

National Disability Authority Submission on the Discussion Paper on Sexual Offences against Vulnerable Persons

September 2014

Summary of key recommendations

- Widen the definition of what constitutes a sexual act
- Extend prohibition on sexual relations with a vulnerable person to people in positions of trust or authority, where these roles are not under a contract of employment
- The definition of a vulnerable person should include lack of ability to consent to a sexual act and lack of ability to guard himself or herself against exploitation or abuse
- Actions are needed in other key areas to ensure effective implementation of the proposed legislation. These areas include determining the legal competence of the vulnerable victim, the use of expert evidence and intermediaries and training for prosecutors

Introduction

The National Disability Authority (NDA) is the independent statutory advisory body to the Minister for Justice and Equality on disability policy and practice. Our previous work in the area of sexual offences against vulnerable persons has included

- Hosting an expert round-table discussions in this area to inform our own advice and to assist the deliberations of the Law Reform Commission
- A policy advice paper to the Department's Civil Law Division in April 2009, in the context of the Mental Capacity Scheme of Bill 2008
- Policy advice to the Law Reform Commission consultation on sexual offences
- Membership of COSC's advisory body

The NDA welcomes publication of the Discussion Paper on Sexual Offences against Vulnerable Persons by the Department of Justice and Equality to reform Section 5 of Criminal Law (Sexual Offences) Act 1993. The NDA considers reform of Section 5 a key part of Government legislative reform to ensure

compliance with Article 12 of the UN Convention on the Rights of Persons with Disabilities on equal recognition of people with disabilities before the law, as well as Article 23 on the elimination of discrimination of people with disabilities in all matters relating to relationships, and Article 16 on freedom from exploitation, violence and abuse.

The NDA recognises that legislative reform in this area of criminal law is complex and there are diverging views on how it should be done. The Irish legal adversarial system, the necessity of ensuring a fair trial for the accused and the requirement to prove beyond all reasonable doubt that the accused is guilty are requirements of criminal proceedings that have to be taken on board in legislative proposals in this area. The need to balance the rights of the victim and the accused, balancing the right to sexual freedom of people with disabilities on the same basis as everyone else, whilst also protecting those most vulnerable from sexual exploitation and abuse, are the key challenges.

Specific NDA recommendations

The following are NDA recommendations on the proposals in the Discussion Paper. They follow the order of the discussion and legislative proposals in the Paper.

Definition of a Sexual Act

The proposed legislation defines a "sexual act" as including

- (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.

The NDA welcomes the widening of the definition of sexual acts to include non-penetrative sexual acts. The NDA also welcomes the inclusion of causing a person to watch a sexual act or engaging in a sexual act in their presence as

offences. In relation to ‘counselling’ in (f) above, there should be no doubt that this would not refer to legitimate sex education programmes being delivered to vulnerable adults to improve their information levels about appropriate and inappropriate sexual behaviour.

The NDA advises that (f) above should include ‘compelling’. The NDA suggests that ‘sexual assault’ referenced to in (e) should be cross-referenced to relevant legislation for definitional purposes (e.g. Section 2 of the Criminal Law (Rape) (Amendment) Act 1990). In its 2009 policy advice paper, the NDA recommended widening the scope of what constituted sexual abuse, citing examples from other jurisdictions. The definition of sexual offences should be as wide and exhaustive as possible to cover the full range of penetrative and non-penetrative sexual offences. This should also include acts such as grooming and the use of social media to incite and induce such acts. It should also include the illicit taking of sexualised images of the person or the making of sexualised images (e.g. videos) and their distribution via social media. On that basis, the NDA advises adding the following to the definition of a sexual act:

- (g) inviting, inducing, counselling, inciting, or compelling for sexual purposes a vulnerable person to watch a sexual act
- (h) committing a sexual act in the presence of a vulnerable person
- (i) an act which if done without consent would constitute sexual exploitation

The definition of sexual exploitation could be based on the definition of sexual exploitation used in Section 3 (3) of the Child Trafficking and Pornography Act 1998, if necessary updated to take into account the use of social media for purposes of sexual exploitation. To make the provisions of the new legislation clear, the NDA advises that rather than make cross references to sections in the Criminal Law Rape Amendment Act 1990, or to other definitions in other Acts, the proposed legislation should repeat the relevant definitions.

The NDA recommends that the broadcasting of sexual images of the vulnerable person by another person, via social media or otherwise, should be an offence. If this is not already provided for under existing legislation, the Department should considering making provision for it in the proposed legislation.

Definition of a Vulnerable person

The Discussion Paper defines a ‘vulnerable person’ as meaning 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.

The Law Reform Commission's 2013 report recommends using the term 'relevant person' to keep it neutral and which would cover as wide a range of persons as possible, including some with disabilities and some with certain conditions that may impact on their capacity to consent to a sexual act (p.2).¹ The Discussion Paper states that it does not seek to include a definition of capacity to consent in the legislation, to establish whether the vulnerable person was able to consent to sexual activities or not. While the Discussion Paper states that it does not wish to use the term 'person who lacks capacity to consent', as this would require a statutory definition of consent and development of a test of the vulnerable person's capacity to consent, the definition of a 'vulnerable person' proposed would seem nonetheless to capture the notion that a vulnerable person's capacity to consent is somehow different from the ordinary population.

Head X.2 Purpose of Provision

The NDA recommends adding abuse in addition to exploitation to this provision as follows:

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 **and abuse**.

Head X.3 Sexual Act with a vulnerable person

This proposed Head defines a category of 'vulnerable persons' and it is used to trigger the evidential presumption that the offender knew or was reckless to the fact that the person was vulnerable and that they did not consent or did not have the capacity to consent. The Head outlines how the presumptions can be disproved by the offender. The NDA proposes that 'did not consent or was unable to consent to the sexual act' be included in the definition in Section (a) so that it would read as follows:

¹ Law Reform Commission (2013) **Sexual Offences and Capacity to Consent**, Dublin

‘A person (other than a vulnerable person) who engages in a sexual act with a person whom he knows to be vulnerable, or reckless to that fact, in circumstances where **the vulnerable person did not consent or was unable to consent to the sexual act**, knowing or being reckless as to whether the vulnerable person consented or was able to consent, shall be guilty of an offence’

‘Where it is proved that the defendant has engaged in a sexual act with a vulnerable person, 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 that fact, unless it is proved (in accordance with the standard of proof applicable to civil proceedings) that the defendant believed on reasonable grounds that the vulnerable person had the ability to consent and did so consent

The most important issue is however, the vulnerable person’s (complainant) capacity to consent. Based on the definition proposed in the Discussion Paper, the prosecution will have to prove in court beyond all reasonable doubt that the complainant was vulnerable due to ‘a disorder of the mind’ or ‘disability’, and the ‘nature and degree’:

- (a) ‘may cause the person to lack the necessary understanding to consent to sexual acts’ or
- (b) ‘may severely restrict the capacity of the person to guard himself or herself against serious exploitation by another person’

This definition is clearly aimed at identifying a category of persons whose capacity to consent may be diminished or absent. In applying the proposed definition in court, it would suggest a two-step test to prove that the person was vulnerable:

1. proving that that the person had a disorder of the mind or a disability
2. Then proving that ‘its nature and degree’ ‘may cause the person to lack the necessary understanding to consent to sexual acts’ or ‘may severely restrict the capacity of the person to guard himself or herself against serious exploitation by another person’.

This could be complex to prove in the courtroom.

Also, it is unclear in what respect ‘the necessary understanding to consent’ in the first criterion is different from ‘capacity to consent’. There could be situations where proving in court, beyond reasonable doubt, that a person was lacking ‘the

necessary understanding to consent' could be problematic, in the absence of any criteria to guide consideration of this aspect.

In its 2009 Submission on reform of Section 5, the NDA proposed four criteria for establishing whether a person had capacity to consent to sexual acts as follows:

A person lacks the capacity to choose to consent to sexual activity if she or he:

- lacks sufficient understanding of the nature of the activity
- lacks sufficient understanding of the reasonably foreseeable consequences of the activity
- lacks sufficient understanding of, or is incapable of guarding against, abuse and exploitation
- is unable to communicate such a choice to the other person

The rationale was that the four criteria could be used by the victim's counsel as far as possible to prove that the victim was not able to consent to sexual acts. Two elements in the definition of Vulnerable Person in the Discussion Paper are similar to two of the four criteria proposed by the NDA (e.g. lack of understanding and ability to protect one's self). However, the question still remains as to how 'lack the necessary understanding to consent' is different from 'lacking the capacity to consent' or indeed 'lacking ability to consent'. The NDA would in fact suggest that the three concepts actually mean the same thing in practice.

It would seem that the focus should be on proof of the victim's lack of consent or inability to consent to the sexual act in question. Based on the above discussion, the NDA advises the following definition be used for a vulnerable person:

“a ‘vulnerable person’ means a person who lacks ability

(a) to consent to a sexual act

or

(b) lacks ability to guard himself or herself against exploitation or abuse by another person.

A vulnerable person's lack of ability to consent or guard him or herself for the purposes of this Act may arise because of

(a) a disability

(b) ill health

but the fact of disability or of ill health or the presence of any other reason does not, in itself, mean that the person lacks ability to consent.”

In considering whether or not the vulnerable person consented to the sexual act in question, or was able to consent to that sexual act, the following shall be taken into account:

- (a) the person’s ability to understand the sexual act and its reasonable foreseeable consequences
- (b) the person’s ability to communicate non-consent to the act
- (c) the person’s ability to guard themselves against exploitation or abuse

The above proposed wording would make clear that the lack of consent or inability to consent is an ingredient of the offence, but incorporates a list of relevant matters for the jury to have regard to in considering whether or not the victim actually consented or had the ability to consent. As such, the criteria do not constitute a restrictive test of capacity per se of the vulnerable person, but a list of factors that the jury can take on board in deciding whether a sexual offence was committed against a vulnerable person. This would not alter the burden of proof but would direct the jury to the relevant matters in considering this issue. It would also remove the need to incorporate any such matters into the definition of ‘vulnerable person’. It would also focus the issue on the precise sexual act and circumstances of the case at trial, rather than an abstract examination of the person’s capacity in general.

‘Capacity to live independently’ not relevant to sexual consent

The Discussion Paper states that an option may be to add ‘may cause the person to be incapable of independent living’ as a further criterion. The National Disability Authority strongly advises against this. The question of whether someone can live independently, for example with regard to supports they might need around physical care, or vulnerability to falls, is not related to their capacity to understand and consent to sexual activity. This point was already raised and discussed in the NDA’s 2009 submission.

Proposal of procedural change as to the onus of proof

As regards the use of presumptions, and the shifting of the burden of proof, the NDA is conscious that this is a complex and technical area in which appropriate balances may be struck but only within appropriate constitutional parameters. The NDA presumes that these issues have been considered by the Department.

The NDA notes that an Action Plan on Rape was published by the England and Wales Crown Prosecution Service and the Police in June 2014 to improve

reporting and conviction rates of rape and sexual abuse. The Plan commits to shifting the focus away from the credibility of the victim, towards consideration of the behaviour of the defendant including around seeking consent.² However, this would not seem to amount to a change in the procedure as to the onus of proof, as it is stated that the 'freedom and capacity of victims to make a choice' must also be focussed on.

Head X.4 and the Definition of Persons in position of trust and authority

The NDA welcomes the proposal in Head X.4 to make it an offence for persons in a position of trust and authority, irrespective of the vulnerable person giving consent, to engage in a sexual act with a vulnerable person. This is in line with the Law Reform Commission's view that legislative reform should also be aimed 'at persons who engage in sexual acts with a person who either lacks capacity to consent or has capacity to consent but is nonetheless vulnerable to abuse and exploitation while they are in a position of trust or authority over that person. (p.75) and 'the fact that the complainant consented to the sexual activity should be irrelevant in this context'.

The Discussion Paper defines

"a 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'

Trust or authority

NDA advises that the proposed legislation should refer to a person in a position of trust OR authority as they are not always one and the same. The NDA advises that the definition should not exclusively focus on those in paid employment, but should extend to other persons in a position of trust or authority, such as those acting in loco parentis. In addition, the 'employed' definition should be sufficiently wide to include contract staff, those on work experience, those with a contract for services, or self-employed people in similar roles.

The definition should be broadened from 'supervises or provides treatment' to extend to roles involving caring, support, training, education, as well as supervision and treatment. Newer models of disability and mental health support services may place less emphasis on treatment or supervision, and more on this

² http://www.cps.gov.uk/publications/equality/vaw/rape_action_plan.pdf.

wider range of support roles. It would be important to ensure that the abuse of trust or authority positions could extend to people whose roles give them ready access to vulnerable adults, such as personnel in training centres for people with disabilities, or drivers of special transport.

As the Government's current policy is to promote people with disabilities to live in their own homes in the community, people in their local community will play an important part of their lives. Support from and friendships with people in local communities will be important in supporting people with disabilities to live independently in the community. The balance therefore, that needs to be struck is to recognise the capacity of people with disabilities to enter into close friendships and to form sexual relationships while protecting vulnerable persons from sexual exploitation or abuse.

The NDA notes that Head 7 in the Law Reform Commission's draft 2013 Bill defines in detail the person who is in a position of trust or authority.³ It details what family members this includes, what persons are in a position of trust, or any other person in loco parentis to or person who directly cares for and supports the vulnerable persons. This is a robust definition in that it is expansive enough to include a wide range of potential offenders but importantly, it makes a distinction between those in positions of trust and those in positions of authority. This definition allows for these categories of persons to overlap or to be mutually exclusive which will be the situation in many cases in practice. For example, someone in a position of authority could also be in a position of trust (e.g. a care home manager) for the vulnerable person or someone in a position of trust may not be in a position of authority (e.g. a parent or family member). Based on the above, the NDA advises that the following wording be considered, which does not seek to be exhaustive in listing the range of persons in positions of trust or authority:

'It is an offence for a person in a position of trust or authority to engage in a sexual act with a vulnerable person.

a person in a position of trust or authority, without disregarding the generality of that role, means:

- (a) a person in receipt of payment to provide care, support, training, supervision, or treatment to the vulnerable person
- (b) a person acting in loco parentis for the vulnerable person

³ Law Reform Commission (2013) **Sexual Offences and Capacity to Consent**, Dublin, p.140

- (c) any other person so determined to be in a position of trust and authority in respect of the vulnerable person

Head X.5 Restriction on Prosecutions

This Head gives authority to the Director of Public Prosecutions to bring a case against a vulnerable person or any proceedings under this Head as follows:

- (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.

This raises the issue as to how the Director of Public Prosecutions (DPP) would decide whether or not to bring proceedings under the above headings and what criteria would be applied in reaching that decision. Where a complainant is judged by the DPP as not competent to testify, and there is no other independent evidence, then complaints of sexual acts committed against a vulnerable person may be unlikely to be brought to trial by the DPP. Vulnerable persons may be even less likely to see alleged sexual offences prosecuted and punished than other victims.

Therefore, the NDA advises that at the same time as Section 5 of the 1993 Act is being reformed, there should be Guidelines on Legal Competence to Give Evidence developed at the same time. This could be along the lines of the guidance publication for professionals in the criminal justice system in the UK 'Achieving Best Evidence in Criminal Proceedings Guidance'.⁴

We advise that the question of whether the DPP should consider whether a prosecution would be in the 'best interests' of the victim be considered. That could also examine how that would be assessed, and whose views on the matter might be sought.

⁴ <http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf>

Other areas where actions are needed to support the successful implementation of the proposed legislation

The Legal Competence of Vulnerable victims (complainants)

Section 27 of the Criminal Evidence Act 1992 provides the current legal test for competence of a witness who has a 'mental handicap'. The test is whether the witness is capable of giving an 'intelligible account of events which are relevant to those proceedings'. No guidance is provided in the legislation or elsewhere as to the matters which are to be taken into account in this regard. Currently, this is done by the trial judge based on his or her own view of what might be relevant, usually through questioning of the complainant. If the trial judge considers that the witness is not competent, the witness cannot give evidence and the case is unlikely to proceed unless there is strong independent evidence of the offence, which is rare in sexual cases. Consideration should be given to whether this test continues to be an appropriate formulation of competence for persons with intellectual disabilities, for example. Consideration should also be given to whether further guidance should be given to the trial judge as to how to make the determination of competence.

The Use of Expert Evidence

Consideration should be given to whether experts should be permitted to give evidence in criminal cases involving persons with disabilities who are considered vulnerable victims, and to what procedures might apply in that regard. Such expert evidence could relate to the competence of the alleged victim, and the ability of the alleged victim to have consented to the sexual act. The NDA notes that the issue of expert evidence is, for example, dealt with in the Criminal Law (Insanity) Act 2006. The NDA recommends that the proposed legislation make provision for this issue.

Use of Intermediaries

Provision is made in the Criminal Evidence Act 1992 for Intermediaries to act as the conduit through which questions are put to the vulnerable witness and through which the witness can answer back and give evidence during a trial. As such, they could have a key and unique role to play in supporting witnesses who may have comprehension or communication difficulties to participate in a trial. The NDA understands that Intermediaries may never have been used in an Irish criminal trial, notwithstanding that this provision has been on the statute book since 1992. This is due to the absence of any infrastructure, such as the creation of panels of experts, the accreditation of experts for inclusion on the panel, guidelines for the role of intermediary, and guidelines as to the manner of questioning,

The role of an intermediary could be considered analogous to the role of an interpreter, in facilitating two-way communication with the court. This issue can arise where someone has significant speech difficulties (e.g. as a result of cerebral palsy), or uses non-verbal forms of communication (e.g. someone with autism where it manifests in a communication disorder)

In the absence of practical measures, the statutory provision regarding intermediaries has no effect at all and it should be urgently addressed.

Training for Prosecutors

The UK Joint CPS and Police Action Plan mentioned above commits to reviewing CPS arrangements for instructing advocates in rape trials to ensure legal advocates with 'relevant skills, attitudes and training are instructed at the appropriated stage' (p.3) There is no training in Ireland available to legal professionals. Such education/training is required and should be provided on an interdisciplinary basis in order to provide legal professionals with the necessary knowledge and skills.

A National Sex Education Programme

In its 2009 submission on Capacity and Sexual Relations, the NDA underlined the importance of developing a national sex education programme for vulnerable persons to be rolled out nationally. It would be important that such a programme would be developed and put in place in tandem to complement changes to Section 5. A research project carried out in the UK found on average far lower levels of sexual knowledge and far higher levels of vulnerability (in terms of understanding abuse) amongst 16-17 year olds with learning disabilities compared to those of the same age without learning disabilities.⁵ However, sex education in the past had a positive impact on scores.⁶ The researchers concluded that that it was essential for people to have on-going access to sex education (as opposed to the 'one shot' variety), particularly with regard to sexual health and pregnancy, contraception, safe sex, abuse, and some aspects of the law (such as consent). Such adults would benefit from wider availability of sex education, in order to empower them to have relationships while at the same time protecting themselves from unwanted pregnancies or sexual abuse.

The NDA is aware that the Department has sought to fund the development of a sex education programme for vulnerable adults under its annual COSC

⁵ Glynis H. Murphy, 'Capacity to consent to sexual relationships in adults with leaning disabilities', in **Journal of Family Planning and Reproductive Health Care** 2003: 29 (3)

⁶ Murphy, G and O'Callaghan, AC (2004) 'People with intellectual disability – capacity to consent to sexual relationships', **Psychological Medicine**

awareness raising grant scheme but no such programme has been funded to date. In view of this, the NDA recommends that other ways of developing and rolling out such a programme should be explored by the Department and in conjunction with other relevant agencies such as the HSE and HIQA. The current work of the HSE Social Care Directorate in finalising a national policy on safeguarding vulnerable adults may present an opportunity to explore with the Social Care Directorate how such training could be developed and rolled out. Such training would aim to raise awareness about appropriate and inappropriate sexual behaviour which would be critical in seeking to prevent sexual abuse and other offences which HSE policy and the Department's proposed legislation aim to do.