove and significantly reduces the potential trauma for the victim as there is no issue of consent to be proved. Because it is an offence regardless of consent a lower penalty (5 years) is envisaged. If a person in a position of trust and authority wishes to engage in a loving relationship with a vulnerable person he or she will have to end any professional relationship first. Because of its strict nature and to respect the possibility of a loving relationship developing it is limited to persons in a professional relationship in a position of trust and authority. Protection from non professional carers, such as family, will rely on the ordinary offences involving consent, incest, the new offence envisaged at head X.3 and, depending on the age of the vulnerable person, the new offence in the General Scheme of the Sexual Offences Bill (abuse of child by persons in authority, etc.) There is a rebuttable presumption that a person in a position of trust and authority knows the victim is a vulnerable person, which would seem reasonable as that person's condition should be known to the person.*

## **Head X.5 Restriction on Prosecutions**

(a) 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.

(b) No proceedings for an offence under this head shall be brought except by, or with the consent of, the Director of Public Prosecutions.

*Note: Because of the special nature of the offences in this Head and issues surrounding prosecution of vulnerable persons for sexual offences against others, it is intended to restrict the right to initiate criminal proceedings under this head and against vulnerable persons generally to the DPP.*

## **Head X.6 Repeals**

Section 5 of the Act of 1993 is hereby repealed.

*Note: Section 5 of the 1993 Act created a statutory offence - it is not a common law offence. Section 27 (2) of the Interpretation Act ensures that any offence committed prior to the repeal may still be prosecuted (DPP -v- Devins & anor Supreme Court 8/2/2012).*