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**NATIONAL FEDERATION OF VOLUNTARY BODIES**

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*Providing Services to People with Intellectual Disability*

**Submission to the Law Reform  
Commission Consultation Paper  
Sexual Offences and Capacity to  
Consent.**

National Federation of Voluntary  
Bodies Providing Services to People  
with Intellectual Disability



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## 1.0 Executive Summary & Summary of Recommendations

The National Federation of Voluntary Bodies warmly welcomes the publication of the Law Reform Commission's Consultation Paper on Sexual Offences and Capacity to Consent and the opportunity to respond. The National Federation of Voluntary Bodies propose that Section 5 of the Criminal Law (Sexual Offences) Act 1993 fails to recognise the right of a person with an intellectual disability to have a consensual sexual life, which has a negative effect on many people's lives. The Law Reform Commission's Consultation Paper on Sexual Offences and Capacity to Consent offers a real opportunity to consider what will best enable positive reform of the legislation. The message from self-advocates is that people with intellectual disability should be entitled to have a sexual relationship if they so wish, and also that staff should be enabled to support a person with a disability, in the same way as they do in every other aspect of their life, such as employment, without being afraid of litigation. There is a clear need to respect the rights of persons with an intellectual disability to have relationships.

This Consultation Paper is set in a wider framework of reform within Ireland and internationally, which is underpinned by the Convention on the Rights of Persons with Disabilities which captures the international legal direction in respecting the self-determination and autonomy of people with disabilities to direct their own lives. We anticipate that the Government will publish a progressive Legal Capacity Bill in early 2012 and propose that this legislation and the reform of Section 5 of the Criminal Law Sexual Offence Act are compliant with the Convention.

Recommendations: National Federation of Voluntary Bodies:

- proposes that a review of the current systems of supported decision making are explored to develop a full range of Irish supported decision making processes generally and specifically in the area of sexuality.
- endorses that the Will and Preferences of the person are the determining factor regarding decisions about their life. This is a significant point of reform and is in our view worthy of further detailed consideration in the context of choosing intimate relationships.
- understands that the presumption of capacity will be part of the imminent Legal Capacity Bill. We warmly welcome such a presumption of capacity and consider that this brings new responsibilities. We propose that this includes the presumption of inclusion reinforced by Article 4.3 of the UN CRPD. This means that policies need to be discussed with people with disabilities and that throughout the process of law reform there needs to be involvement of people with disabilities.
- recommends the development of a strengths based support process in promoting decision-making ability – a functional support approach.
- proposes that the core challenge is to balance the right to autonomy and self-

determination with the right to protection, with both rights present at the same time and one not overriding the other.

- recommends that the Criminal Law (Sexual Offences) Act 1993 is amended as part of the changes to Legal Capacity Legislation, to ensure the rights to intimate relationships and to protection are upheld.
- considers it is critical that we enter into a new era of replacing the historical paternalistic legacies with a newly informed respect for the rights of people with intellectual disabilities.
- supports the principle of disability neutral legislation.
- welcomes and endorse the presumption of capacity expected in the imminent Legal Capacity legislation and seek the extension of this presumption to the area of sexual relations.
- endorses the view that education and training in the area of relationships and sexuality is a fundamental right for individuals who have an intellectual disability, to develop this aspect of their lives, just as in all others aspects of their lives, to the fullest extent possible.
- proposes that the LRC develop a recommendation to strengthen the right of the provision for Relationships and Sexuality Education for children and adults who have intellectual disability.
- recommends that any legal test of capacity must allow for the provision of supported decision making. This is a functional support approach to the test of capacity, rather than the functional test approach, recommended by the Commission. The functional support approach defines capacity as the ability, with assistance if needed, to understand the nature and decision within the context of the available range of choices; and to communicate that decision, with assistance as needed. This distinction between the functional test approach and the functional support approach is of paramount importance for people with intellectual disability and is in keeping with Article 12 of the CRPD which emphasises that people can receive support in decision making and maintain full legal capacity.
- supports the position that with regard to consent to sexual relationships, the general approach of the Convention is to ensure that people with disabilities have equal right to consent to sexual activity, and are not held to a higher standard than others when it comes to informed consent.
- proposes that the only reasonable conclusion to such realities is that any statutory test for the existence or absence of consent will need to be applied equally to persons who have or who do not have an intellectual disability. We also recommend that the test for capacity to consent is lowered and the requirement for an

understanding of consequences is removed from the test of capacity to consent. We agree that the consequence of this is that the existing Irish sexual offences legislation which defines rape and sexual assault may not need to be amended, and could be applied in a disability-neutral manner.

## **Specific Comment on Law Reform Commission Recommendations**

### Recommendation 7.01

The National Federation of Voluntary Bodies supports a functional support approach to capacity and not a functional test approach. We propose that any statutory test for the existence or absence of consent will need to be applied equally to persons who have or who do not have an intellectual disability. We also recommend that the test for capacity to consent is lowered and the requirement for an understanding of consequences is removed from the test of capacity to consent. We agree that the consequence of this is that the existing Irish sexual offences legislation which defines rape and sexual assault may not need to be amended, and could be applied in a disability-neutral manner.

The question that arises is how far does this recommendation increase the standard for marriage by aligning it with the criminal law and will this bar a greater number of people from marriage and civil partnerships? If so, then we propose that this is not advisable. We also require clarification if this proposal is for universal application or people with intellectual disability only?

### Recommendation 7.02

The National Federation of Voluntary Bodies welcomes and supports this recommendation. We are aware of discriminatory practices that emerge in the absence of this presumption of capacity to parent towards parents who have an intellectual disability. We propose that such support provision should be available as required through the mainstream childcare system and not necessarily through the Disability Act given that its implementation is paused at present.

### Recommendation 7.03

The National Federation of Voluntary Bodies strongly welcomes and supports this recommendation as a matter of urgency. Given that people with disability have a higher risk of abuse, we consider this an essential element in encouraging the dismantling of this discriminatory law, and ensuring that appropriate safeguards are in place. We welcome the Multi agency approach proposed by the LRC. We are aware that the HSE is likely to initiate a process of an Adult Safeguarding Policy in the near future. We propose that this process be underpinned by appropriate legislation. We also wish to highlight that protections are multi-layered including standards, quality systems, raising awareness of the nature of violations and having a system in place to track and adequately address them.

### Recommendation 7.04

The National Federation of Voluntary Bodies does not support the functional test

approach but strongly advocates for a functional support approach.

Recommendation 7.05

The National Federation of Voluntary Bodies welcomes the proposed move away from a status approach to capacity and the proposed repeal of the legislation. While we agree on the repeal of the legislation we are anxious that any replacement should respect the right to sexual intimacy and the right to protection based on the functional support approach and the framing of such rights in disability neutral legislation.

Recommendation 7.06

The National Federation of Voluntary Bodies welcomes and supports the specific offence for a person *in a position of trust or authority*. We propose that such a definition includes volunteers or anyone who was in position of trust and power in the past. At the same time we differentiate this role from people who are part of the *natural environment supports*. We also support the normative path that people with intellectual disability may form relationships with people who do not have a disability. We believe it should allow for the possibility that a friend, who might be “a person living without the label intellectual disability” may become an appropriate consensual sexual partner. Again we propose that such an offence is applied in a disability neutral way.

Recommendation 7.07

The National Federation of Voluntary Bodies endorses the recommendation that all forms of sexual acts and sexual exploitation should be included. We propose that such definitions should be underpinned with legalisation.

Recommendation 7.08

The National Federation of Voluntary Bodies supports the recommendation that a defence of reasonable mistake should apply and welcomes the exclusion of a person in a position of trust from this defence.

Recommendation 7.09

The National Federation of Voluntary Bodies supports this recommendation.

Recommendation 7.10

The National Federation of Voluntary Bodies broadly welcomes the inclusion of such an offence, but would welcome further discussion on this.

Recommendation 7.11 to Recommendation 7.15

The National Federation of Voluntary Bodies is preparing a separate submission on this issue and will forward this in the near future.

## 2.0 Introduction

The National Federation of Voluntary Bodies warmly welcomes the publication of this The Law Reform Commission's Consultation Paper on Sexual Offences and Capacity to Consent which complements the general consolidation of sexual offences law currently being undertaken by the Department of Justice and Equality. We recognise that this builds on the Commission's previous work on the civil law of Mental Capacity. The National Federation of Voluntary Bodies anticipates that the Government will publish a progressive Legal Capacity Bill in early 2012. In the Consultation Paper, the Commission makes 15 provisional recommendations for reform, including the repeal and replacement of the existing law on sexual offences involving persons with intellectual disability, Section 5 of the Criminal Law (Sexual Offences) Act 1993. The National Federation of Voluntary Bodies welcomes the opportunity to respond to the invitation by the Law Reform Commission for submissions on this Paper.

We propose that as Section 5 of the Criminal Law (Sexual Offences) Act 1993 fails to recognise the right of a person with an intellectual disability to have a consensual sexual life, this has a negative effect on many people's lives. This brief submission will focus on people with intellectual disabilities and or autism and is set out in the following five sections:

1. Introduction
2. Changing context
3. Core Issues with the Section 5 of the Criminal Law (Sexual Offences) Act 1993
4. Response to specific sections of Law Reform Commission Consultation Paper
5. Summary response to the Recommendations of the Consultation Paper

The National Federation of Voluntary Bodies is a national umbrella organisation for voluntary/non-statutory agencies that provide a wide range of direct support services to people with intellectual disability in Ireland. There are 62 Member Organisations that provide services to approximately 22,000 people with intellectual disability and their families which accounts for in excess of 85% of this country's direct service provision to people with an intellectual disability. The National Federation of Voluntary Bodies *Vision Statement for Intellectual Disability in Ireland for the 21<sup>st</sup> Century*, which is endorsed by its Board and General Assembly, outlines the vision as:

*"Being supported to live a life on one's own terms – Above all people have a deep and rooted desire to belong, to be in relationship, to live within the intimacy and security of their family and friends, to be included in the greater life around them and all its attendant possibilities for hope and fulfilment and to do so, to the greatest extent possible, on their terms. The implications of this simple truth will determine our actions on behalf of all citizens with Intellectual Disabilities"*

The five core principles to drive this process are: *Self Determination - Friendships, Relationships, Inclusion, Equity, and Equal Citizenship*.<sup>1</sup> The Law Reform Commission's Consultation Paper on Sexual Offences and Capacity to Consent offers a real opportunity to consider what will best enable this vision in this most private part of a person's life. On this reform journey the main message from self-advocates is that people with intellectual disability should be entitled to have a sexual relationship if they so wish, and also that staff should be enabled to support a person with a disability, in the same way as they do in every other aspect of their life, such as employment, without being afraid of litigation. There is a clear need to respect the rights of persons with an intellectual disability to have relationships. The barriers that currently exist to prevent this are highlighted as:

- No discussion with people with intellectual disabilities when this law was introduced. People with intellectual disability need to be aware of the law and need to know more about it. A lot of people with disability do not know that the criminal sexual offences law exists. The Law should be in an easy to read format. Why have this particular piece of legislation at all? Why not scrap the law in its current format?
- There is a need for a change in language e.g. mentally impaired should not be words used in the law.
- There is a lack of respect and support for peoples choices about relationship
- People with disabilities want to be in relationships if they so wish. They may need support to do this and often this is not available
- More obstructions and barriers regarding relationships are in the way of people with intellectual disabilities – These barriers are often hidden–
- People with intellectual disabilities are able to work, live in houses but are not supported to have relationships.
- People with ID are not in relationships in the same ratio as people without disabilities.<sup>2</sup>

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<sup>1</sup>National Federation of Voluntary Bodies Providing Services to People with Intellectual Disability (2009) *Vision Statement for Intellectual Disability in Ireland for the 21<sup>st</sup> Century – Discussion Document*, Strategic Plan 2011 -2014, and Service Plan are at the following links: . [Vision Statement for Intellectual Disability in Ireland for the 21<sup>st</sup> Century](#) ; [National Federation of Voluntary Bodies Strategic Plan 2011-2014](#) ; [National Federation of Voluntary Bodies Service Plan 2011](#)

<sup>2</sup> The Law Reform Commission met with the National Federation of Voluntary Bodies in an informal discussion on the Review of the Criminal Sexual Offences Act, 1993, as part of their information gathering on Sexual Offences and Vulnerable Adults Project. The National Federation of Voluntary Bodies nominees from their member organisations including members of the Connect People Network and Inclusive Research Network (IRN) This discussion focused on the negative effect this Act has on the lives of people with disabilities and the barriers that are preventing them from having relationship of their choice. A National Study on Relationships and Supports entitled [Relationships & Supports Study: People with Disabilities in Ireland \(2010\)](#) which was carried out by Inclusive Research Members from across Ireland reports that people with intellectual disability “want to have the choice to have relationships like everyone else and that we need to change the law in Ireland to give those rights to people with ID”

The Connect People Network (formerly the Irish Sex Education Network) was founded in 2002 and is a registered charity. The CPN's main objective is to advance public education through provision of a practical forum to members and non-members in respect of training, information sharing and best practice in the area of sex education for people



### 3.0 Changing Context

The Law Reform Commission's Consultation Paper on Sexual Offences and Capacity to Consent sets out a number of the key issues with the legislation and proposes recommendations for reform. We robustly welcome and endorse many core elements of the consultation paper, as outlined below, but we wish to highlight the following key areas which we consider require further clarification.

- The functional test of capacity as applied to consent to marry
- Supported decision making processes
- Need for a statutory definition of consent
- Implications of Ireland ratifying the UN Convention on the Rights of Persons with Disabilities, especially CRPD requirement for disability neutral legislation
- Application of a specific offence of obtaining sex by threats or deception

It is important to highlight that this Consultation Paper is set in a wider framework of reform within Ireland and internationally, including the pending Legal Capacity/Inclusive Citizenship Legislation, the establishment of the National Advocacy Service in January 2011, the recent publication of the Report entitled: Value for Money Review of Disability Policy (2011), Time to Move on from Congregated Settings – A strategy for Community Inclusion (2011) the imminent New Directions Personal Support Services for Adults with Disabilities Report (expected March 2012), Review of Autism Services (due 2012) and the National Housing Strategy for People with Disabilities 2011-2016, and underlying this the signing of the Convention on the Rights of Persons with Disabilities by Ireland on 30.3.2007, its potential ratification in the near future, and the Convention entering into force in the European Union on the 21<sup>st</sup> January 2011. The Convention on the Rights of Persons with Disabilities captures the international legal direction in relation to people with disabilities. The Guiding Principles are set out in Article 3 which states:

*The principles of the present Convention shall be:*

*(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;*

*(b) Non-discrimination;*

*(c) Full and effective participation and inclusion in society;*

*(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;*

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with disabilities. It also acts as a voice for change in respect of the rights of people with a disability to experience self-determined sexual expression. Members include people with disabilities, professionals and parents. The Inclusive Research Network is a group of people with ID who come together to do research or talk about research that is about people with intellectual disabilities and are supported by National Institute for Intellectual Disability (NIID) and National Federation of Voluntary Bodies.

- (e) Equality of opportunity;*
- (f) Accessibility;*
- (g) Equality between men and women;*
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.<sup>3</sup>*

The clear focus throughout the Convention and the above reform is on the self-determination and autonomy of people with disabilities to direct their own lives and to oppose the legacy of paternalism that has intruded into the lives of people with intellectual disability in particular. While many Articles of the Convention are relevant in this area we especially want to highlight the following: Article 12 on Equal Recognition before the law, Article 13 on Access to Justice, Article 14 on Liberty and security of person,<sup>4</sup> Article 15 on Freedom from torture or cruel, inhuman or degrading treatment or punishment,<sup>5</sup> Article 16 on Freedom from exploitation, violence and abuse,<sup>6</sup> Article 17 on Protecting the integrity of the person,<sup>7</sup> Article 19 Living independently and being included in the community, Article 22 on Respect for privacy,<sup>8</sup> and lastly but most importantly Article 23 on Respect for home and the family.<sup>9</sup> The CRPD along with the

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<sup>3</sup> UN Convention on the Rights of Persons with Disabilities is referred to interchangeably as the UN Convention, CRPD full details available at [www.un.org/disabilities](http://www.un.org/disabilities)

<sup>4</sup> **Article 14 Liberty and security of person** 1. States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. 2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

<sup>5</sup> **Article 15 Freedom from torture or cruel, inhuman or degrading treatment or punishment** 1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation. 2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

<sup>6</sup> **Article 16 on Freedom from exploitation, violence and abuse**

<sup>7</sup> **Article 17 Protecting the integrity of the person** Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

<sup>8</sup> **Article 22 Respect for privacy** 1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others

<sup>9</sup> **Article 23 on Respect for home and the family** 1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that: (a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized; (b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided; Persons with disabilities, including children, retain their fertility on an equal basis with others. 2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities. 3. States Parties shall ensure that children with disabilities have equal rights with

policy reports herald an enormous change in direction that focuses on the self-determination and autonomy of people with disability to control their own lives. It is intended that people with intellectual disabilities will be supported to live the lives of their choosing towards the goal of equal citizenship

It is widely understood that to be in compliance with Article 12 of the Convention changes to the legal capacity legislation is required in order to enable Ireland to ratify. It is therefore essential that the forthcoming Legal Capacity legislation and the reform of Section 5 of the Criminal Law Sexual Offence Act are compliant with the object and purpose of the Convention. There has been substantial and informative international debate on the implementation of the Convention, and Article 12 in particular, since 2008, which must also be taken into account. Specifically, the important issues which arise in this context are the presumption of legal capacity and the focus of restoring personhood, with the onus to always maximise a person's decision-making ability. The requirements of Article 12, Equal recognition before the law are that:

*1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*

This includes the right to be recognised as a citizen and to be respected as a rights holder. This is often referred to as the rights that we acquire as children in a State, often captured by registration of birth as a citizen.

*2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*

This includes the right to marry, to operate a bank account, to decide where and with whom to live, who to be friends with etc. These are often referred to as adult rights.

*3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

This includes the right to a wide range of supported decision making processes, including the right to reasonable accommodations, accessible information, access to support persons, facilitators, advocates, circles of supports or personal networks etc. It also shifts the focus and onus to support the capacity building of the person rather than a negative focus on deficits. So previously a person had to pass a capacity test before

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respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families. 4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents. 5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

they were free to exercise their autonomy. If they failed to do so they were regarded as non-persons before the law, and decisions were made on their behalf (guardianship) often without any consultation with the person. This old system of decision-making is based on the individual/medical model which sees the person being unable to make decisions. In a social model of disability, however, the whole decision making system would be taken into account

The Convention articulates a different understanding of this process. It acknowledges that a person may require support to exercise their decision making ability, and that the provision of such support does not make the person less equitable before the law. It recognises that we all need support to exercise our will and preferences in decision making, and focuses more on the capacity of the decision making process than the capacity of the person. This is a complex notion and represents a fundamental shift in thinking. It is at the heart of what is called the *paradigm shift* of the Convention. Supported decision making can include a whole range of processes that enable the decisions to be driven by the person's own will and preferences. A growing array of examples exist in practice, like NIDUS Personal Planning and Resource Centre which is a not for profit group set up to support personal networks, through formal legal representation agreements in British Columbia, Canada.<sup>10</sup> Such processes also require a system of safeguards. The National Federation of Voluntary Bodies recommends that a review of the current systems of supported decision making are explored in relation to developing a full range of Irish supported decision making processes generally and specifically in the area of sexuality.

*4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, **will and preferences of the person**, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*

A critical aspect of the safeguards listed is the focus on the **Will and Preferences** of the person. This moves away from a best interests principle which has a significant risk of paternalism. This is a substantial change and requires a total reformulation of how people are supported. The best interests principle emerged from a children's perspective and it is increasingly considered inappropriate in relation to adults. So the Will and Preferences of the person are the determining factor regarding decisions about their life. This is a significant point of reform and is in our view worthy of further detailed consideration in the context of choosing intimate relationships.

*5. Subject to the provisions of this article, States Parties shall take all appropriate and effective*

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<sup>10</sup> <http://www.nidus.ca/>

*measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

The legacy of people being deprived of their finances and property was so prevalent, that it was deemed necessary to have a separate paragraph in the CRPD, to reinforce these rights.

The UN Convention reinforces the rights of people with intellectual disability to have their rights to protection respected, but also their rights to dignity, self-determination, liberty, equality and justice and not just the right to protection. It also requires the presumption of capacity. The National Federation of Voluntary Bodies understands that the presumption of capacity will be part of the imminent Legal Capacity Bill. We warmly welcome such a presumption of capacity and consider that this brings new responsibilities. We propose that this includes the presumption of inclusion reinforced by Article 4.3 of the UN CRPD. This means that policies need to be discussed with people with disabilities and that throughout the process of law reform there needs to be involvement of people with disabilities.

The functional approach proposed by the LRC is a significant step forward in determining capacity, as distinct from the status approach (where for example a person's diagnosis is used to decide their decision-making ability) that has largely been adopted in Ireland. There is a growing debate however, that the functional approach also has significant short comings in relying on a cognitive deficits based model.<sup>11</sup> Quinn reports that Cognitive psychologists have questioned the very integrity of the divide between cognition and emotion; depicting that *decision-making as very complex, very intuitive and very reliant on experience as well as the innumerable cues and supports of others*. They question that *if you are denied experience then how can your decision-making capacities evolve?*<sup>12</sup> It is increasingly understood that none of us make decisions by a purely solitary, rational process and therefore, an approach focused on the supports that are required to support decision-making, is required. Many people with intellectual disability will develop the capacity to make certain decisions if they are given the support (educational, emotional, practical etc) to understand the nature of the issues being decided. The National Federation of Voluntary Bodies does not believe it is adequate to simply apply a functional test and decide that the person lacks the capacity to make a particular decision, without also considering where the person could develop this capacity with support. Thus the National Federation of Voluntary Bodies

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<sup>11</sup> This is discussed by Professor Gerard Quinn see <http://www.inclusionireland.ie/LawConference.asp> last accessed 1.2.2012 and [http://www.nuigalway.ie/cdlp/documents/cdlp\\_submission\\_on\\_legal\\_capacity\\_the\\_oireachtas\\_committee\\_on\\_justice\\_defence\\_and\\_equality.pdf](http://www.nuigalway.ie/cdlp/documents/cdlp_submission_on_legal_capacity_the_oireachtas_committee_on_justice_defence_and_equality.pdf) CDLP Submission to the Submission on Legal Capacity the Oireachtas Committee on Justice, Defence & Equality

<sup>12</sup> Quinn G. "Rethinking Personhood: New Directions in Legal Capacity Law & Policy" [Vancouver: University of British Columbia, 29 April 2011].

recommends the development of a strengths based support process in promoting decision-making ability – a functional support approach. See section 4.7 below.

The National Federation of Voluntary Bodies proposes that a broad framework of actions to effectively implement Article 12 – *Equal Recognition before the Law* is required. The framework is a continuum of actions in eight broad areas specifically driven by the rights of people with intellectual disability including: advance planning, self-determined decision making, provision of accessible information, provision of a range of reasonable accommodations, provision of advocate support, supported decision making, co-decision making and facilitated decision making and support for financial rights.<sup>13</sup>

#### **4.0 The Core Issues with the Section 5 of the Criminal Law (Sexual Offences) Act 1993**

The National Federation of Voluntary Bodies acknowledges that Section 5 of the Criminal Law (Sexual Offences) Act 1993 was written with the intention of protecting persons with intellectual disability from sexual exploitation and abuse.<sup>14</sup> However, the reality is that in focusing on the right to protection it had the effect of nullifying or limiting other equally important rights to sexual identity, sex education and sexual expression. The National Federation of Voluntary Bodies proposes that the core challenge is to balance the right to autonomy and self-determination with the right to protection, with both rights present at the same time and one not overriding the other. Although this was said to be the intention in the past, segregation and protective actions did not protect. There is a growing awareness that the more people are supported in the normative path the more people will be protected.

The National Federation of Voluntary Bodies participated in a European Association of Service Providers (EASPD) DAPHNE project in 2002 which highlighted the restrictive impact of Section 5 of the Criminal Law (Sexual Offences) Act 1993 on the personal choices of people with intellectual disability. Consequently, in part response to this the NFVB held a major conference entitled “ReSpEcT Symposium” in Killarney in November 2003, to address issues including: the legal and policy vacuum in Consent; the provision of information on Sex Education Practice; the exploration of Policy considerations in supporting safety and the development of Implementation Strategies for children and

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<sup>13</sup> Further details can be found in the National Federation of Voluntary Bodies submission to the Oireachtas on Legal Capacity

<sup>14</sup> Criminal Law (Sexual Offences) Act 1993 Section 5 5. Protection of Mentally Impaired Persons (Paragraph 5) In this section “*mentally impaired*” means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or guarding against sexual exploitation.

adults with intellectual disability.<sup>15</sup> The Symposium highlighted the current gaps within Irish legal capacity legislation, the need to address the legacy of the Lunacy Regulation (Ireland) Act 1871, and the inadequacy of the archaic Wards of Court system. The Symposium firmly endorsed the parallel right to relationships and the right to protection for people with intellectual disability. The absence of modern legal capacity legislation for people with intellectual disability has, over a long period of time, led to a situation where there are no viable solutions to what are very often complex issues. This is especially true in the areas of medical treatment, choice about where people live and sexual relationships.

This section briefly reviews the core elements of the *Criminal Law (Sexual Offences) Act 1993 Section 5 Protection of Mentally Impaired Persons*.

*In this section “mentally impaired” means suffering from a disorder of the mind, whether through mental handicap or mental illness*

It is generally understood that these terms are considered offensive and need to be revised. We acknowledge that this language is open to on-going reform.

*which is of such a nature or degree as to render a person incapable of living an independent life*

The *Time to Move on from Congregated Settings: A Strategy for Community Inclusion Report (2011)* findings report that over 3,802 people with intellectual disabilities are living in settings of more than 10 people. It has been reported that Ireland scores low on supporting people to choose where and with whom they live.<sup>16</sup> To have an offence that is based on a person’s living arrangement, when there is no opportunity for the person to choose their living arrangement, further highlights the challenges of working within the context of this legislation.

Article 19 Living independently and being included in the community states:

*States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:*

*(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;*

*(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living*

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<sup>15</sup> The papers from this conference are available from the National Federation of Voluntary Bodies.

<sup>16</sup> Outcomes Network of Ireland 2007 the Quality of Life of People with Disabilities in Ireland in 2007: Result of a National Survey see [http://www.jwebireland.com/UserFiles/File/QUALITY\\_OF\\_LIFE\\_2007.pdf](http://www.jwebireland.com/UserFiles/File/QUALITY_OF_LIFE_2007.pdf) last accessed 2.1.12

*and inclusion in the community, and to prevent isolation or segregation from the community;*

*(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.*

While Article 19 reaffirms the right of people with disability to choose where and with whom to live, to date this right has not been a reality for people with intellectual disabilities and therefore, is not a sound foundation on which to base individuals' rights to sexual expression. Section 5 operates from a status mindset, as it is not based on the person's will and preferences but on a person's housing arrangement. Consequently, people with intellectual disability have to pass a higher test than their peers to exercise their right to intimate relationships. In aiming to protect people, Section 5 has failed to preserve the right to intimate relationships, as defined in the Convention. Furthermore, concerns over duty of care responsibilities have had an intrusive and negative impact on organisations supporting friendships and relationships, which are basic human rights.

*or guarding against sexual exploitation.*

Determining the ability to guard against exploitation is very questionable, as we are all vulnerable in different situations. As part of a report on the Department of Health and Children ***Disability Strategic Review – Specialist Study Group: on Protecting Vulnerable People***<sup>17</sup>, 2005, people with intellectual disability were consulted about their notion of vulnerability. The self-advocacy group reported:

*“We feel vulnerable when...*

- *We are bullied*
- *We have conflict at work*
- *We don't feel well*
- *We feel under pressure*
- *We think someone is talking behind our backs*
- *We get into a fight*
- *We worry about an uncertain future*
- *We face an unwanted sexual advance*
- *We think someone is taking advantage”*

Feedback from a Self Advocacy Group

This report reinforced the view that vulnerability is a condition that affects everyone from time to time. The situations that are described above by a group of people with disabilities are everyday occurrences for all of us. Similarly at the 2011 NDA conference, Dr. Hoong Sin reinforced the environmental context of vulnerability rather than the

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<sup>17</sup> 2005 DOHC Disability Strategic Review – Specialist Study Group: on Protecting Vulnerable People available from National Federation of Voluntary Bodies.



individual context.<sup>18</sup> In researching abuse of people with disabilities, he reports that risk is not simply due to disability or characteristics of the person, but that vulnerability is situational. Essentially, the best response to address vulnerability is the same as for any other citizen. People need to be informed; make decisions that help them feel in control and thereby increase their competence, confidence and safety. Promoting protection through empowerment in this way, ensures people are supported as much or as little as needed, and are seen as individuals in their own unique situation, capable, and with full rights and entitlements to citizenship. Dr. Hoong Sin advises against protectionist, (disabled people are vulnerable) or deficiency (disabled people are lacking) approaches and recommends rights based approaches with more structured and explicit processes for managing risk. He acknowledges that this is a balancing act, involving rights and risks that must involve people with disabilities themselves. Ultimately, rights promotion and protection from abuse are multifaceted in nature and require a complex response rather than the denial of rights.

*5.—(1) A person who—  
(a) has or attempts to have sexual intercourse, or  
(b) commits or attempts to commit an act of buggery,  
with a person who is mentally impaired (other than a person to whom he is married or to whom he believes with reasonable cause he is married) shall be guilty of an offence and shall be liable on conviction on indictment*

We propose that the focus on sexual intercourse and buggery is too narrow a definition of sexual crime. We also propose that marriage is not a protection to sexual crime. It has long been discussed that this legislation is outdated and in fact discriminatory, in denying people with intellectual disability the right to have intimate relationships, while at the same time failing to adequately protect people from sexual abuse. The National Federation of Voluntary Bodies recommends that the Criminal Law (Sexual Offences) Act 1993 is amended as part of the changes to Legal Capacity Legislation, to ensure the rights to intimate relationships and to protection are upheld.

## **5.0 Response to specific sections of Law Reform Commission Consultation Paper**

The National Federation of Voluntary Bodies welcome the proposed repeal of the legislation and thank the LRC for remaining focused on the negative impact of this law on the lives of people with intellectual disability. While welcoming the repeal of the legislation, the National Federation of Voluntary Bodies identifies the following key issues that need to be addressed:

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<sup>18</sup> *Principal, Stakeholder Engagement and Analytical Studies Unit, office of Public Management see <http://www.nda.ie/CntMgmtNew.nsf/DCC524B4546ADB3080256C700071B049/9F9913EECB74D24D8025795E0033975E?OpenDocument> last accessed 27.1.2012 also see [www.nda.ie](http://www.nda.ie) for conference presentation.*

- 5.9 Right to relationships – history of paternalism.
- 5.10 Discrimination –disability neutral legislation.
- 5.11 Presumption of Capacity
- 5.12 The Conservative Impact of Current Legislation on Organisations.
- 5.13 How it can be done differently – hope for change.
- 5.14 Relationships and Sexual Education
- 5.15 Functional Support Approach and Assessment
- 5.16 Consent

### 5.1 Right to relationships – the barriers that exist – history of paternalism.

The Commission clearly states that Section 5 of the 1993 Act fails to provide sufficient clarity in recognising the rights of person with intellectual disability to have a fully-expressed consensual sexual life. The National Federation of Voluntary Bodies concur with this view and acknowledge that this lack of clarity has often led to paternalistic responses from services that have resulted in people with intellectual disability being denied their right to sexual expression. The capacity of individuals has been and continues to be seriously compromised as a result of, in many cases a complete absence of dialogue/ engagement with individuals regarding the issue of sexuality. This we understand may have been driven by discredited type casting of adults with intellectual disability as either “non-sexual beings” or “children” or “people who can’t control their sexual urges”.

The testimony of the Inclusive Research Network representatives, who are speaking from a knowledge base of their own peer research (I.R.N. 2010) about the right to relationships, can be summarized under three headings Respect, Access and Equality.

*Respect- Please stop making us feel different. Treat our relationships with respect and respect the choices we make about our relationships. We are asking for support to understand intimacy, marriage and partnerships.*

*Access- Why are we being singled out for special treatment with secret, special laws that do not reflect our opinions and have the effect of creating a barrier to our acceptance and inclusion? Staff and families knew about this law but we were never told. Please give us “easy read” versions of laws that apply equally to everyone.*

*Equality- In every area of life we are being encouraged to be part of our local communities; to get work, to socialize and to live in accommodation alongside everyone else. A special law for us is not necessary, is not right and is against the UN Convention on the rights of people with a Disability.*

The National Federation of Voluntary Bodies considers it is critical that we enter into a new era of replacing the historical paternalistic legacies with a newly informed respect for the rights of people with intellectual disabilities.

### 5.2 Discrimination – disability neutral legislation.

The Convention on the Rights of Persons with Disabilities in Article 2; Definitions

introduces the term *Discrimination on the basis of disability* and defines this as:

*Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.*

This reinforces the point that having different approaches to people with intellectual disability from wider society increases the risk of inequality for people with intellectual disabilities, and it calls for a move towards disability neutral legislation. The purpose of this Article is to ensure that legislation is not “raising the bar” higher for people with disabilities and in this case people with intellectual disability than for others. Laws which apply only to offences involving people with an intellectual disability are part of the old thinking that defines people with intellectual disabilities as being different. If a sexual offence has taken place and someone has been abused, that is against the law, and it is no different if the victim is not able to consent whether it is because of drink or drugs or not being able to understand or protest. If an offence has taken place, regardless of whether any of the people involved have an intellectual disability, functional considerations should apply to decide if the victim was incapacitated in any way. The present law, conceived without engagement with or consideration for the feelings and holistic human experience of people living with an intellectual disability, currently casts a shadow of criminality and “forbidden-ness” over acts of consensual intimacy; an activity which, in the mainstream adult community, is aspired to and celebrated. People with intellectual disability do not want further barriers created which deny them their basic right to enjoy and celebrate mutually consensual intimacy. The National Federation of Voluntary Bodies supports the concept of disability neutral legislation.

### **5.3 Presumption and Support of Capacity**

The National Federation of Voluntary Bodies welcomes and endorses the presumption of capacity expected in the imminent Legal Capacity legislation and seeks the extension of this presumption to the area of sexual relations. We propose that with the presumption of capacity that the functional support approach is only used when something triggers a question over the person’s decision making ability and/or the consensual nature of the relationship. Once such questions are raised this should be a call to action to support the capacity of the person.

### **5.4 The Conservative Impact of Current Legislation on Organisations**

The LRC states:

*4.24 From a practical perspective section 5 of the Criminal Law (Sexual Offences Act 1993 has created a dilemma for many services. There is a clear lack of knowledge how the law is applied. Staff are fearful that if they encourage mutually consensual relationships between clients they could be held liable for aiding and abetting a crime. As such, given the difficulties section 5 of the 1993 Act presents, service providers are slow*

*to take a proactive approach to sexuality which consequently perpetuates the ignorance experienced by service users in this area. At the same time organisations are vulnerable to criticism that, if they support people to develop relationships that are seen as contravening the provisions of section 5 of the 1993 Act and also open to failure in their duty of care if they allow relationships between service users.*

The current legislation is creating a barrier for Service Providers in providing education and support for individuals to develop their knowledge of sexuality and their confidence in developing intimate relationships. It is important to highlight that many National Federation of Voluntary Bodies member organisations have sought legal advice and have been advised that they are exposing themselves to the risk of litigation if they facilitate people who have an intellectual disability to have a sexual relationship, and that they may be in breach of their duty to care. We understand that the DPP has a different perspective which is highlighted by the fact that as far as we know there have been no cases against people with intellectual disabilities for entering into sexual relationships. Despite this, the absence of case law in this area has made some barristers very wary of what judgements could be made if a case was brought against an organisation for facilitating people to break the law as it is currently set out. For example if people are living in group homes that are supported by an organisation, it might be contested that they are not living independently in the community and are therefore subject to Section 5, of the Criminal Law (Sexual Offences) 1993 Act.

This has raised questions about how to define living independently in the community. For example, is living with your family or living in a group home living independently in the community? However, the strength of the various legal opinion has led to the conservative interpretation of this legislation, with many Service Providers having conservative and restrictive policies around relationships and sexuality, whereby individuals' right to privacy and their right to a family life is not upheld or respected if they reside in a residence which is run and supported by the organisation. Other organisations have attempted to evade the issue entirely by having no policy around sexuality and relationships. In such a context, individual staff members have no authority or backing from their agency if they decide to support individuals who wish to pursue a relationship. The fear of litigation, which could arise if a family or staff member was to contest an organisation's right to provide information, training or support to an individual around developing their sexuality has discouraged some Service Providers from taking a proactive and empowering approach to supporting people in this area. If the law was amended to allow consensual relationships among people who have an intellectual disability, and those without disability, without the fear of prosecution, Service Providers would be free to support and enable individuals in this area, just as they support many other aspects of their lives.

### **5.5 How it can be done differently – hope for change?**

Despite the barriers and risks created by the Act, some organisations have taken a positive and proactive stance and have provided individuals with training and support in

the area of sexuality and relationships, where people are living independently in the community. Some organisations have developed enabling policies and protocols for staff engaged in such work, while others have done so in the absence of a comprehensive policy. These experiences have shown that many individuals who have an intellectual disability are more than able to express their desire for friendships, relationships and intimacy and are also well able to say when they do or do not wish to engage in intimate acts and with whom. Training programmes have been developed that have shown individuals' capacity to learn and retain knowledge of a personal and sexual nature. They can recognise if they are being exploited or being taken advantage of and can apply this knowledge in their day to day interactions and relationships with peers and others. An example was given of an organization which runs a community service for over ninety adults, with some other adults living at home with their parents for whom it is deemed that the Act does not apply, that has been supporting people in exercising their own choices about relationships.

## **5.6 Relationships and Sexual Education**

The National Federation of Voluntary Bodies welcomes the attention of the LRC to the areas of sex education, specifically the following references.

*4.23 The Commission is aware that there is a general desire by service providers to have in place policies and procedures aimed at empowering people to realise their sexual rights. Currently, the provision of sex-education is a voluntary step taken by the service provider. The Commission has learnt that for the most part the policies on sexuality have focused on protection rather than empowering clients and providing them with information on sexuality and relationships which in turn perpetuates their lack of knowledge in this area.*

*4.26 The Commission considers there is merit in having a national sex education programme which would give guidance on what the law permits and the steps required to protect adults who may be vulnerable to abuse while maintaining their right to sexual freedom. The introduction of national guidelines on sex-education would also benefit from training of staff, carers and parents. Without such guidelines there is a danger that information and training would be inconsistent. A curriculum along the lines of the FETAC level training courses which are currently provided on a range of topics could be developed. In the past, the Irish Sex-Education Network funded research on sex-education programmes and this could be reviewed in line with national guidelines. As noted above, the Commission in its 2006 Report on Vulnerable Adults and the Law recommended that the proposed Office of Public Guardian should ensure appropriate codes of practice are formulated for a range of people dealing with vulnerable adults', including medical, health and social care staff, financial institutions, legal professionals and others.<sup>41</sup> A code of practice could be developed by the Office of Public Guardian to provide guidance for those working with people with disabilities in the area of sexuality and relationships on interpreting the provisions in the forthcoming mental capacity legislation*

The current law impacts negatively on the right of people with intellectual disabilities to have sexually active lives, and has further impacts on their right to information and education on sexuality. It is universally acknowledged that education enables people to

make informed choices about sexuality and sexual relationships, as well as raising awareness of risks and how to avoid these.

Provision of information and education for people with intellectual disability is not contrary to the law. However, there is a belief amongst service providers and some families that the provision of education may encourage sexual relationships and it is therefore deemed to be aiding and abetting the commission of a criminal act (Foley2009).<sup>19</sup> Irish Sex Education Network research (ISEN) (Allen and Seery 2007)<sup>20</sup> demonstrated that just over 78% of organisations had no in-house training policies in relation to Relationship and Sexuality Education (RSE) delivery and 71% did not provide any form of RSE education. This has resulted in serious deficits of knowledge and skills and poor attitudes within the disabled population with the consequences of diminished quality of life and greater vulnerability for both children and adults. Furthermore, the absence of basic information and education about sexuality makes the validity of any capacity assessments or functional tests extremely questionable. These assessments are designed to test what we think people should know about sex. This may be reasonable to do in a situation where people have had normal exposure to information and experiences concerning relationships and sexuality. But for people with intellectual disability, who have received little or no sex education, it is an unfair tool that can be used to deny them their rights. Consequently, there should be a positive obligation on Schools and Service Providers, to offer ongoing comprehensive relationship and sexuality education.

Relationships and sexuality knowledge is essential for people who have an intellectual disability in enabling the exercise of their rights and to avoid being exploited or abused. Knowledge is empowering and protective and far less likely to lead to abuse and exploitation than ignorance or misinformation regarding sexual matters. The National Federation of Voluntary Bodies endorses the view that education and training in the area of relationships and sexuality is a fundamental right for individuals who have an intellectual disability, to develop this aspect of their lives, just as in all others aspects of their lives, to the fullest extent possible. We propose a three tier process:

Primary source of sex education – parents are the primary educators of the child but may require adapted materials to support this task.

Secondary source of sex education– schools delivering a mainstream or adapted curriculum with tailored materials

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<sup>19</sup> Foley S. Kelly G: 2009 Friendships and Taboos Research on Sexual Health Promotion for People with Mild to Moderate intellectual Disabilities in the 18-25 Age Range. HSE South

<sup>20</sup> Allen M and Seery D 2007 The Current Status of Relationships and Sexuality Education Practice for People with an Intellectual Disability in Ireland. The Irish Sex Education Network

Tertiary source of sex education – service providers making accessible information available to adults with intellectual disability, and informing parents and family members, where appropriate.

Relationship and Sexuality Education was introduced in schools in 1996 and a national SPHE curriculum for relationships and sex education has been compulsory in mainstream schools since 2003.<sup>21</sup> Such education adapted to suit pupils with disabilities and tailored to suit learning styles should be a compulsory component of the syllabus in all settings. On a cautionary note the Crisis Pregnancy Agency (2009) on mainstream research report that *sex education in the home is a reality for a minority of young people and furthermore that many young people reported not having received sex education at all in secondary school and for those who did, school sex education was often seen as too biological. Teenagers seemed concerned that they were denied the chance to learn what they needed to know.*

As parents are universally recognised as the primary educators of their children, all efforts will need to be made to develop user friendly education programmes and resource materials for parents to use in developing their children's sexual awareness and knowledge. These materials should be in easy to read formats suitable for using with children who have varying abilities and needs. The RSE area should also form an essential component of the assessment of need process, that is provided for under the Disability Act 2005. It must be acknowledged that some parents, particularly if they are elderly or those whose family members have been involved in segregated services for many years are reluctant to acknowledge the needs and rights of individuals who have an intellectual disability, in terms of developing and enjoying their sexuality and forming intimate relationships or may be uncomfortable discussing these issues. However, the experience is that with support and involvement in such programmes family members have become more supportive of their family member in terms of their sexual needs and preferences. The amendment of the Act will go a long way to removing the fear and concerns felt by staff and family members, and would open the way for organisations to develop enabling and empowering policies and practices in this area. It is critical that in the case of adults, there is a right to such information that cannot be obstructed by parents. The National Federation of Voluntary Bodies proposes that the LRC includes a recommendation to strengthen the right to the provision of Relationships and Sexuality Education for children and adults who have intellectual disability.

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<sup>21</sup> There is a positive obligation and onus on all schools to provide relationship and sexuality education, specifically within the Department of Education Social, Personal and Health Education (SPHE) Circulars. Circular 0027/2008 To the Principals and Boards of Management in Post-primary Schools -Relationships and Sexuality Education and Management Authorities of Second Level Schools M11/03 Social, Personal and Health Education (SPHE) in all schools by September 2003

## 5.7 Functional Support Approach

Many services who have wished to be proactive in their approach to supporting sexuality and sexual expression have sought legal advice on interpretation of the current law. This legal advice has concluded that they are restricted by the Section 5 definition of “mentally impaired” to mean a disorder of the mind rendering the person incapable of living an independent life or of guarding against serious exploitation. This has been interpreted to mean that people living in residential services cannot be permitted to have sexual relationships. Other services have focussed on the ability to consent and have used assessments to test this ability and distinguish between people who can be supported to have sexual relationships and those who cannot. To date there is no presumption of capacity. Both interpretations have denied people their right to sexual expression.

The Commission is clear that the criminal law concerning sexual offences should provide for the legitimate right of all people to engage in consensual sexual relationships and should protect people from sexual exploitation. It acknowledges that the present law provides some protection from sexual exploitation but does not protect the right to engage in consensual sexual relationships. This is part of the reasoning for the Commission’s recommendation that section 5 be repealed and replaced. Most of the recommendations for change, in the Consultation Paper, are related to protection from sexual exploitation. In order for the law to also provide for the right to engage in consensual sexual relationships and to overcome the concerns and caution shown by services, as described above, the law should also:

1. Emphasise that people with intellectual disability have the right to engage in consensual sexual relationships. This implies an obligation on services to provide supports and training.
2. State that the general presumption of capacity also applies to people with intellectual disability and sexual relationships.

This clarity would enable services to change their role from being the gatekeeper of those who can and cannot engage in sexual relationships to becoming the supporters of the right to sexual expression and mutually consensual sexual relationships. This can be done through the provision of information, education, training and counselling and creating policies and environments that protect people’s rights to privacy and enable them to express their sexuality and develop positive sexual relationships. Knowledge and understanding of sexuality and sexual relationships, including the risks, will in turn reduce the risk of exploitation and abuse. The focus of assessments of sexual knowledge and understanding should be on identifying the person’s support needs in order to exercise their rights to sexual expression and sexual relationships, rather than on assessing capacity to consent.

With regards to the reform of Section 5 of the Criminal Law (Sexual Offences) Act 1993, the commission recommends a functional approach to assessing capacity to consent to



sexual relations, which emphasises the person's ability to understand the nature and consequences of a decision in the context in which the decision is being made. The test of capacity recommended is based on assessing whether the person has the ability:

- to understand information relevant to engaging in the sexual act, including consequences,
- to retain the information,
- to use or weigh up that information as part of the process of deciding to engage in the sexual act and
- to communicate his or her decision

In recent years, (with) the shift in the approach to disability has led to an emphasis on human rights which focuses on equal rights for all, whether or not they have a disability. This has had a huge impact on the lives of people with intellectual disability who are now starting to be regarded as active citizens within their communities – attending local schools, working in ordinary jobs, volunteering on local committees, taking part in local sports clubs etc. With this comes the right to make decisions around all areas of their life. Decision making has always been an area of difficulty for people with intellectual disability when reasonable accommodations have not been available. This does not mean that they cannot make decisions, but that they need support in order to make decisions. This support includes the provision of information relevant to the decision, in a form that is accessible to the person, support to understand how the decision may impact on their lives, and support to make their decision known and to act upon it.

In addition, as stated earlier, the validity of these assessments, in light of people's limited access to sex education, is questionable and will likely mean that they are not going to score very well on the assessment. Furthermore, their *mental capacity* will be based on these scores. There are serious questions about the validity and ethics of assessing people to see if they are capable of having a relationship, given the complexity of decision making as previously discussed. The mainstream population does not have to go through this process as they are presumed to have capacity – why should people with disabilities have to go through such a discriminatory process? Presumed capacity needs to be clearly stated for people who have disabilities

The National Federation of Voluntary Bodies recommends that any legal test of capacity must allow for the provision of supported decision making. This is a functional support approach to the test of capacity, rather than the functional test approach, recommended by the Commission. The functional support approach defines capacity as the ability, with assistance if needed, to understand the nature and consequences of a decision within the context of the available range of choices; and to communicate that decision, with assistance as needed. This distinction between the functional test approach and the functional support approach is of paramount importance for people with intellectual disability and is in keeping with Article 12 of the CRPD which

emphasises that people can receive support in decision making and maintain full legal capacity.<sup>22</sup>

In proposing the functional support approach and provision of a range of supports we urge for the avoidance of a complex and bureaucratic infrastructure around decision making. The National Federation of Voluntary Bodies proposes that it has to be kept simple and close to the person and the people who support their will and preference. The supporters should have a relationship with the person of sufficient continuity as to establish their bona fides. We consider that people walking in and out of the lives of others is not an adequate protection. The support network needs to be empowered but it also needs to be real.

### 5.8 Consent

The National Federation of Voluntary Bodies supports the position that with regard to consent to sexual relationships, the general approach of the Convention is to ensure that people with disabilities have equal right to consent to sexual activity, and are not held to a higher standard than others when it comes to informed consent. McCarthy and Thompson (2004) propose that for *valid consent to sex, (an individual) must know that sex, especially when initiated by a more powerful person, is not required and compulsory*. They propose that this requires that: *People must have sufficient communication skills to be able to make their choice (to engage in sexual activity or not) known to the other party. This means that either verbally or through an alternative communication system known to both parties they must be able to give/deny/withdraw consent at any stage in the activity. Silence or non-communication must not be interpreted as consent*. They also propose that *there needs to be a reasonable degree of equality between the parties, so that both parties have sufficient power to make the choice to engage or not engage in sex, without fear of adverse consequences*.<sup>23</sup>

Under current law, a sexual offence involving adults can only be established where a lack of consent by the victim can be proven beyond reasonable doubt. This is complex where adults with intellectual disability are concerned, who may have freely given consent without an understanding of what they are consenting to. In these situations,

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<sup>22</sup> For example the BILD 2007 *Exploring sexual and social understanding* an illustrated pack designed for working with people with disabilities it is of note that this guidance was revised following the **D Borough Council V AB (Respondent) Court of Protection 2011** stating: *This case stipulates that the "capacity to consent to sex remains act specific and requires an understanding and awareness of: the mechanics of the act; that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections; sex between a man and a woman may result in the woman becoming pregnant" The rationale for this was that you could not set the bar higher for a sexual relationship than for marriage where sex is deemed to be an integral part. As such, the issues of consent and age are not now part of the decision in relation to capacity to have sex. However, these issues are important in relation to other parts of the law e.g. Sexual Offences Act, assault legislation. Risk still needs to be considered in relation to these issues but does not form part of the decision re: capacity.*

<sup>23</sup> McCarthy and Thompson "People with learning disabilities: Sex, the law and consent" in M. Cowling and P. Reynolds, *Making Sense of Sexual Conduct* (Ashgate Publishers; 2004) as cited in the CDLP Submission to the LRC.

although there may be agreement that consent was given, the capacity to consent is called into question. The Law Reform Commission's report outlines how different countries approach the definition of consent and the legal test for the capacity to consent. For example, in England the Sexual Offences Act of 2003 provides a statutory definition of consent: *"A person consents if he agrees by choice and has the freedom and capacity to make that choice"*.

In terms of measuring the capacity to consent, some countries limit this to an understanding of what the act is and the ability to decide whether or not to engage in the act, where as others look for a higher level of understanding, including an understanding of the consequences (including moral consequences) of the act. While the Law Reform Commission has recommended in the past that consent should be statutorily defined, this is not the case at present, with juries deciding the issue in each case, nor is there provision in the current sexual offences law for a test of capacity to consent.

The Law Reform Commission recommends that the test for assessing capacity to consent to sexual relation should reflect the functional test of capacity and should examine the person's

- a. understanding of the information relevant to engaging in the sexual act, including the consequences*
- b. ability to retain that information*
- c. ability 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*

This requires a higher level of understanding and it can be argued that this is a discriminatory practice as this level of understanding would not be expected of the non-disabled population in terms of assessing their capacity to consent. The National Federation of Voluntary Bodies proposes that the only reasonable conclusion to such realities is that any statutory test for the existence or absence of consent will need to be applied equally to persons who have or who do not have an intellectual disability. We also recommend that the test for capacity to consent is lowered and the requirement for an understanding of consequences is removed from the test of capacity to consent. We agree that the consequence of this is that the existing Irish sexual offences legislation which defines rape and sexual assault may not need to be amended, and could be applied in a disability-neutral manner.

## 6.0 Comments on Provisional Recommendations of the LRC Consultation Paper

**Recommendation 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 National Federation of Voluntary Bodies support a functional support approach to capacity and not a functional test approach. We propose that any statutory test for the existence or absence of consent will need to be applied equally to persons who have or who do not have an intellectual disability. We also recommend that the test for capacity to consent is lowered and the requirement for an understanding of consequences is removed from the test of capacity to consent. We agree that the consequence of this is that the existing Irish sexual offences legislation which defines rape and sexual assault may not need to be amended, and could be applied in a disability-neutral manner.**

**The question that arises is how far does this recommendation increase the standard for marriage by aligning it with the criminal law and will this bar a greater number of people from marriage and civil partnerships? If so, then we propose that this is not advisable. We also require clarification if this proposal is for universal application or people with intellectual disability only?**

**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 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 National Federation of Voluntary Bodies welcomes and supports this recommendation. We are aware of discriminatory practices that emerge in the absence of this presumption of capacity to parent towards parents who have an intellectual disability. We propose that such support provision should be available as required through the mainstream childcare system and not necessarily through the Disability Act given that its implementation is paused at present.**

**Recommendation 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 National Federation of Voluntary Bodies strongly welcomes and supports this recommendation as a matter of urgency. Given that people with disability have a higher risk of abuse, we consider this an essential element in encouraging the dismantling of this discriminatory law, and ensuring that appropriate safeguards are in place.<sup>24</sup> We welcome the Multi agency approach proposed by the LRC. We are aware that the HSE is likely to initiate a process of an Adult Safeguarding Policy in the near future. We propose that this process be underpinned by appropriate legislation. We also wish to highlight that protections are multi-layered including standards, quality systems, raising awareness of the nature of violations and having a system in place to track and adequately address them.<sup>25</sup>**

**Recommendation 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 National Federation of Voluntary Bodies does not support the functional test approach but strongly advocates for a functional support approach, as stated above in section 4.7.**

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<sup>24</sup> Sexual Abuse and Violence in Ireland (SAVI) 2002 International studies show that learning disabled people are at a greater risk for sexual violence than their non-disabled peers (Kelly, 1992; West-cott, 1991; Muccigrosso, 1991; Ammerman, Van Hasselt and Hersen, 1988).

<sup>25</sup> See Convention on the Rights of Persons with Disabilities **Article 16 on Freedom from exploitation, violence and abuse** 1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. 1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. 2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive. 3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities. 4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs. 5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

**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 National Federation of Voluntary Bodies welcomes the proposed move away from a status approach to capacity and the proposed repeal of the legislation. While we agree on the repeal of the legislation we are anxious that any replacement should respect the right to sexual intimacy and the right to protection based on the functional support approach and the framing of such rights in disability neutral legislation.**

**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 National Federation of Voluntary Bodies welcomes and supports the specific offence for a person *in a position of trust or authority*. We propose that such a definition includes volunteers or anyone who was in position of trust and power in the past. At the same time we differentiate this role from people who are part of the *natural environment supports*. We also support the normative path that people with intellectual disability may form relationships with people who do not have a disability. We believe it should allow for the possibility that a friend, who might be “a person living without the label intellectual disability” may become an appropriate consensual sexual partner. We propose that such an offence is applied in a disability neutral way.**

**Recommendation 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 National Federation of Voluntary Bodies endorses the recommendation that all forms of sexual acts and sexual exploitation should be included. We propose that such definitions should be underpinned with legalisation.**

**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 National Federation of Voluntary Bodies supports the recommendation that a defence of reasonable mistake should apply and welcomes the exclusion of a person in a position of trust from this defence.**

**Recommendation 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 National Federation of Voluntary Bodies supports this recommendation.**

**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 National Federation of Voluntary Bodies broadly welcomes the inclusion of such an offence, but would welcome further discussion on this.**

**Recommendation 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 National Federation of Voluntary Bodies is preparing a separate submission on this issue and will forward this in the near future.**

**Recommendation 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]

**The National Federation of Voluntary Bodies is preparing a separate submission on this issue and will forward this in the near future.**

**Recommendation 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 National Federation of Voluntary Bodies is preparing a separate submission on this issue and will forward this in the near future.**

**Recommendation 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]

**The National Federation of Voluntary Bodies is preparing a separate submission on this issue and will forward this in the near future.**

**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 National Federation of Voluntary Bodies is preparing a separate submission on this issue and will forward this in the near future.**