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## **Sexual offences against vulnerable persons: comments of the Irish Family Planning Association (IFPA)**

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The IFPA welcomes the opportunity to comment on the Department's proposal to replace section 5 of the Criminal Law (Sexual Offences) Act 1993 ("protection of mentally impaired persons") (hereafter, section 5).

The IFPA has worked to promote and protect basic human rights in relation to reproductive and sexual health, relationships and sexuality since 1969. The IFPA submits these remarks based on its role as a leading reproductive rights advocacy organisation within Ireland and its experience in providing reproductive health care services and sexuality education to women and men with intellectual disabilities.

### **Section 5**

In the view of the IFPA, section 5 falls short of Ireland's obligations to uphold the rights guaranteed by the UN Convention on the Rights of Persons with Disabilities 2006 (UNCRD), and other human rights treaties and conventions, in a number of ways. Section 5 both under and over-protects vulnerable persons: it fails to recognise and protect the sexual autonomy of people with intellectual disability or mental illness who have the capacity to consent. Yet it also assumes that no person who is incapable of living an independent life is capable of consenting to a sexual act, a presumption rejected by the Law Reform Commission (LRC) in its 2013 report, *Sexual Offences and Capacity to Consent* (hereafter LRC 109-2013).

The IFPA is also of the view that the definition in section 5 is drafted so broadly that consensual sexual relationships outside marriage that involve a person with intellectual disability, including consensual sexual relationships between two adults with intellectual disability, are criminalised. At the same time, it is too narrow in focus in that it does not apply to sexual acts that fall short of sexual intercourse or buggery.

Article 23 of the UNCRD ensures that all persons, including pregnant women, irrespective of their disability status, are entitled to have access to age-appropriate information and



reproductive and family planning education. The IFPA knows from its work with frontline staff in disability services that the criminalisation of some forms of sexual activity under section 5 leads to the de facto denial of sexuality education to vulnerable persons. This is because of fear that sharing information on relationships and sexuality might be portrayed as facilitating a criminal offence. In addition, criminalisation creates and reinforces stigma around sexuality and can have a chilling effect whereby people working in services for people with disabilities may believe it is their role to prevent the consensual sexual behaviour of service users.

People with intellectual disabilities are thereby denied knowledge and understanding of sexuality and relationships as positive aspects of life, and about how to protect themselves from inappropriate sexual behaviour, sexually transmitted infections and unplanned pregnancy.

The IFPA is of the view that the chilling effect of section 5 places people with intellectual disabilities at higher risk of abuse, sexual exploitation, unplanned pregnancies and sexually transmitted infection.

The IFPA therefore welcomes the proposal to replace section 5.

However, the IFPA would like to raise some concerns about the current proposal and to recommend that the legislative provision that replaces section 5: (1) include reference to a wider range of sexual acts; (2) adopt a functional approach to consent; (3) use the concept of informed consent; (4) that this reform be accompanied by effective measures to ensure that people with intellectual disability have access to comprehensive, evidence based sexuality education and to quality sexual and reproductive information, supplies and services.

## **1. Purpose of the proposals**

The IFPA welcomes the intention to include a wider range of sexual acts than currently included in the legislation. The approach of the UK Sexual Offences Act (SOA) 2003 is a useful model in this regard.

The IFPA also welcomes the specific intention to ensure that the law is compatible with the UNCRD.

However, the IFPA is of the view that the purpose of the proposal should be to respect the rights of the intellectually disabled person to enter into sexual relationships based on *informed consent* rather than “to enter into loving sexual relationships” as stated in the discussion paper. The term “loving relationship” is nowhere used by the LRC in its report; the term informed consent, however, is used throughout. Informed consent is a well-recognised and widely understood concept in the context of sexuality, the law and sexuality education. The use of this term instead of “loving sexual relationship” would reflect both international best practice and the language and recommendations of LRC 109-2013. It would also avoid the taint of discrimination inherent in applying a different standard to sexual behaviour of people with intellectual disability vis-à-vis other people.



## **2. Definition of vulnerable adult**

The IFPA is concerned that, rather than adopting the functional approach to consent, which was recommended by the Law Reform Commission (LRC 109-2013, para 1.17) and which was adopted in the Assisted Decision-Making (Capacity) Bill 2013, the proposal takes a status approach. A status approach assumes that capacity to consent is fixed and unchangeable, whereas a functional approach enables an individual to realise his or her right to self-determination in the context of their personal social setting (LRC 109-2013, para 1.17).

## **3. Access to sexuality education and to sexual and reproductive health information, services and supplies**

The IFPA is of the view that legislative reform must be accompanied by other measures to ensure that people with intellectual disabilities can realise their rights to sexual autonomy and reduce risk of sexual exploitation and abuse, sexually transmitted infection and unplanned pregnancy.

(i) Measures must be put in place to ensure that people with intellectual disability have access to stage-appropriate, sensitive, comprehensive and evidence-based sexuality education which is designed to meet their specific needs and learning abilities. Sexuality education promotes self-awareness, sexual-autonomy, self-protection from abuse and exploitation, and the development and maintenance of healthy relationships, irrespective of whether these relationships are loving or long-lasting. It is the IFPA's experience that such education, delivered through appropriate active learning, methods and reinforced through multiple sessions, can enable people with intellectual disabilities to negotiate respectful sexual relationships, give and receive informed consent and keep themselves safe from harm.

(ii) Relationships and protective education is necessary for people with intellectual disabilities to maintain sexual health. People with intellectual disabilities need accurate and timely information to help them make critical decisions affecting their health, and to access sexual health services to stay healthy and prevent STIs/HIV and crisis pregnancies. People with disabilities must be supported to access contraception information, advice and services, STI screening, cervical cancer screening and, where appropriate, crisis pregnancy counselling. Measures should be put in place to ensure that client confidentiality is respected and that services are accessible, available, affordable, acceptable and of high quality.