



## **RCNI Submission to the Law Reform Commission on "Sexual Offences and Capacity to Consent"**

**December 2011**

# RCNI Submission on LRC CP 63-2011 December 2011: “Sexual Offences and Capacity to Consent”

## Introduction

Rape Crisis Network Ireland **is the national representative body for the rape crisis sector**. It is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects including expert data collection, supporting Rape Crisis Centres to reach best practice standards, and using our expertise to influence national policy and social change. We are the representative, umbrella body for our member Rape Crisis Centres who provide free advice, counselling and support for survivors of sexual abuse in Ireland, including a growing number between the ages of 14 and 18.

Rape Crisis Network Ireland (RCNI) welcomes the opportunity to make submissions on the **Law Reform Commission Consultation Paper 63-2011, “Sexual Offences and Capacity to Consent”**, as we are concerned to ensure that our clients with intellectual disabilities are given every possible support to pursue a case through the criminal courts if that is their wish. Our experience is that current law and procedure in this area do not work for our intellectually disabled clients to offer them the same opportunities to pursue a case as other clients without any such disability, so we are delighted to see this detailed and thoughtful Consultation Paper, and also to contribute our own reflections on it.

RCNI looks forward to making more submissions on this topic once the Law Reform Report on it has been published.

## Submission Format

For clarity and ease of reference, this Submission will set out the relevant LRC-CP 63-2011 Recommendations from Chapter 7 of the Consultation Paper in numeric order, each one in full, and provide the RCNI response under each of the cited Recommendations.

## RCNI Submissions on each of LRC-CP Recommendations in Order

*“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”]*

**7.01:** RCNI would concur with all three aspects of this recommendation.

*“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*

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*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]”*

**7.02:** RCNI view is that it does not have the expertise and experience to make a meaningful recommendation on this point.

*“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]”*

**7.03:** RCNI agrees strongly with both arms of this recommendation, not least because of its positive view of the SATU National Guidelines multi-agency approach, based on its longstanding and continuing involvement in the SATU project and its own substantial and ongoing contribution to the development of the SATU National Guidelines. We would recommend that specialist advocacy groups, such as Inclusion Ireland and RCNI for example, should be included in the development of these guidelines, as their perspectives and expertise as representatives of their clients are **absolutely vital** if the guidelines are to work as they should for people with disabilities. Also, we would recommend that the Office of the Director of Public Prosecutions [ODPP] is also included. It is also vital that those who are to be served by these guidelines should be consulted as to its content and impact.

*“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]”*

**7.04:** RCNI view is that it is entirely right in principle to introduce a functional test of capacity, and further, that this test is likely to be workable in practice. We would suggest only that “consequences” is qualified as “reasonably foreseeable consequences”, as in the corresponding Section 30(2) of the UK Sexual Offences Act 2003.

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*“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]”*

**7.05:** RCNI agrees with this recommendation without reservation or qualification.

*“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]”*

**7.06:** RCNI agrees in principle with this recommendation. We note however that *Criminal Law (Sexual Offences) Act 2006* does not itself create any strict liability offences, and would be concerned that a new strict liability offence might be the subject of a defence challenge on the basis that it is not constitutional for serious offences, following the judgement of the Supreme Court in the CC case<sup>1</sup>. Furthermore, the likelihood of a person in a position of authority or care of a person with intellectual disability being able to put forward a defence of not knowing that person had an intellectual disability is remote. Therefore, we would respectfully suggest that applying strict liability here adds little and potentially weakens the legislation.

*“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]”*

**7.07:** RCNI agrees completely with 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]”*

**7.08:** RCNI agrees in principle, but again would have concerns that the absence of such a defence to such serious offences would attract a defence challenge on the basis that this is not constitutional, following the judgement of the Supreme Court in the CC case cited above under 7.06.

*“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]”*

**7.09:** RCNI agrees with this recommendation wholeheartedly.

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<sup>1</sup> C.C. vs Ireland & ors [2006] IESC 33, judgement of Mr Justice Hardiman 23 May 2006, available online at [www.courts.ie/judgments](http://www.courts.ie/judgments)

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*“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]”*

7.10: RCNI is inclined to think there should be such an offence and that it should include inducements, as our experience is that some people with intellectual disabilities can be persuaded by inducements, threats and/or deceptions to take part in sexual activity that they might not otherwise have considered and that it is very easy for a serial abuser to exploit these people by offering such inducements (in particular) repeatedly. We think that Section 34 (1) (c) of the *UK Sexual Offences Act 2003* offers one useful form of words to describe the essence of this offence: “A obtains B’s agreement by means of an inducement offered or given, a threat made or a deception practised by A for that purpose”.

However, we can see that there might be practical difficulties in prosecuting cases of inducements – it is difficult to see how the line could be drawn in every case between legitimate gifts, treats, promises etc offered by A to B as part of a normal courtship, on the one hand, and gifts, etc, offered to B as part of a deliberate plan to exploit that person, on the other. There are cases though, where the distinction will be clear on the facts, so on balance we would be inclined to include “inducements” in the definition of this offence.

*“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]”*

7.11: RCNI view is that sentencing maxima should reflect the seriousness of the crime, and suggest that 10 years maximum is too low for sexual crimes involving any form of penetrative act and/or for any offence where the perpetrator is in a position of trust or authority. We suggest that there should be a graduated scale of sentencing maxima to reflect the variety of possible acts and surrounding circumstances. As to whether the DPP’s consent should be required for the prosecution of the proposed offences, we do not object, as we would see this as a desirable safeguard against the unwarranted prosecution of accused people who themselves have some intellectual disability. We would recommend in addition that the DPP should help develop and then follow the proposed National Guidelines as recommended at paragraph 7.03 above. In fact, we would go further and recommend that all involved in the criminal justice system with complainants who have disabilities, should undergo joint training by **experts** in the area, so that they have a common and well-founded understanding of the issues facing disabled complainants.

*“7.12 The Commission invites submissions on whether the Criminal Evidence Act 1992 should be amended to allow for pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act to special measures in the criminal trial process. [paragraph 6.34]”*

7.12: RCNI **provisional view** is that pre-trial cross-examination of complainants and witnesses who are eligible under the 1992 Act would be desirable from the point of view of minimising delays before trial, and therefore additional stress, for the complainant. However, RCNI also believes that delays before and during trial should be minimised anyhow by all means possible, including an integrated

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and proactive system of case management and pre-trial hearings, to ensure that the criminal justice process is as streamlined as possible. If pre-trial cross-examination were to be introduced, it would be desirable for the procedure to allow for re-examination by the prosecution after the close of cross-examination, where necessary for clarification or amplification of any essential point. Also, the question arises, would “live” examinations of complainants be likely to result in **more** or **fewer** convictions? The difficulty with evaluating this is that as we have seen, there are very few cases which actually get to Court for detailed study, however anecdotal evidence suggests that a complainant in person makes much more of an impression on jurors. That said, it does seem to us right in principle that survivors of sexual violence should have the right to request or refuse having their entire evidence video-recorded.

RCNI suggests that the answers to some of these questions at least might be sought from well-designed empirical research studies. These would not need to be lengthy or wide-ranging, but they would need to be expertly designed, for example by research teams who have already completed well-regarded mock juror studies.

*“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]”*

**7.13:** RCNI endorses this recommendation and expresses its own willingness to participate in the development of these guidelines insofar as they relate to the investigation and prosecution of sexual offences. We feel that the development of these guidelines would also benefit from the involvement of specialist groups who advocate for those with particular disabilities such as Inclusion Ireland, specialist groups who support survivors of sexual crimes, such as RCNI, and from the involvement of other statutory agencies, such as An Garda Síochána, the Courts Service, and ODPP. These guidelines will impact on people with Intellectual disability and their rights; they should therefore be consulted as part of the process of forming them and in evaluating their impact once in place.

*“7.14 The Commission invites submissions on the current use of intermediaries under section 14(1) of the Criminal Evidence Act 1992 and their efficacy as a special measure in criminal proceedings. [paragraph 6.49]”*

**7.14:** As it stands, Section 14 (1) of the *Criminal Evidence Act 1992* does not allow for **the complainant’s responses** to be put through an intermediary, only the questions to which he/she must respond. We submit that this is illogical and discriminatory: one has only to compare the position of a complainant with an intellectual disability with that of a complainant who only speaks a foreign language. Nobody would dream of saying that the latter should not be allowed to have their answers relayed by an interpreter. We would therefore recommend that Section 14 be amended to allow for responses to be relayed through an intermediary. As to how it works in practice, it is clear that intermediary and complainant need to understand each other very well, and also that the intermediary must be able to understand the questioner very well in order to explain the questions fully and accurately to the complainant. Intermediaries if they are skilled, can work very well for the complainant, however there is a need to ensure that they do in fact have the requisite skills and that a preliminary out of court test is done to ensure that they understand and are understood by the complainant. If there is any fear of inadvertent “coaching”, this could be tackled by proper training and accreditation of Court intermediaries, and by the presence of representatives of both parties at the preliminary out of court test stage.

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However, there may also arise cases where the individual interpretive needs of a person with intellectual disability can only be met by a limited number of people who may not have training in court intermediating. Such cases should at least be assessed on an individual basis with a view to proceeding, bearing in mind that in the case of sexual violence it is possible that those interpreters may themselves be witnesses, co-dependents etc themselves. (Note: this matter which also relates to witnesses with physical but not intellectual disability who require an interpreter.)

RCNI would submit that the use of intermediaries should also be a key topic to be covered in the National Guidelines proposed at LRC Recommendation 7.13 above.

*“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]”*

**7.15:** RCNI view is that it does not have the expertise, or the mandate, to make any meaningful recommendation on this point.